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*EDITOR:*

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 J. N. S.  
 Assistant to the Court  
 Srinagar, Kashmir  
 Srinagar.



# INDIAN CASES

1921.

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## VOLUME LX.

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### PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

December 13, 1920.

*Present*:—Lord Moulton, Lord Sumner  
and Sir John Edge.

KHEGRAMONI DAS, SINCE

DECEASED, NOW REPRESENTED BY

DUNIA CHAND BARAL AND ANOTHER—  
APPELLANTS

*versus*

JIBAN KRISHNA KUNDU AND OTHERS—  
RESPONDENTS.

*Bengal Tenancy Act (VIII B. C. of 1885), ss. 52 (1)  
(b), 114—Landlord and tenant—Deficiency in area of  
tenure—Rent, reduction of—Land in the Sunderbunds—  
"Permanently settled area".*

The respondents held land in the Sunderbunds under a permanent *mokurrari* lease granted by appellant. They claimed a reduction of rent under section 52 sub-section 1 (b) of the Bengal Tenancy Act on the ground that part of the land leased had been diluviated. Appellant opposed the reduction, relying on the terms of the lease and on section 114 of the Act, which permits the holder of a permanent tenure in a permanently settled area to grant a permanent *mokurrari* lease on any terms agreed between him and the tenant. The land had been granted by Government in 1848 to appellant's predecessor at a rent increasing for a period of years, after which it was subject to survey and measurement, and the proprietary right in the grant was to be "under conditions generally applicable to owners of estates not permanently settled."

*Held*, that the land was not proved to be in a "permanently-settled area" and that, consequently, respondents were entitled to reduction of rent irrespective of the terms of their lease. [p. 3, col. 2.]

Appeal from a decree of the Calcutta High Court, dated the 9th June 1916, affirming a decree of the District Judge, 24 Perganas, which reversed a decree of the Third Subordinate Judge, Alipur.

*FACTS*.—To the statement of facts in their Lordships' judgment it may be added

that the Subordinate Judge dismissed the suit upon the grounds, (1) that it was not maintainable, inasmuch as some of the tenants were not joined as plaintiffs, and (2) that the terms of their lease precluded respondents from claiming the reduction. The District Judge allowed an appeal. He held that the suit was maintainable as the tenants not joined as plaintiffs had been made defendants; that the terms of the lease did not clearly exclude the right to a reduction of rent, and that having regard to section 13 of Bengal Regulation III of 1928, the tenure could not be held to be in a permanently settled area, so as to make section 175 of the Bengal Tenancy Act applicable. He remanded the suit to the Sub Judge to determine the amount of the reduction.

Khetram D. appeared to the High Court. The appeal was heard in the first instance by Chatterji and Maillik, JJ., the terms of the grant from Government to appellant's predecessor (the material parts of which are set out in their Lordships' judgment) were not before the learned Judges, who understood that appellant's holding from Government was a permanent tenure. They were of opinion that, on that assumption, and the land being in the Sunderbunds, it was in a permanently settled area, and that section 79 of the Bengal Tenancy Act applied. They held, further, that the stipulations of the lease excluded the right to a reduction and, therefore, allowed the appeal.

An application for review was made and granted by the learned Judges on the ground that they had been misled by a misstatement in Court that the appellant's

KHETRAMONI DAS v. JIBAN KRISHNA KUNDU.

lease from Government was a permanent one.

Thereafter, the appeal was heard *de novo* by Woodroffe and Chandler, JJ., who dismissed it.

Hence the present appeal.

Mr. H. N. Sen, for the Appellants.—The respondents agreed in their lease that there should be no reduction of rent on diluviation. The respondents are not *raiyats*, but tenure holders, and it was open to them to make what terms they chose with their landlord. Even if the Government grant of 1880 was not a permanent grant still the land was held by respondents upon a permanent tenure. When land is so held in the Sunderbunds it is in a permanently settled area for the purposes of section 179 of the Bengal Tenancy Act.

*Tamasha Bibi v. Ashutosh Dhur* (1).

Reference was also made to Bengal Tenancy Act, sections 3 (7) and 5 and to Bengal Regulation 1 of 1793.

Messrs. De Gruyther, K. O., and Kenworthy Brown, for the Respondents.—Section 179 of the Bengal Tenancy Act does not apply in this case as the land is not in a permanently settled area. Conceding that an area may be a permanently settled area even though no permanent settlement of the District containing it was made in 1793, still the terms of the grant from Government to appellant's predecessor show clearly that this was not a permanently settled area. Section 179 not applying, respondents as tenants could avail themselves of section 52 (1) (b). If it be properly construed, the lease to respondents does not in any case exclude the right to a reduction of rent upon a permanent reduction of the area by diluviation.

The Sunderbunds were not included in the Permanent Settlement.

*Rajah Burodacant Roy v. Commissioner of the Sunderbunds* (2).

[Reference was also made to Bengal Regulation III of 1820, section 13 and to section 178 of the Bengal Tenancy Act (VIII of 1855)].

Mr. H. N. Sen replied.

## JUDGMENT.

LORD MOULTON.—The action to which this appeal relates is brought by the respondents, who are holders of a lease from the appellants of land situated in the Sunderbunds, with the object of obtaining a reduction of rent on the ground that a large portion of the holding has been washed away by the surrounding waters, and that the area leased has been reduced thereby to the extent of nearly a quarter. They rely on section 52 (b) of the Bengal Tenancy Act, 1885, which enacts that—

"Every tenant shall be entitled to a reduction of rent in respect of any deficiency proved by measurement to exist in the area of his tenure or holding as compared with the area for which rent has been previously paid by him, unless it is proved that the deficiency is due to the loss of land which was added to the area of the tenure or holding by alluvion or otherwise, and that an addition has not been made to the rent in respect of the addition to the area."

The facts of the case are not substantially in dispute, although the extent of the diminution of the area is not agreed between the parties and must be determined by measurement in the proper way. There is no doubt that there has been a diminution and no case is set up that there has been any previous increase of the holding without increase of rent so as to bring it under the latter part of the clause.

The substantial defence of the appellants (who are grantees from the Government of the holding which they have leased to the plaintiffs) is that the case comes under section 179 of the Bengal Tenancy Act, 1885, which reads as follows:—

"Nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent *mukarrari* lease on any terms agreed on between him and his tenant."

It is contended that by the terms of the lease to the plaintiffs they are precluded from denying their obligation to pay the full rent thereby fixed on the ground of flood or diluviation, and it is to meet a defence founded upon this provision that the plaint-

(1) 4 C. W. N. 513.

(2) 12 M. L. A. 226; 2 B. L. R. P. O. 83; 11 W. R. P. O. 14; 2 Suth. P. C. J. 184; 2 Sar. P. O. J. 413; 1 Ind. Dec. (N. S.) 504; 20 E. R. 324.

## TULA RAM v. TULSHI RAM.

iffs contend that they are protected by section 52 (b). The appellants, on the other hand, contend that they hold from the Government a permanent tenure in a permanently-settled area, and, therefore, are excepted from the operation of section 52 by the provisions of section 179 above referred to.

By the definition clause 2 (12) of the Act, "permanent settlement" means the Permanent Settlement of Bengal, Behar and Orissa made in the year 1793. The grant from the Government to the appellants certainly does not come within that description if it be taken literally, for it was not made until December 1880. But, apart from this, their Lordships are of opinion that the terms of the grant are not such as to render the lands to which it refers "a permanently-settled area." In substance, the payment to the Government is not to commence for twenty years from 1831, and is to go on at increasing rates until the expiration of 99 years, when the following clause comes into force:—

"That after the 99th year the grant shall be liable to survey and re-settlement, and to such moderate assessment as may seem proper to the Government of the day the proprietary right in the grant and the right of engagement with Government remaining to the grantees, their heirs, executors or assigns, under the conditions generally applicable to the owners of estates not permanently settled, and that revenue equal to the amount annually paid from the 51st to the 99th year shall be paid annually by the grantees, their heirs, executors or assigns, until such survey and re-settlement or re-assessment as is described above be effected."

These terms are in such strong contrast with what is known as "permanent settlement" in India that their Lordships are of opinion that the appellants have failed to establish that the lands are situated in a permanently settled area. Hence they hold that section 179 does not apply to this holding, and that the respondents are entitled to the relief which they claim under section 52 (b). This was the judgment of the High Court of Judicature at Fort William in Bengal from which this appeal is brought and their Lordships will, therefore, humbly

advise His Majesty that this appeal be dismissed with costs.

*Appeal dismissed.*

Solicitors for the Appellants:—Messrs. Geo. and Wm. Webb.

Solicitors for the Respondents:—Messrs. Watkins and Hunter.

## ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 373 OF 1917.

April 23, 1920.

Present:—Justice Sir P. C. Banerjee, Kt., and Mr. Justice Sulaiman.

TULA RAM AND OTHERS—DEFENDANTS  
—APPELLANTS

*versus*

TULSHI RAM AND OTHERS—PLAINTIFF AND  
DEFENDANTS—RESPONDENTS.

*Hindu Law—Joint family—Mortgage of family property, when binding on family—Burden of proof.*

A mortgage of family property with the object of raising funds for the purchase of zemindari shares in a village, such purchase being for the benefit of the family and not detrimental to its interests, is binding on all the members who belong to the family. In such a case it is not necessary for the mortgagee to prove that the money raised by the mortgage was actually applied towards the purchase of the zemindari. It is enough if he proves that a representation was made to him that the zemindari was to be purchased and that after reasonable enquiry he believed the representation to be true. [p. 4, col. 2.]

Where a mortgage-deed of family property contains a recital of a previous mortgage and the object of the subsequent mortgage is to pay off the previous mortgage, the validity of which is admitted, both the previous and subsequent mortgages are binding on the family. [p. 5, col. 1.]

First appeal from a decree of the Subordinate Judge, Pilibhit, dated the 7th August 1917.

The Hon'ble Dr. Tej Bahadur Sanyal, for the Appellants.

Mr. G. W. Dillon and Babu P. N. Banerjee, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for sale upon a mortgage executed on the 5th of July 1904 by Hulas Rai, Jawahir Lal and Dori Lal who were members of the



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same family. The appellants before us are the descendants of Hulas Rai and it is contended on their behalf that the mortgage was executed without any family necessity and is, therefore, not binding on the joint family property which was comprised in the mortgage. The amount secured by the mortgage was Rs. 3,000 and this amount was alleged to have been due to the mortgagee, Sohanlal, who is now dead and is represented by his adopted son, the plaintiff, under an earlier mortgage of the 19th of June 1891 executed by Hulas Rai and Jawahir Lal in favour of Sohanlal for Rs. 2,000. We may mention that the present appellants have purchased the interests of Jawahir Lal in the mortgaged property and in the sale-deed which was executed in their favour one half of the mortgage money due to the plaintiff was left in the hands of the purchasers for payment to the mortgagee Sohanlal. In order to consider whether the mortgage now in suit is binding on the appellants it is necessary to determine whether the earlier mortgage of the 19th of June 1891 was made for family necessity or for the benefit of the family. In the mortgage-deed the necessity for raising the loan is stated to be the purchasing of *semindari* shares in the villages of Tajpur and Muriana. It appears that on the 19th of September 1891 a sale-deed of the said villages was obtained in the names of the two sons of Hulas Rai from the Liquidator of the Uncovenanted Service Bank. The consideration for that sale was Rs. 5,250. If that sale was for the benefit of the family, and if the loan was taken on the representation that the money was required for the purpose of obtaining a sale of the aforesaid property, the debt was incurred for the benefit of the family and was binding on all the members who belonged to it. It is admitted that the two villages of Tajpur and Muriana which were purchased on the 19th of September 1891 are still in the possession of the family including the present appellants, and that the villages have been in their possession ever since the date of the purchase. We have evidence before us which shows that this purchase was one which proved beneficial to the family. One of the purchasers was Baljit and from his evidence it appears that the revenue assessed on the property purchased at the time of the purchase was Rs. 800 a year. Baljit further deposed that at the

present time the income from the property is Rs. 1,600 or Rs. 1,700, and that the revenue has been enhanced to Rs. 900. From the fact that at the date of the purchase the revenue assessed on the property was Rs. 800 a year it may reasonably be presumed that the income which the property yielded to its owners was at least Rs. 600 and the fact that at the present moment the profits amount to about Rs. 200 raises a strong presumption that at the date of the sale the purchase was not an unprofitable or improvident transaction but was a purchase for the benefit of the joint family. Had it not been so it is unlikely that the family would have retained possession of this property for nearly 30 years. We may, therefore, take it as established that the purchase which was made in 1891 was a purchase which was beneficial to the family and not detrimental to its interests. We have now to consider whether the creditor, on whom the burden, of course, lay of showing that the loan was taken for the benefit of the family, took reasonable care to ascertain that the representations made to him were representations upon which he could reasonably and honestly have acted. As we have already stated, it is recited in the mortgage deed that the loan was taken for the purpose of purchasing *semindari* shares in the villages of Tajpur and Muriana. There is the evidence of witnesses which proves that this was the representation made by Hulas Rai and Jawahir Lal to Sohanlal at the time when the loan was taken from him. The amount of the loan, Rs. 2,000, was paid in cash at the time of registration. It appears that, as a matter of fact, the price for the purchase of the two villages had already been paid by the 4th of June 1891 to the Liquidator of the Uncovenanted Service Bank and, therefore, no purchase-money had actually to be paid at the date of the mortgage in question. If, however, the mortgagors represented that they needed the money for the purposes of the purchase and their statements were believed by the lender upon such enquiry as he could have made from the borrowers and he honestly believed that the money was required for the purposes of a purchase he would be entitled to realise his money from the mortgaged property which happened to be joint family property. In the well-known case of *Hunoomanpersaud Panday v. Musummat Baboosa Munraj*



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*Koonwerse* (1) their lordships observed as follows:—

“Their Lordships think that the lender is bound to enquire into the necessities for the loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so enquire and acts honestly the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge.” In the present instance the lender, Sohanlal, made enquiries with reference to the parties with whom he was dealing and satisfied himself, as well as he could, that the mortgagors who were the managers of the joint family were acting for the benefit of the family. The sale had not actually taken place and negotiations for it were in progress. If he was satisfied that the sale was about to take place and the borrowers represented to him that the money which they borrowed was needed for the purposes of the sale, it was not necessary for him to ascertain whether the money was actually needed for the purchase or whether the purchase-money had already been paid or not. Sohanlal is now dead and so are Hulas Rai and Jawahir Lal. It must be remembered that a number of years have elapsed since the date of the mortgage of 1891. The only person who is alive and who, along with Hulas Rai and Jawahir Lal, admitted the correctness and validity of this mortgage of 1891 is the defendant Dori Lal but he has not appeared in this case and has not offered his evidence on behalf of the defendants. The fact that the adult male members of the two branches of the family, who were apparently the managing members of the family, executed the mortgage of 1904 and admitted the validity of the mortgage of 1891 is a circumstance which tells strongly in favour of the plaintiffs. The further circumstance that when the present appellants purchased the share of Jawahir Lal they undertook to pay half the amount of the disputed mortgage to the mortgagee on account of the share of Jawahir Lal's liability under the mortgage also tells strongly in favour of the original mortgage of 1891 being

a mortgage which was entered into for the benefit of the family. In these circumstances, we must hold that the mortgage of 1891 was binding on the family and that, consequently, the mortgage now sought to be enforced is equally binding. We dismiss the appeal with costs including fees on the higher scale. We extend the time for payment of the mortgage-money for six months from this date.

*Appeal dismissed.*

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION CASE No. 188 OF 1919.

January 20, 1920.

Present:—Mr. Heald, A. J. C.

MAUNG MEIK AND ANOTHER—

APPLICANTS

*versus*

U KUMARA—RESPONDENT.

*Court Fees Act (VII of 1870), s 7 (v) (c)—Suit for possession of “religious land”—Court-fee payable—Valuation, method of.*

In a suit for possession of land the plaint must be stamped according to the value of the subject-matter, and where the subject-matter is land which pays no revenue and has produced no profits during the year next before the date of presenting the plaint, the value must be deemed to be the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood, and the same principle is applicable where the land in suit is “religious” land [p. 6, col 1.]

The mere fact that the land is “religious” does not render it incapable of valuation with reference to the value of similar land in the neighbourhood. [p. 6, col 1.]

Mr J. N. Basu, for the Applicants.

JUDGMENT.—The petitioners sued the first two respondents, who are Pongyis, for possession of a certain Kyaung and its close on the strength of a decision of the ‘Gaingdauk Sayadaw’ of Myingyan and joined the third respondent as being also bound by that decision.

A question of the amount of Court-fee payable on the plaint arose, and the Trial Court held that, under the provisions of section 7 (v) (c) of the Court Fees Act, the value of the subject-matter must be

(1) 6 M. L. A. 393; 18 W. R. 81n.; Sevestre 253n.; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

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deemed to be "the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood."

The petitioners allege that this decision is wrong and apply to me to set it aside in revision. They allege that, because the land is religious land it is incapable of valuation, and their learned Advocate argues that Article 17 (vi) of the Second Schedule of the Court Fees Act should be applied.

It is quite clear that that Article cannot apply to the present case because it applies only to cases which are not otherwise provided for by the Act, and section 7 (c) (c) of the Act makes express provision for such a case as the present. The present case is clearly a suit for possession of land. In such suits the plaint must be stamped according to the value of the subject-matter, and where the subject-matter is land which pays no revenue and has produced no profits during the year next before the date of presenting the plaint, the value must be deemed to be the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood.

The learned Advocate argues that no other land in the neighbourhood can be similar to religious land, and that, therefore, section 7 cannot apply. I cannot accept this argument. The difference between the land in suit and other lands in the neighbourhood is merely a difference of ownership, and that difference is merely accidental and not essential. There is the same difference between lands belonging to different private owners, but no one would be found to argue that that difference prevented the lands from being "similar" within the meaning of the Act.

I, therefore, see no reason to believe that the lower Court was wrong in its interpretation of the Act and I dismiss the application summarily.

*Application dismissed.*

# LAHORE HIGH COURT.

SECOND CIVIL APPEAL No 839 of 1920.

December 15, 1920.

*Present* :—Mr. Justice Scott-Smith.

BHURA AND OTHERS—PLAINTIFFS—

APPELLANTS

*versus*

MATU AND OTHERS—DEFENDANTS—

RESPONDENTS.

*Misjoinder of parties—Suit against several defendants—Suit withdrawn as against some, whether involves dismissal of suit.*

Plaintiffs, proprietors of a village, sued to eject three persons, who were brothers, from a piece of land which was alleged to be *shamilat* land. Subsequently, finding that one of the defendants was on field service, the plaintiffs withdrew their claim as against that defendant and reduced it to two-thirds of the land in suit. A decree was passed in their favour. On appeal the District Judge dismissed the suit on the ground of non-joinder of a necessary party :

*Held*, that the claim having been reduced so as to relate only to the interests of the defendants on the record, the suit could not be dismissed on the ground of non-joinder of the third defendant. [p. 7, col. 1.]

Second appeal from the decree of the Senior Subordinate Judge, Karnal, dated the 23rd December 1919, reversing that of the Munsif, First Class, Kaithal, District Karnal, dated the 29th October 1919.

Mr. Nanak Chand Pandit, for the Appellants.

Mr. J. O. Vaughan, for the Respondents.

JUDGMENT.—In the suit out of which the present appeal arises the plaintiffs, who are proprietors in the village, sued defendants Nos. 1 and 2 to dispossess them from certain land which was alleged to be *shamilat* and which, it was said, they had encroached upon. The defendants Nos. 3 to 5, who are co-owners with the plaintiffs and who did not join them in bringing the suit, were impleaded as *pro forma* parties. The defendant No. 6, Indraj, who is brother of defendants Nos. 1 and 2, was subsequently impleaded. On the 30th April 1919, Bhura, plaintiff, said that Indraj was on field service, that therefore, the plaintiffs reduced their claim to two-thirds of the land in suit, and that they would sue for Indraj's share later on. This statement was preceded by an order of Court from which it appears that Bhura, probably at the suggestion of the Court, made his statement giving up the claim against Indraj. The first Court proceeded with the case and eventually gave the plaintiffs a

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decree for the whole land claimed against all the defendants including Indraj whose name was never struck out of the list of the defendants. The lower Appellate Court has dismissed the plaintiff's suit on the ground that Indraj was a necessary party. It purported to follow *Ram Sarup v. Musammatt Rikhi* (1) and *Rattan Ohand v. Ram Pershad* (2) and *Motan Mal v. Kirpa Mal* (3).

The plaintiffs have filed a second appeal in this Court, and it is contended on their behalf that the rulings relied upon by the lower Appellate Court are not applicable; that the plaintiffs gave up their claim against Indraj in the manner stated, and that as the defendant never objected to this, the suit should not have been dismissed. A perusal of the rulings referred to by the lower Appellate Court will show that they are distinguishable from the present case and in no sense applicable. The plaintiffs having given up Indraj and reduced their claim to two-thirds of the property in dispute and the defendants never having objected to this, the suit should certainly not have been dismissed. Another objection to the order is that Indraj's name was never struck out of the list of defendants, that he continued to be a party to the suit until the end, and that the decree was passed against him as well as against other defendants.

I, therefore, accept the appeal and, setting aside the order of the lower Appellate Court, remand the case thereto for decision of the appeal in accordance with law. It will be for the lower Appellate Court, if it finds in plaintiff's favour on the merits, to decide how far the first Court was justified in passing a decree against Indraj, having regard to the fact that he was never served with a summons and never appeared before it. Stamp in this Court will be refunded and other costs will be costs in the cause.

*Appeal accepted.*

(1) 12 P. R. 1905; 73 P. L. R. 1905; 24 P. W. R. 1905.

(2) 69 P. R. 1906; 118 P. L. R. 1906; 124 P. W. R. 1906.

(3) 79 P. R. 1906; 106 P. W. R. 1906.

## UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 302 OF 1918.

January 5, 1920.

Present:—Mr. Heald, A. J. C.

MA NYEIN AND ANOTHER—

APPELLANTS

versus

MA THA GAUNG—RESPONDENT.

*Buddhist Law, Burmese—Succession—Step-father and step-children—Share of step-child in property jointly acquired by mother and step-father and property inherited by father during marriage with mother.*

As regards the jointly acquired property of the marriage between the mother and step-father of a child, where there are no children of that marriage and no children of the step-father by any other marriage, the share of the step-child is one-fourth. The same rule applies to property inherited by the step-father during his marriage with the mother of the step-child. [p. 12, col. 2]

The fact that the step-father has married another wife does not deprive a step-child of his share in the property. [p. 13, col. 2.]

A step-child, however, has no interest in property acquired by the step-father jointly with a later wife. [p. 13, col. 2.]

Mr. O. G. S. Pillay, for the Appellants.

Mr. A. C. Mukerjee, for the Respondent.

**JUDGMENT.**—The respondent, Ma Tha Gaung, as widow of one Chet Su, sued Chet Su's step daughter, Ma Nyein, and Ma Nyein's husband, San U, to recover two plots of land which she claimed as having belonged to Chet Su but which were in the possession of the appellants. She alleged that they had wrongfully dispossessed her, but my learned predecessor has found that that allegation was not established and, therefore, it need not now be considered.

The appellants alleged that one of the pieces of land, known as "Kaingdaunggyi", originally belonged to Chet Su and his wife Ma Thaing, who was the appellant Ma Nyein's mother; that over 20 years ago Chet Su and Ma Thaing gave it to them to work as their own, and that about three years ago, not long before his death, Chet Su confirmed that gift by reporting the transfer to the Revenue Surveyor. In support of this story they produce a "*lyatpaing*" which recorded the transfer as having been reported by Chet Su and Ma Nyein's husband San U in 1914.

As for the other piece of land, known as "Letpaubin," the appellants alleged that it never belonged to Chet Su at all but had been



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brought under cultivation by them and belonged to them, and they explained the fact that it stood in the name of the respondent by saying that they lived in her house and that she, being an elderly woman, would be regarded as head of the household. There is, however, no difficulty in accounting for the fact that it stands in respondent's name since before Chet Su died it stood in the joint names of him and his wife Ma Thaing and after Chet Su's death it would in the ordinary course be transferred to the name of his widow, the respondent, his earlier wife, Ma Thaing, having predeceased him.

The Trial Court after hearing the evidence came to the conclusion that the respondent established her case on all points and gave judgment in her favour.

Appellants appealed but the lower Appellate Court dismissed their appeal.

They then came to this Court on second appeal on the following grounds, namely:—

(1) that the finding of the lower Appellate Court that Ma Nyein, as Chet Su's step-daughter, could not claim any share in the property left by Chet Su as against Chet Su's widow, was contrary to Burmese Buddhist Law;

(2) that the respondent's suit to recover the lands was not maintainable in view of the fact that appellants had been in possession of the lands for 20 years either on their own account or jointly with Chet Su;

(3) that the burden of proving title to the lands was on respondent, and

(4) that the Appellate Court was wrong on the evidence in holding that they were in possession of the lands by the permission of Chet Su or as his tenants, and in finding that their present possession as against the respondent was wrongful.

My learned predecessor, after hearing the learned Advocates, framed the following issues and referred them to the Court of first instance for trial:—

(1) Did Chet Su's father, Po Hnyin, die before or after Chet Su married Ma Nyein's mother Ma Thaing? and

(2) when did Chet Su first exercise dominion over the two lands in dispute?

On these issues the Trial Court, after taking further evidence, found—

(1) that Po Hnyin died after Chet Su married Ma Thaing;

(2) that Chet Su came into the possession of the first of the two lands which respondent claimed, namely, "Kaingdaunggyi" on the death of his father Po Hnyin, from whom he inherited it; and

(3) that Chet Su and Ma Thaing acquired the other land, namely, "Letpanbin," while they were husband and wife.

The lower Appellate Court accepted these findings and, after a careful perusal of the evidence, I too accept them. It is, I think, clear that Chet Su's father first occupied the "Kaingdaunggyi" land and cleared it, probably with Chet Su's help, and that after his father's death Chet Su occupied also the "Letpanbin" land, which is separated from the "Kaingdaunggyi" land merely by a creek, and cleared it similarly with the help of his step-daughter and her husband, the present appellants. I have no doubt both the lands belonged to Chet Su and that they were "*lette'pwa*" of his marriage with Ma Thaing.

As for the share of such property to which respondent as widow of Chet Su would be entitled as against Ma Nyein as Chet Su's step-daughter, very little has been said in argument and the learned Advocates themselves admit that they are in doubt on the point.

The case law seems to be conflicting and inconclusive.

In the case of *Nga Po Thit v. Mi Thaing* (1) it was held that a son as against his father's children by his step mother is entitled to a one eighth share of the jointly acquired property of his father's marriage with the step-mother. That ruling obviously cannot be applied to a case like the present where there are no children of the step-father's marriage with the mother and the contest is practically one between the step-daughter and the step father.

In the case of *Shwe Ngon v. Ma Min Dwe* (2) it was held that a step-daughter whose step-mother survived her father may sue the step-mother for a share of properties inherited by the father during his marriage with the step-mother and may recover from the step-mother half those properties. That ruling is authority for the proposition that the step child can claim and recover from

(1) S. J. L. B. 18.

(2) S. J. L. B. 110.



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the step-parent its interest in property inherited by the parent during the marriage between the parent and the step-parent, but it is no authority for the rule of partition in the present case, since in this case the properties were inherited not by the mother but by the step father.

In the case of *Mi So v. Mi Hmat Tha* (3) the learned Judicial Commissioner of Lower Burma held some diffidence that as against the step child the step mother takes seven-eighths of the jointly acquired property of the marriage between the father and the step-mother.

The case of *Maung Ohit Saya v. Ma Meinkale* (4) was a contest between the children of two marriages and the widow of a third marriage which was childless and there was no evidence as to whether the property was *letetpwa* of any particular marriage or was *payin* of the husband or of any of the wives. The learned Judicial Commissioner referred the question as to the rule of partition involved to the "Kinwunmingyi" and the "Wetmasuk Wandank" and, in accordance with their opinion, decided that the children of the first marriage were to get half the property, the children of the second marriage one quarter, and the surviving widow one quarter. I doubt whether a detailed examination of the opinions of the two learned authorities on Buddhist Law to whom that case was referred would shed much light on the simpler question which arises in the present case.

The judgment in *Ba Kyu v. Ma Zan Byu* (5) merely followed *Ngaz Po Thit's case* (1), in so far as it referred to a rule of partition between the son of a first wife and his deceased father's second wife.

The case of *Ma Gun Bon v. Maung Po Kyue* (6) dealt with the case of the children of step-children and did not mention the specific shares to which they would be entitled. It did, however, lay down that step-children are to be regarded as heirs without limitation except in the case of ancestral property that is inherited property which is still undivided, and even in that they are granted a share provided the

step-parent has lived to have a vested interest in it. This dictum, of course, applies only to a case where there are neither widow nor own children of the step parent to inherit.

The case of *Ma Sa v. Ma Thet Haon* (7) dealt with the shares of the children of step children and not with those of step-children themselves, and as the rules for partition in the two cases are different it throws little, if any, light on the question which arises in the present case.

In *Ma Hnin Dok v. Ma U* (8) it was held that the share of a child of a step-child in the jointly acquired property of the marriage of the step-child's parent and step parent is one-eighth. If this ruling and that in *Mi So's case* (3) are both correct, it would seem that the shares of the step-child and of the child of the step child are the same, and that is hardly what one would expect since the share of an out-of-time grand-child is one-fourth of that of its parent.

In *Maung Kado v. Ma Kyin* (9) the daughter of a step-child sued her step-mother's second husband for her share of her own mother's separate property and it was held that she was entitled to half that property. That decision throws little light on the present case.

The case of *Maung Tun Gyaw v. Ma Balo* (10) seems to be important for the purposes of the present discussion. It was a suit between a step-mother and her step-sons for her share of the property left by her husband, who was father of the step children. It resembled the present case in the fact that there were no children of the marriage between the parent and the step-parent. The rule of partition adopted was that the step mother was entitled to a half share of the property which her husband inherited during his marriage with her and the step-children were entitled to the other half share. The authority on which that rule of partition was based is Manugye X 8 which, it may be noted, goes on to say that the step-son is entitled to one-sixth of the jointly acquired property of the marriage of his mother and step-father.

(3) S. J. L. B. 177.

(4) U. B. R. (1892-93), II, 93.

(5) P. J. L. B. 299.

(6) U. B. R. (1897-1901), II, 166.

(7) U. B. R. (1897-1901) II, 122.

(8) U. B. R. (1897-1901) II, 126.

(9) U. B. R. (1897-1901) II, 164.

(10) U. B. R. (1897-1901) II, 185.

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That case is, however, to be distinguished from the present case in that in the present case the property was inherited not by the parent but by the step-parent, which would probably make a difference to the rule for partition.

The case of *Nga Son v. Ma Nyo* (11) merely followed *Ma Gun Bon's case* (6) in regarding a step-child as an heir of the step parent.

The case of *Ma Ba We v. Mi Sa U* (12) was a Full Bench case of the Lower Burma Chief Court. It dealt with a contest between a childless widow and the children of her deceased husband's two earlier marriages and decided that the widow is entitled to a one-fourth share of any "payin" property brought by her husband to his marriage with her, and to a seven eighths share of the property jointly acquired by her and her husband during their marriage. The decision in that case merely followed the rulings of this Court in the cases of *Chitsaya* and *Mi So* which the learned Judges in Lower Burma were content to accept as good law, and, therefore, threw no new light on the question now under consideration.

*Maung Kyaw Yan v. Maung Po Win* (13) merely followed *Mi Gun Bon's case* (6) in recognising step-children as heirs.

In *Sein Tun v. Mi On Kra Zan* (14) the contest was between a grand-child of the first wife on the one side and the second wife and her child on the other, and it was held that the grand child is entitled to a one-eighth share of the jointly acquired property of the second marriage, and the second wife to seven eighths, and that in the property brought by the grand father to the second marriage the second wife gets one-quarter, the grand-child three-fifths of the remaining three-quarters, and the second wife's child the remaining two fifths. That rule of partition obviously does not apply in a case like the present.

The case of *Ma Leik v. Maung Nwa* (15) involved a contest between the son of a first wife on the one side and the second wife

and her family on the other, and decided that as against his step mother and her family the son is entitled to a half share in property inherited by the father after the death of the first wife and before marriage to the second, and that such property is an exception to the ordinary rule that the children of the first marriage as against their step-mother take a three-quarters share of the property which their father took to the second marriage. It is clear that that case is of little use as a guide in the present case.

In *Mi Ohan Mya v. Mi Ngwe Yon* (16) the child of the first wife sued her father's second wife and the child of the second marriage for her share of the property left by the father and it was held that in such a case the child of the first marriage takes a three fourths share of the property taken by the father to the second marriage and one-eighth of the jointly acquired property of the second marriage, but it is to be noted that my learned predecessor did not refer to any authorities in support of the latter rule but said merely that the texts were almost unanimous and that in the case before him the rule was not disputed.

In *San Pe v. Ma Shwe Zin* (17) the step-children sued their step-father's second wife and her children for their share of the property left by their step father, claiming that that property was partly jointly acquired property of their own parents and partly jointly acquired property of their mother and step-father.

As for the jointly acquired property of the first marriage it was held that, although the children of that marriage could have claimed their share in it from their mother on her marriage to the step father, nevertheless after their step-father's death, all they could claim from his widow and her children would be their own mother's separate property taken to her marriage with the step-father, and that they had no claim to the jointly acquired property of that marriage. As for the jointly acquired property of the marriage of the step-father with his later wife, it was held that "it is only when the surviving step-parent dies leaving no natural

(11) U. B. R. (1897-1901) II, 531.

(12) 2 L. B. R. 174.

(13) U. B. R. (1904-06) II, Buddhist Law, Inheritance 1.

(14) 3 L. B. R. 219.

(15) 4 L. B. R. 110.

(16) 31 Ind. Cas. 94; U. B. R. (1915) II, p. 74.

(17) 47 Ind. Cas. 189; 9 L. B. R. 176; 12 Bur. L. T. 44.

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issue and no widow surviving that the children of the step-father's deceased wife by a former husband are entitled to the step-parents' property."

If the first part of the decision is good law it would apparently suffice for the disposal of the present case since the lands in dispute here are both "*lettetpwa*" of the marriage of the mother with the step-father, one being ordinary jointly acquired property and the other what is known as "*inherited lettetpwa*," that is, property inherited by one of the married couple, in this case the step father, during the subsistence of the marriage. Neither of the lands was the separate property of Ma Thaing and, therefore, if this ruling is correct, her children could not claim it from their step-father's widow. It seems to me, however, that that decision is not in accordance with previous rulings and is contrary to the authority of the recognised Dhammathats. It is based on the solitary "*Panam*" text cited in section 216 of the Digest and seems to me to misinterpret or misapply the extract from "*Pyu*" given in section 222. Both these texts start by saying that the step children have no interest as against the step father's surviving widow in the jointly acquired property of the step father and his last wife and this is of course reasonable because the step-children are not related by blood to either of the couple. But the view that the step-children have no interest in the property which the step father took to that marriage and which, as in the present case, may include the "*lettetpwa*" property of the marriage of the step-father and their own mother, seems to me unreasonable and contrary to the principles of Burmese Buddhist Law. Rules for partition between a step-father and his step children are contained in section 211 of the Digest and of the Dhammathats cited there the Kungye, Yazathat, Dhamma, Rajabala and Kungyalinga give the step-child one-fourth and the step-father three-fourths of the ordinary "*lettetpwa*" property of the marriage of the step father with the mother.

On the other hand, the Manussika, Dhamma, Manugye, Mann, Dayajja Ambwebon and Chittara give the step children one-sixth and the step parent five-sixths.

The reason for the division into three-fourths and one-fourth is intelligible.

The step-father takes his own half share of the jointly acquired property and half his wife's half share, that is, three-fourths, of the whole, while the step-son gets half his mother's half share, that is, one-fourth, as being co-heir with his father in respect of that half share.

The justification for the division into five-sixths and one-sixth is difficult to understand if only the step-father and the step-children are concerned.

It has been suggested that the one sixth share was chosen as a sort of mean between the share allotted to the child of a step-child, which is one eighth, and the share which the children of the marriage would receive if there were no step-children, but I do not think that this is probable particularly as this rule appears in the Manussika, which is, I believe, one of the oldest of the Dhammathats.

The only explanations of the rule which I can offer are, either, that it may be a survival from a time when the husband was regarded as having two shares in jointly acquired property to his wife's one or else that it is based on some passage in an old Dhammathat which dealt with the shares of the step-children and step-father in a case where there were also children of the marriage with the step-father. In such a case the step-father might be regarded as representing not only himself but his children, those children not being entitled to claim partition while he was alive, so that he would receive his own half share on his own account, while on behalf of his children, who would inherit from both parents, he would receive two shares out of his wife's half-share as against one share taken by the children who inherited from one parent only. That mode of partition would give the step-father five-sixths and the step-children one-sixth but, as I have said, it involves the assumption that there are two families and not only one. The rule in Manugye X, 10, which deals with a case where there are three families, is somewhat similar, the step-father taking on his own account his own half share of the jointly acquired property and one quarter of his wife's separate half share, that is five-eighths of the whole, while the children take three quarters of their mother's separate



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half share divided between them in the proportion of two shares to those who inherit through both parents, that is, two eighths, and one share to those who inherit through one parent only, that is, one eighth. If the same principle were applied to the case where there are only step children and step father, the result would be that the step father would take his own half share on his own account and one fourth of his wife's half share as her heir, that is, five eighths, while the step children would take three quarters of their mother's half share, that is, three eighths of the whole. One is tempted to suggest that the true explanation of the one sixth share might be that some scribe converted eight into eighteen, and so made the step children's share three eighteenths, that is, one sixth, instead of three eighths and that "five eighths" was then altered to five sixths to make it agree, but I think that the explanation I have suggested above is more probable and that the passages which give the step children one sixth tacitly assume that the marriage between the mother and step father had its natural results and that there were children of that marriage. This view possibly receives some slight support from the reference to children of the second marriage in the very passage of Manugye X, 8 which gives the step father a five sixths share. That passage runs as follows: "If, while the step son is living with the step father and mother the mother dies, let all the property which is with the mother be divided into four shares and let the husband take one. If, while the mother has been living with her second husband, she has received her parents' properties as inheritance, the said properties, because the husband has a right to the wife's property, though there is no child, shall belong half to the step father and half to the former son. If the grand son's share comes into possession in the step father's time the step father shall not enjoy it. It shall belong to the former son. If there are debts, let them pay them in the same proportions. If there is any property acquired while the mother and step father are living together, divide it into six shares and let the former son have one." The specific provision that the step father is to have half the mother's inherited pro-

perty even though there is no child of the marriage seems to me to suggest that possibly in the other cases mentioned in that passage and particularly in the case of the five sixths share, the father was regarded as taking the share allotted to him not on his own account merely but on account of himself and his children by the mother, and that, therefore, it was necessary to say that the step father got half the inherited property on his own account even though there might be no children whom he could represent.

However that may be, it is clear that we have to choose between the authorities which give the step children a one fourth share and those which give them one sixth, and in view of the fact that the division into one fourth and three fourths is intelligible as following principles of partition which are recognised by the authorities and that the division into one sixth and five sixths does not seem to be consonant with any recognised principle unless it be assumed that it deals with a case where there are two families, and further that that rule of division would lead to the result that in respect of property inherited by the step father, which is differentiated from ordinary "*lettetpwa*" property, because the step father, as original owner of the property is regarded as having a larger interest in it than he has in ordinary jointly acquired property, the step son would have a larger share than he would have in ordinary "*lettetpwa*" property, I am of opinion that, in spite of the authority of Manugye, the former rule ought to be followed.

I shall, therefore, hold that as regards ordinary "*lettetpwa*" that is the jointly acquired property of the marriage between the mother and the step father, where, as in the present case, there are no children of that marriage and no children of the step father by any other marriage, the share of the step child is one fourth.

There remains for consideration the question as to what rule of partition is to be applied to property inherited by the step parent during marriage with the parent, which is differentiated from ordinary "*lettetpwa*." In all the reported cases where the rule of equal division between the step children and the step parent has been



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followed the property has been inherited by the parent and not by the step parent and I have been unable to find either in the Dhammathats or in the rulings any express rule for cases where the property was inherited by the step-parent.

The rule of equal shares obviously could not be fairly applied where the step-parent himself is the original owner of the property, and the first question to be decided is whether the step-child as heir of the parent takes any interest in property inherited by the step-parent, and, if so, what is the extent of that interest. There can be no doubt, I think, that the parent acquires by reason of the status of husband or wife some interest in such property, and, if so, one would expect the step child as one of the heirs of the parent to have a share in that interest.

It has been held that in cases where it is necessary to determine the interests of husband and wife in such property on divorce the rule is that two-thirds of the property belongs to the person who inherited it, and the remaining one-third to the other, but it has been suggested that that rule cannot be applied to cases of inheritance. It seems to me, however, that that very rule may itself be regarded as the basis of the rule for equal partition in the case of property inherited by the parent. In such a case, the step-parent would be entitled to one third in his or her own right and to one-fourth of the remaining two-thirds as heir of the parent, that two-thirds share being regarded as the parents' separate property after the deduction of the step-parent's one-third share. Similarly, the step-child as heir to the parent would be entitled to three-fourths of the parent's two-thirds share, the result being that the step-parent and the step child would each receive half since one third plus one-fourth of two-thirds is half and so is three-fourths of two thirds.

I think, therefore, that the two thirds and one-third rule may safely be applied to cases where the property was inherited by the step-parent no less than to cases where it was inherited by the parent.

The result of the adoption of that rule would be that, as against the step-parent the step-child is entitled to three-fourths of one-third, that is, to one quarter of the

property inherited by the step-parent during marriage with the parent, and that the step parent by whom the property was inherited is entitled to two thirds and one-fourth of one-third, that is to three-fourths. These shares, it will be noticed, are the same as would have been obtained by regarding the property as ordinary "*lettetpwa*" and by applying the one-fourth and three-fourths rule, so that it might simplify matters to say that the rule of equal division applies only when the property has been inherited by the parent, and that if it has been inherited by the step-parent it is treated as ordinary "*lettetpwa*" property in which the step-child takes one-fourth and the step-father three-fourths. Strictly speaking, however, that would not be true because, although the result is the same, the shares are based on a different rule of partition.

I have now found that the step children are entitled, as against the step-father, to one-fourth of the jointly acquired property of his marriage with their mother and to one-fourth of property inherited by him during that marriage, and if they are so entitled as against the step-father himself, it is difficult to see on what principles of law or justice the fact that the step-father has married another wife should deprive them of that right. It seems to me that the wording of the passage from "*Pyu*", cited in section 222 of the Digest, indicates that the step-children can recover from their step father's widow the interest which they, as heirs of their mother, have in property left by their step-father and that the single passage from Panam, cited in section 216 of the Digest, is not sufficient authority for the contrary view.

As for the jointly acquired property of the marriage between the step-father and his later wife, both those passages expressly lay down the rule that the step-children have no interest in that property and as that rule is clear and reasonable, it must be accepted.

I hold therefore, that as against the step-father's widow the step-children are entitled to the share of the "*lettetpwa*" property of the marriage between their mother and the step-father, to which they were entitled as against their step-father, and that they are not entitled to any share in the "*lettetpwa*"

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property of the marriage between their step-father and his later wife.

Accordingly, in the present case I hold that Ma Nyein's interest in both the lands in dispute is one fourth and that the respondent's interest is three-fourths.

On the first ground of appeal, therefore, I find that the lower Courts were mistaken in holding that the appellants had no interest in the property in dispute and that the respondent was entitled to the whole of it.

As for the second ground of appeal, I do not think that the appellants established either that Chet Su gave them the "Kaing-daunggyi" land or that they were themselves the owners of the "Letpanbin" land. I have no doubt that they worked both lands, or at any rate a considerable part of both lands, for many years but in my opinion they must be held to have worked them as children of Chet Su and not as being themselves owners of them and they would acquire no title adverse to Chet Su or to respondent by so working them. I may, however, note in this connection that I do not think that the aspersions which both the lower Courts cast on the genuineness of the "*pyatpaing*" in suit were warranted by the facts. The Trial Court said that one important particular, namely, the character of the transaction, was not entered in the form and this was one of the grounds on which both Courts held that the document was a forgery. If the learned Judges had been more familiar with the way in which these documents are prepared, they would have known that Revenue Surveyors commonly enter in the space in which the nature of the transaction is intended to be inserted a reference to the list of kinds of transaction given on the back of the form. Frequently, they enter merely the number of the entry relating to that class of transactions in the list, but quite as often they enter the first words of that entry, and that is what was done in this case, the word "*Ayadaw*" being merely the first word of entry No. 12, see Note I of the form. There was, therefore, nothing suspicious in the form so far as this matter was concerned and, as a matter of fact, I think that it was possibly quite genuine. As, however, the appellants did not take the trouble to offer any evidence

of the transaction beyond the form itself I do not think that they can complain if their case so far as it was based on that transaction failed. There was another matter also which they do not seem to have thought it worth while to put in evidence. It appears from the documents filed at the trial that the dispute between Ma Nyein and Chet Su about the property left in Chet Su's possession on Ma Thaing's death had been referred to arbitration, and, if, as appears to have been the case, an award was made, that award probably settled the matter now in dispute. As, however, neither side pleaded that award or offered any evidence of it, it cannot now be considered.

The third ground of appeal needs no discussion and the fourth has already been dealt with in considering the second.

On the case, as a whole, I hold that the respondent was entitled to recover three-quarters of each of the two plots of land from the appellants and, therefore, I set aside the judgments and decrees of the lower Courts and give judgment for the respondent for partition and possession of three quarters of the lands and not, as the lower Courts did, for possession of the whole lands.

As for respondent's claim to mesne profits, all that she could claim would be a fair rent for her share of the lands and as there is on the record nothing to show what a fair rent would be I do not see how I can give her a decree for mesne profits.

As the respondent has succeeded in respect of three quarters of her claim, she will get three-quarters of her costs through-out.

*Decree set aside.*

RAJANDRAMANIA DEVI GARU v. YELLAPPA RAMU NAIDU.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 919 AND 927  
OF 1919.

August 27, 1920.

Present :—Justice Sir Abdur Rahim, Kt., and  
Mr. Justice Oldfield.

Sri Sri Sri RAJANDRAMANIA DEVI  
GARU AND ANOTHER—PLAINTIFFS—  
APPELLANTS

versus

YELLAPPA RAMU NAIDU—DEFENDANT  
—RESPONDENT.

*Madras Estates Land Act (I of 1908), s. 25—Home-farm land, conversion of, into ryoti land—Tenant, whether liable for rent.*

*D* was in possession of home-farm land as usufructuary mortgagee. *P.* instituted a suit for redemption which was compromised and *D.* remained in possession for a term of years. On the expiry of this term *P.*, treating the land as ryoti land, gave *D.* a lease of it on certain terms. *P.* now brought the present suit, under sections 77 and 192 of the Madras Estates Land Act, to recover rent on the basis of the lease. The suit was contested on the ground that *D.* having been admitted to possession of ryoti land, within the meaning of section 25 of the Act, he was not liable for rent :

*Held*, that as *D.* was previously in possession as usufructuary mortgagee up to the date of the lease, he could not be said to have been admitted to possession of ryoti land at the date of the lease; that section 25 of the Madras Estates Land Act had no application to the case, and that *D.* was liable for rent according to the terms of the lease. [p. 16, col. 1.]

Second appeals against the decrees of the District Court, Vizagapatam, dated the 20th December 1918, in Appeal Suit Nos. 303 and 314 of 1916, preferred against the decrees of the Court of the Sub-Collector, Narasapatam, dated the 5th May 1916, in Estates Land Act Suits Nos. 55 and 53 of 1915.

FACTS appear from the judgment.

Mr. V. Ramesam (Government Pleader), for the Appellants.—The District Judge's finding that the home farm land was converted into ryoti land is erroneous. He was also wrong in holding that the plaintiff could not demand the contract rate of rent stipulated in the Kadapa but only to equitable rent. Section 25 of the Estates Land Act does not apply. The defendant could not be deemed to have been 'admitted into possession of ryoti land' within the meaning of the section as he was already in possession prior to the lease as mortgagee. The respondent wishes to adopt a strange position, to claim the benefits of occupancy rights

while repudiating the other terms of the lease. Section 181 is silent as to the terms on which conversions from home-farm to ryoti lands could be made.

Mr. P. Narayanamurthi, for the Respondent.—The plaintiff describes the land in the instrument of Kadapa as *jeroyati* land and the defendant is termed a *ryot*. He cannot now go back on that document and say that the land is still home-farm land.

The defendant was a person 'admitted to possession of ryoti land.' The explanation to sub-clause (2) of section 6 shows that where payments are received from tenants under section 45 the tenant shall be deemed to have been admitted to possession. Then on that principle under section 25 he is entitled to make the payment on the basis of what is fair and equitable.

JUDGMENT.—The defendant-respondent in this second appeal has been in possession of the land in dispute for a long time as usufructuary mortgagee. A suit was instituted by the plaintiffs appellants for redemption, and that suit was compromised in 1905. By that compromise the defendant remained in possession for seven years rent free. Then, in April 1912, he was given a Kadapa or lease of the land on certain terms and the plaintiffs have instituted this suit in the Revenue Court under the provisions of sections 77 and 192 of the Estates Land Act for the recovery of rent on the basis of that Kadapa. It is argued by Mr. Ramesam that the land is *Seri* or home-farm land; that the finding of the District Judge that, although it was home farm land originally, it had been converted into ryoti land is wrong and that we ought to set it aside. But we must hold that the plaintiffs by their own conduct debarred themselves, at least so far as this suit is concerned, from contending that the land is home farm land and not ryoti land so as to exclude it from the scope of the Estates Land Act. The plaintiff describes the land as *jeroyati* and the Kadapa relied on describes the land as *jeroyati* and the defendant as a *ryot*. We must decide this point against Mr. Ramesam.

The learned District Judge, however, has dismissed the suit holding that the plaintiffs are not entitled to the rent claimed by them, and they are entitled only to a fair and equitable



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rent on the basis of the previous mortgage-deed and as the amount which he had already paid exceeded the amount claimable on that basis the suit was liable to be dismissed. The learned District Judge was of opinion that section 25 of the Estates Land Act applied to this case. In our opinion he is wrong. The defendant could not be said in this case to have been 'admitted to possession' of *ryoti* land at the date of the Kadapa and Muchilika as he had been in possession previously as usufructuary mortgagee. The land until the date of the Muchilika was home farm land and the District Judge says that by the contract between the plaintiffs and the defendant as evidence by the Kadapa and Muchilika the character of the land was changed from home farm into *ryoti*. It would be straining the language of section 25 too much to say that the defendant in this case was 'admitted to possession' of a *ryoti* land. That there is a distinction between admission of a *ryot* to possession and a *ryot* being in possession is not only clear from the ordinary meaning of the two phrases but the Legislature itself observed the distinction in various sections of the Act. The Explanation to sub-section (2) of section 6 which has been relied on by Mr. Narayanamurthi for the respondents makes a special provision with respect to section 45 by which a *ryot* occupying old waste and from whom rent has been recovered or received is deemed to be a person admitted thereby to possession. That Explanation supports Mr. Narayanamurthi's suggestion that the phrase "a person admitted to possession" does not ordinarily mean a person in possession. If the contention of the respondent was to be accepted it would lead to manifestly inequitable results. He wants to have the benefit of the contract by which he acquired occupancy or permanent rights in the lands, and at the same time herepudiates the other terms which induced the landlord to confer on him occupancy rights. If there is any provision of the Act itself by which such a result could be sustained the defendant's position could not be assailed, but since section 25 has no application to his case we are unable to hold that he is not liable to pay the rent which he contracted to pay when the land was converted from homefarm land into *ryoti* land. Section 181 contemplates such a conversion but the Legis-

lature has not made any special provision as regards the terms on which such conversion may be made. In the absence of any such provision, the contract of the parties on the basis of which the conversion was made must be enforced.

The result is the decrees of the lower Appellate Court is reversed and that of the Court of first instance restored with costs here and in the lower Appellate Court.

M. C. P.

*Decree reversed.*

## UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS No. 25 OF 1920.

June 7, 1920.

Present:—Mr. Heald, A. J. C.

MA SAT PU—APPLICANT

versus

MA SIN—RESPONDENT.

*Upper Burma Registration Regulation (II of 1897), ss 4, 6—Document not signed, whether executed—Registration, whether necessary—Admissibility in evidence.*

Documents which, according to Burmese custom, are complete without signature are "executed" within the meaning of section 4 of the Upper Burma Registration Regulation, and, when they fall within the purview of the section, require registration, and in the absence of registration are inadmissible in evidence by virtue of the provisions of section 6 of the Regulation. [p 18, col. 1.]

Mr. J. O. Chatterjee, for the Applicant.

JUDGMENT.—In the suit with which I dealt in Civil Second Appeal No. 372 of 1919 of this Court, the plaintiff sued on a mortgage which she said had been recorded in a stamped document, and she called on the defendant to produce the deed.

The defendant denied the mortgage and naturally did not produce the writing recording it.

The plaintiff had no personal knowledge of the document but said that she got her information about it from her sister. She admitted that the document was not registered.

The sister, who was called as a witness, said that she was present when the document



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was written that it was written on an impressed sheet stamped with Rs. 3 but that it was not signed by the parties because they said, "It is all right if agreed."

In my judgment I suggested that the statement that the document was not signed was probably false and was intended to account for the failure to have the document registered, since the document was admittedly written on a stamped sheet with a view to its being used as a record of the transaction, and as the transaction was admittedly completed, there was no reason why the document also should not have been completed. I went on to say that even if the document was not signed it would still be compulsorily registrable, and I held that because it was not registered, neither the document itself nor secondary evidence of its contents could be received as evidence of the mortgage. I held, further, that under section 91 of the Evidence Act no evidence of the mortgage except the document itself or secondary evidence of its contents could be admitted to prove the mortgage, and that because neither the document nor secondary evidence of its contents was admissible, the mortgage could not be proved.

I am now asked to review that judgment on the ground that I ought to have held that the document was unsigned because it was not customary among Burmans to sign the documentary records of their transactions and that, therefore, the document was a nullity and might be regarded as non-existent.

This argument seems to me to involve a *non-sequitur*. If, as is suggested, Burmese records were complete without signature, it would not by any means follow that they were to be treated as nullities or as non-existent. It is true that *parabaihs* or palm-leaf documents were not usually signed, but this Court continually accepts, and has always accepted, such documents as complete records of the transactions embodied in them and as excluding oral evidence of those transactions. Section 91 of the Evidence Act says nothing about signing or execution. What it says is that, when the terms of a disposition of property have been reduced to the form of a document, no evidence shall be given in proof of the terms of such disposition except the document itself or secondary evidence of

its contents in cases in which secondary evidence is admissible. The provisions of that section are sufficient to meet the argument that the document in this case could be disregarded, and as a matter of fact the plaintiff herself did not claim to disregard it but, on the contrary, made it the basis of her suit and called on the defendant to produce it.

In his argument in Court the plaintiff's learned Advocate has taken a different ground, and has suggested that the document in suit ought not to be excluded from evidence by reason of its being unregistered. He says that it cannot possibly have been the intention of the Upper Burma Registration Regulation that the unsigned records of transactions, which were usual among Burmans at the time when the Regulation was brought into force should be registered or that failure to have them registered should have the effect of making them inadmissible in evidence.

The Registration Regulation, which came into force at the end of 1897, expressly stated that a document which was required to be registered should not affect any immovable property comprised in it or be received as evidence of any transaction affecting that property unless it had been registered.

Under the Local Government's General Department Notification No. 25, dated the 17th February 1898, which was issued in exercise of the power conferred by section 4 of the Regulation, all non-testamentary instruments executed on or after the 1st of July 1898, and purporting or operating to create, declare, assign, limit or extinguish any right, title, or interest in immovable property were required to be registered.

The question whether documents which, according to Burmese custom, were complete without signature could be said to be "executed" was considered by this Court in *Queen Empress v. Mi Nan Thi* (1) and in *Mi Ta v. Nga Sein* (2), and it was decided that such documents were "executed", at any rate, within the meaning of the Stamp Act of 1879. I have not been able to trace any published ruling in which the

(1) U. B. R. (1892-96) I, p. 303.

(2) U. B. R. (1907-09) II, Ex. Signing, p. 5.

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meaning of the word "executed" in section 4 of the Regulation or in Notifications under that section has been considered, but this Court has always held that such unsigned documents were compulsorily registrable and were inadmissible in evidence if unregistered and I see no reason to believe that that view is incorrect. It might possibly have been open to the Courts to hold that the intention of the Regulation and of the Local Government's Notification was to encourage the substitution of a more regular form of execution for the form then customary by allowing registration and its privileges to documents regularly executed and by denying those privileges to documents not so executed, but the Courts have never taken that view, and, in my opinion, it is clear from the Regulation and the Notifications themselves that the actual intention was that, for the future, all non testamentary documents affecting immovable property should be registered and if unregistered should be inadmissible in evidence.

The document in this case was not a *para-lik* or palm leaf document but was apparently a formal record written on stamped paper. Parties who recognized the necessity for a stamp rarely, if ever, adopted the Barmese form of recording their transactions without signatures and there was, therefore, some presumption that the present document was in the modern form and was signed. But even if it was in the old form and was unsigned it would still, in my view, be compulsorily registrable and would be inadmissible in evidence because it was admittedly unregistered.

I am of opinion, therefore, that my former judgment was correct and that sufficient reason for review has not been established.

The application is rejected.

*Application rejected.*

# MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 643 AND 644 OF 1919.

September 13, 1920.

*Present*:—Justice Sir Abdur Rahim, Kt., and Mr. Justice Odgers.

SWAMINATHA ODAYAR—PETITIONER

IN C. R. P. No. 643 OF 1919

K. ARUMUGA PADAYACHI—PETITIONER

IN C. R. P. No. 644 OF 1919

*versus*

S. SUNDARAM AIYAR—RESPONDENT—

IN BOTH.

*Madras Estates Land Act (I of 1908), s. 43 (5)—Occupancy rights, application for acquisition of—Receiver holding estate, application to, validity of.*

Inasmuch as the term 'landholder' in sub-section (5) of section 46 of the Madras Estates Land Act is confined to a landholder who is the owner of the estate, an application for the acquisition of occupancy rights in an estate in the hands of a Receiver must be made to the landholder and not to the Receiver. A Receiver has no jurisdiction to entertain such an application. —[p. 19, cols. 1 & 2.]

Petition, under section 115 of Act V of 1908, and section 107 of the Government of India Act, praying the High Court to revise the orders of the Court of the District Collector, Tanjore, in Revision Petitions Nos. 3 and 4 of 1919, preferred against the orders of the Court of the Revenue Divisional Officer, Kumbakonam, in Miscellaneous Appeals Nos. 31 and 21 of 1918 respectively.

FACTS appear from the judgment.

Mr. K. Rajah Aiyar, for the Petitioners:—

The Revenue Courts erred in holding that a Receiver appointed by Court had no power to entertain applications under section 46 of the Estates Land Act. He stands in the shoes of the landholder. Under section 3, clause (5) landholder includes transferees from the owner and all persons entitled to collect rents. A Receiver appointed by a competent Court would come within this definition. He exercises all functions of the landholder in respect to the management of the property. There is no meaning in restricting unduly the scope of section 46. The word 'owner' should not be narrowly construed as 'beneficial owner.' See definition in section 7 of the Easements Act.

Mr. Varada Ohariar, for the Respondents.—Whatever may be the definition of 'landholder' in section 3 (5), section 46, clause (5) makes it clear who are competent to receive applications under the section. It is only

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the landholder who is the owner of the estate to whom the sums payable under the section have to be paid and applications have to be made only to such landholder. A Receiver does not fall within that category. It is needless to enquire into the object of the Legislature in making that distinction. The sub-section is plain.

#### JUDGMENT.

ABDUR RAHIM, J.—These cases arise out of an application made by certain tenants of the Palace Estate, which is under the management of a Receiver appointed by the Court, for the compulsory acquisition of occupancy rights under section 46 of the Estates Land Act. The Revenue Authorities decided against the *ryots* on the ground that section 46 precludes any application being made under it to a Receiver appointed by the Court as distinguished from the beneficial owner of the property. We have not found it necessary to decide the preliminary objection raised that no objection lies against the order of the Revenue Authorities as, on the merits, we are clearly of opinion that sub section 5 of section 46 is a bar to the present application of the *ryots* in the case. While in the main clauses of that section the word landholder alone is used, in clause (5) at the end, the Legislature has added: "The sums payable under this section for the acquisition of the occupancy rights shall be paid to the landholder *who is the owner of the estate* or part thereof and any application or proceeding under this section shall be made only to or against such landholder (which means the landholder who is the owner of the estate). "Landholder," as defined in section 3 clause (5), would include not only the owner of an estate but also persons who are entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor in title or of any order of a competent Court or of any provision of law. This definition, therefore, would include a Receiver appointed by the Court as a landholder within the meaning of the Act. Therefore, sub section (5) to section 46 when it says that any application or proceeding under this section shall be made only to or against such a landholder "who is the owner of the estate" it clearly intended to exclude persons like a Receiver of the estate from the purview of that section. There is another

section brought to our notice by Mr. Varada Chariar, the learned Vakil for the respondent, in which the same definition is found, namely, section 200. It is argued by Mr. Rajah Aiyar that a Receiver exercises all or most of the powers of the landholder with reference to the management of the property and, therefore, in several connections he has been held to stand in the shoes of the owner. That may very well be, but here we have to consider the express words of a Statute which clearly show that the Legislature intended to confine these proceedings against persons who are owners of the estate as distinguished from persons who may be entitled to collect the rents of the estate and to do other acts contemplated by the Act as landholder. It is not for us to speculate as to what the object of the Legislature was in drawing this distinction and in restricting the rights given to the *ryots* by section 46 to cases where the owner himself is in management of the property. The frame of this section, like that of several sections of the Act, is somewhat peculiar but there is no escape from its language which admits of no doubt as to the intention of the Legislature.

The result is that Civil Revision Petitions Nos. 643 and 644 are dismissed with costs.

ODDAR, J.—I agree. There is no doubt that a Receiver falls within the definition of a landholder in section 3 sub section (5) of the Madras Estates Land Act. See *Receiver of Ammayanaikanur Zamin v. Suppan Ohetty* (1). It is equally clear that the meaning of "landholder" as defined in section 3 sub-section (5) has been restricted by words in section 46 sub-section (5) for the purpose set forth in that section. Section 46 sub section (5) is very clear and lays down that "any application or proceeding under this section shall be made only to or against such landholder." Such landholder being defined just previously as the person "who is the owner of the estate or part thereof." The difficulty in construing this section arises, in my opinion, from the fact that the definition of landholder for the purposes of the section has been relegated to the last sub section instead of being clearly stated in the first. In view of the clear and unequivocal words of section 46 sub section (5) no good purpose is served

(1) 30 M. 505; 17 M. L. J. 483; 3 M. L. T. 7.



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by referring to decisions under other Acts in which the word "owner" has been held not to mean necessarily a beneficial owner, as for instance, section 7 of the Easements Act. The construction I put upon subsection (5) of section 46 of the Madras Estates Land Act is further strengthened by the distinction drawn between a landholder who is a landholder who is not owner in section 200 of the same Act.

I, therefore, think that the decision of the Revenue Authorities are right and that the Civil Revision Petitions Nos. 643 and 644 must be dismissed with costs.

M. C. P.

*Petitions dismissed.*

# LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 471 OF 1920.

December 2, 1920.

*Present* :—Mr. Justice Broadway.

LAL SINGH AND OTHERS—PLAINTIFFS—  
APPELLANTS

*versus*

HIRA SINGH AND OTHERS—DEFENDANTS  
—RESPONDENTS.

*Limitation Act (IX of 1908), s. 23, Sch. I, Arts. 120, 144—Suit for injunction directing removal of chhappars—Limitation applicable—Erection of chhappars, whether continuing wrong.*

Plaintiffs, the owners of a courtyard, alleged that the defendants had erected *chhappars*, or thatched sheds, in front of their house and asked for a perpetual injunction directing them to remove the *chhappars* and restore the courtyard to its former condition;

*Held*, (1) that although the injunction would have the effect of restoring the courtyard to a state in which the plaintiffs would be able to have a more extensive use of it, the suit was essentially one for the issue of an injunction and was governed by Article 120 of Schedule I to the Limitation Act and not by Article 144 [p. 0, col. 2]

(2) that the moment the *chhappars* were erected the injury sought to be removed by the issue of an injunction was complete, and that there was no continuing injury within the meaning of section 23 of the Limitation Act. [p. 21, col. 2.]

Appeal against the order of the District Judge, Hoshiarpur, dated the 20th November 1919, reversing that of the Munsif, First Class, Hoshiarpur.

Lala Fakir Chand, for the Appellants.

Dr. Nand Lal, for the Respondents.

**JUDGMENT.**—The plaintiffs in this suit claimed to be joint owners of a certain courtyard, and alleged that the defendants had erected certain *chhappars* or thatched sheds in front of their house and asked for a perpetual injunction to issue to them directing them to remove the said *chhappars* or thatched sheds and to restore the courtyard to its former condition. It was alleged that the said *chhappars* had been erected two years prior to suit. The defendants pleaded that they were the owners of the courtyard themselves, that the *chhappars* had been erected many many years ago and that the suit was barred by limitation. The Trial Court granted the plaintiffs a decree for the removal of these *chhappars* but on appeal the learned District Judge came to the conclusion that the *chhappars* had been in existence for over six years and that the suit was barred by Article 120 of the Limitation Act. He accordingly dismissed the suit. The plaintiffs have now come up to this Court in second appeal through Lala Fakir Chand whom I have heard, while Dr. Nand Lal has addressed me on behalf of the respondents.

Lala Fakir Chand contended that, although the suit was one for the grant of a perpetual injunction, it was in essence a suit for possession, that, therefore, Article 144 of the Limitation Act applied and that the suit was within time. I may say at once that I am unable to accede to this contention. The suit was essentially a suit for the issue of an injunction and, although the injunction would have had the effect of restoring the courtyard to a state in which the plaintiffs might have been able to have a more extensive use of it than they have now, I am unable to see that this reason brings the suit for an injunction such as this within the four corners of Article 144.

It was then contended that the obstruction or interference with the rights of the plaintiffs was a continuing one and that for that reason section 23 of the Limitation Act applied and the suit was within time. *Punja Kumar v. Bai Kuvar* (1) and *Kamphul Sahoo*

(1) 6 B. 20; 8 Ind. Dec. (N. S.) 470.

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*v. Misree Lall* (2) were relied on by the learned Vakil. The Bombay suit referred to the right of user of a drain and the obstruction complained of was held to be a continuing nuisance. I am unable to see that this decision affords any assistance in the present case. In *Ramphul Sahoo v. Misree Lall* (2) it was held that, "if the plaintiff had been dispossessed from any portion of his land by an adverse possession having been taken by the defendant, the case would then fall within clause (12); but that if, on the other hand, no adverse possession had been taken by the defendant, then each act of trespass on the plaintiff's land would constitute a fresh cause of action, and whether the period be six years or twelve years, the plaintiff would be competent to rely upon the last act of trespass as constituting a cause of action." Here, by erecting these *chhappars*, the defendants have definitely taken possession of a portion of the joint land, and that their intention was to take adversely to the rest of the world is evidenced to some extent by the fact that in answer to the present suit they pleaded that the land was their own property. Mr. Fakir Chand then put his case in this way. He said that his clients had a right to enjoy the courtyard including the land under the *chhappars*. Their erection prevents them from doing so and, so long as these *chhappars* stand, this disability continues and, therefore, section 23 of the Limitation Act is applicable. By the provisions of section 23 in the case of a continuing wrong independent of contract a fresh period of limitation begins to run at every moment of the time during which the wrong continues. In *Achar Singh v. Badhawar Singh* (3), a suit for ejectment from a specific field which was recorded as part of a thoroughfare and *shamlat* instituted nominally on behalf of the village community to remove an obstruction to the enjoyment of the *shamlat* by the proprietors generally, it was held that section 23 of the Limitation Act did not apply. In *Ashutosh Sadukhan v. Corporation of Calcutta* (4) a platform had been built by the plaintiff upon a portion of a street or drain vested

in the Calcutta Municipal Corporation. This platform had been in existence for about half a century and was an integral part of his building. The Municipal Corporation demanded its removal claiming the land upon which it stood. The plaintiff then instituted a suit for a declaration of his right to the land upon which the platform stood. On behalf of the Calcutta Municipal Corporation section 23 of the Limitation Act was appealed to. It was, however, held that it had no application. Similarly, in the present case it seems to me that section 23 does not apply. The moment the *chhappars* were erected the injury complained of and sought to be removed by the issue of an injunction was complete. I do not think that there was any continuing injury within the meaning of the Statute. The effect, no doubt, continues but this does not, I think, extend the time of limitation. *Kanakasabai v. Muttu* (5) also appears to me to be in point. I accordingly am of opinion that the learned District Judge has rightly applied Article 120.

Finally, Lala Fakir Chand contended that inasmuch as the *chhappars* have been shown to exist for more than four years in the present suit, the suit in its entirety should not have been dismissed. It has been found as a fact that the *chhappars* had existed for more than six years and it would be, I think, exceedingly difficult to ascertain the exact size of these *chhappars*. The plaintiffs on whom the onus lay to prove their case alleged that they had been erected only two years before suit. This has been found to be wrong and I do not see how I can hold differently. The appeal is accordingly dismissed with costs.

*Appeal dismissed.*

(5) 13 M. 445; 4 Ind. Cas. (N. S.) 1022.

(2) 24 W. R. 97.

(3) 15 Ind. Cas. 285; 124 P. R. 1912; 132 P. W. R. 1912; 2 P. L. R. 1913.

(4) 49 Ind. Cas. 93; 28 C. L. J. 494.

PAMBAYAM CHETTY & KANDASWAMI IYER,

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1648 OF 1919  
AND CIVIL REVISION PETITION No. 898  
OF 1919.

August 24, 1920.

Present:—Justice Sir Abdur Rahim,  
Kt., and Mr. Justice Oldfield.

PAMBAYAM CHETTY *alias*  
RAMASWAMI CHETTIAR (DEAD)  
AND ANOTHER—(DEFENDANT No. 1 AND HIS  
LEGAL REPRESENTATIVES)—APPELLANTS—  
PETITIONERS

*versus*

KANDASWAMI IYER AND OTHERS—  
PLAINTIFFS AND DEFENDANT No. 2—  
RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXIII, r. 8  
—Compromise effected by parties—Fact certified to  
Court by Pleaders of parties—Party, right of, to object  
to compromise—Compromise by trustee in good faith,  
whether lawful.

Where the parties to a suit themselves effect a compromise, and the fact of the compromise is conveyed to the Court by means of a petition presented by the Pleaders appearing on both sides, it is not open to the parties to question the compromise on the ground that the Pleaders had no authority to compromise. [p. 22, col. 2.]

A compromise by a trustee in good faith of a suit relating to trust property is lawful and the Court will not, in such a case, enquire whether the compromise is or is not beneficial to the trust [p. 23, col. 1.]

Appeal and revision petition against the decree of the Court of the Subordinate Judge, Trichinopoly, in Appeal Suit No. 45 of 1919, preferred against the decree of the Court of the District Munsif, Srirangam, in Original Suit No. 453 of 1915.

FACTS appear from the judgment.

Mr. S. T. Srinivasa Gopalachariar, for the Appellants:—The appellants' Pleader had no power to compromise the suit on behalf of his clients. There was no provision in his *vakalat* empowering him to do so. The compromise petition is signed by the Pleader when he could not actively adjust the subject-matter of the suit.

It is not a lawful compromise within the meaning of Order XXIII, rule 3, Civil Procedure Code. The suit related to a trust and the trustee could not compromise it.

Mr. T. R. Venkatrama Sastriar, for the Respondents:—All that the Pleaders had done was to present the compromise petition to Court. The parties effected the

compromise and drew a petition to have it recorded. They have signed it and they are bound by its terms. There is no question here of the Pleader's authority to compromise as they have not done it.

The objection that the appellant did not authorise his Pleader to file the *vakalatnamah* comes too late. No affidavit to that effect was filed in the lower Court and no application was made to it to have the *razi* decree set aside.

As to a trustee's powers to compromise a suit relating to the trust there can be no objection to that course if the compromise is for the benefit of the trust.

No authority *contra* has been shown. Besides, the trustee acted in good faith.

JUDGMENT.—The *razinama* petition states that it was presented by the parties, that is to say, through their Pleaders, and it also contains a clear and full statement of the views of the parties to the compromise. The matter is set forth in the petition and there is nothing in the record to suggest that this statement is not correct. The petition is signed by the Pleaders appearing on both sides. But it is now said that the appellant did not in fact authorise his Pleader to file this *razinama*. If that were so, he would at once have brought the matter to the notice of the Court and filed an application to have the decree set aside, or at least he would have filed an affidavit before us stating that the Pleader was not authorised to file this petition. In the absence of any such affidavit, it is not possible for us to act upon a mere statement made by the Pleader appearing before us under instructions.

Then it is argued that the *vakalatnamah* did not empower the Vakil to compromise the suit. He did not compromise it of his own accord, but it was compromised by his client; and all that he did was to convey the fact of the compromise to the Court. The compromise being embodied in the petition he undoubtedly had the power to present it to the Court in conducting the case and the Court acted upon the petition.

It is also suggested that the compromise is unlawful. It is very difficult to see how that is made out unless a broad proposition is established for which no authority has been cited and which is clearly untenable.



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that the trustee of a public trust cannot enter into a compromise of a suit relating to the trust properties, however beneficial it may be. If he acted in good faith it is not for the Court to enquire whether the compromise is in fact beneficial or not beneficial to the trust.

The second appeal is dismissed with costs.

Civil Revision Petition No. 898 of 1919 is dismissed.

M.C.P.

*Appeal and Revision  
Petition dismissed.*

# UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 166 of 1919.

May 26, 1920.

Present :—Mr. Swinhoe, A. J. C.  
YINKE SUPAYA AND ANOTHER—  
APPELLANTS

*versus*

MAUNG KIN—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Arts. 81, 181, 182, Expl. I—Suit by surety against principal—Payment made by surety into Court to satisfy decree—Limitation, commencement of—Execution of decree—Mortgage-decree against mortgagor and surety—Application for execution against mortgagor—Limitation as against surety, whether extended.*

Article 81 of Schedule I to the Limitation Act makes limitation begin to run from the time when the surety pays the creditor and the principal debtor remains liable to be sued for three years only after this payment has been made. [p. 26, col. 2.]

Where the payment made by the surety is made in satisfaction of a decree obtained by the creditor limitation as against the principal begins to run from the date on which the surety pays the money into Court and not from the date on which the creditor draws it out. [p. 27, col. 1.]

Where a mortgage-decree provides for the sale of the mortgaged property and in the case of a deficiency makes the mortgagor and his surety respectively liable for the balance, the liability of the surety is co-extensive with that of the mortgagor but is only deferred for a time. An application for execution of the decree as against the surety would be governed by Article 181 of Schedule I to the Limitation Act, but even if Article 82 were applicable, any application for execution made against the mortgagor would save limitation as regards the surety also under Explanation I to the Article. [p. 25, col. 2.]

Mr. A. C. Mukerjee, for the Appellants.

Mr. S. Mukerjee, for the Respondent.

JUDGMENT.—Since this appeal was filed Yinke Supaya has died and the second appellant Maung Maung Gale carries it on as her legal representative as well as on his own account.

In Civil Suit No. 141 of 1907 of the District Court, Mandalay, C. T. P. A. Chetty obtained a decree dated 3rd July 1907 against the two appellants and respondent in the following terms :—

"It is ordered and decreed that the defendants Nos. 1 and 2 (Yinke Supaya and Maung Maung Gale) do pay to plaintiff the sum of Rs. 1,157 (Rupees one thousand one hundred and fifty-seven only) and costs with further interest at one per cent. per mensem. Time to redeem till 3rd January 1908.

In default of payment on or before the above period the mortgaged property, being Holding No. 18/10 in Block No. 50, situated at Mawyagiwa Quarter, Mandalay, together with all the buildings thereon may be sold by auction and the proceeds applied in and towards payment of decree and costs. If there be any deficiency, the defendants Nos. 1 and 2 are ordered to pay it.

Against Maung Po Kin there is only a money decree as surety in case defendants Nos. 1 and 2, wife and husband, default.

In the mortgage document it was stated that the defendants Nos. 1 and 2 alone mortgaged the property, and the covenant for repayment was made jointly by them and the third defendant as surety. The meaning of the last clause of the above decree, therefore, clearly is that all three are, in the last event, liable for the amount due but the mortgaged property is to be first sold before the third defendant becomes liable. What is then left over is a money decree for any balance against all three according to the covenant for re-payment, with an order that defendants Nos. 1 and 2 are to pay it and if they "default" the third defendant is to be as a surety.

As the amount was not paid within the time fixed, the mortgaged property was sold in Civil Execution No. 332 of 1908, the application being dated 24th August

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1908, and realised Rs. 437 on 4th November 1908, and the sale was confirmed on 7th December 1908 and the amount paid out on a *chellan* dated 12th December 1908.

It is not suggested that the mortgagore had any other property from which the Chetty could have made up the deficiency and it is also quite clear that, once the mortgaged property was sold and out of the way, the Chetty could hold the surety liable on his money decree and leave him to recover from the principal debtors. The Chetty then applied on 24th July 1911 against the surety (Civil Execution No. 159 of 1911) by attachment of his pay—he being a Government Clerk—and, as there were other attaching creditors, a *pro rata* share was credited each month to the Chetty's decree. When this amounted to Rs. 1,130-9-0 Maung Kin filed Civil Suit No. 32 of 1919 against the principal debtors to recover Rs. 842 9 0 only as he admitted that as to Rs. 258 his claim was time-barred. His suit was dated 20th February 1919 and he claimed that the cause of action (leaving aside the Rs. 258) arose as to Rs. 824 3-0 on the 20th September 1918 and as to Rs. 18 6 0 on the 29th October 1918 those being the dates on which the Chetty had withdrawn the amounts from the Court. He claimed to recover as he had been compelled to pay under process.

The defendants pleaded that the Chetty's decree was barred as against the surety at the time when he executed it and that the surety should have raised this objection. In other words, they said that it was a voluntary payment by the surety and they were not liable to refund it. They also pleaded that the payments to the Chetty were made by monthly instalments and that only those made within three years of suit were within time. It is now said that on this basis, instead of counting from the dates of withdrawal, Rs. 611 8-0 would be recoverable at Rs. 18 6 0 a month but this requires correction as will be seen as the amounts credited monthly were Rs. 15 for most of the period and varied for the remainder. The plea amounted to this that limitation began to run from the payment into, and not the payment out of, Court. They also said the calculations

of interest were wrong but this is not now urged. The only issue fixed was, "is the present suit time barred as regards sums paid into Court in execution by plaintiff more than three years previous to this suit?"

There was no issue on the plea that the Chetty's decree was time-barred and that the surety had made a voluntary payment, and the diary shows that the single issue was framed in the presence of the Advocates for both sides on a date previously given for fixing issues. The Advocates were heard in argument on a subsequent date and orders passed on the following day. There is nothing to show that the defendants' Advocate asked for another issue, and in the judgment the Judge dismisses the matter with the remark "the Chetty proceeded against Maung Kin in Execution Case No. 159 of 1911 on 24th July 1911. That application was clearly in time under Article 182, Limitation Act." It is, therefore, obvious that the Advocate did not press the point in the lower Court and gave up the plea of the voluntary payment of a time barred debt, on being convinced that it was not sustainable. On the point put in issue the lower Court held that limitation ran from the date of withdrawal, following the rulings in *Fuskoruddeen Mahomed Ahsan v. Mohima Chunder Chowdhury* (1) and *Pattabhiramayya Naidu v. Ramayya Naidu* (2), and it decreed the amount sued for.

It is now objected on appeal that the Chetty's decree was barred by the 24th July 1911, and the surety's payment was a voluntary one and, further, that the above Indian cases were wrongly decided on the point as to when limitation begins to run.

There is, as I have pointed out, no issue on the former objection and it must be presumed that the Court fixed the only issue that was found to arise, and there is no note by the Judge that any other issue was suggested.

The Advocates could only argue on the one legal issue fixed, and if an objection had been raised here against the revival of an argument which had been abandoned

(1) 4 O. 529; 2 Ind. Dec. (N. S.) 836.

(2) 20 M. 23; 7 Ind. Dec. (N. S.) 16.

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at the hearing I should have allowed the objection.

It has not, however, been raised. The Chetty's application for execution against Yinke Supaya and Maung Maung Gale is dated 24th August 1908 and that against Maung Kin, the surety, is 24th July 1911, that is within three years but it is urged that the decree is not joint but several, and that, according to the latter part of Explanation I to Article 182, First Schedule, Limitation Act, the application made under Article 182 (5) on 24th August 1908 has effect only against the persons it was made against. If so, this means that it does not keep the decree alive as regards Maung Kin so that it cannot be used as a fresh starting point when applying against him; and to this it is replied that the decree was joint, but was not executable against Maung Kin until the Chetty had sold the mortgaged property at any rate, as 'that was to be exhausted before any liability began to attach to Maung Kin, and he would not be liable for anything if the mortgaged property had realised the full amount due.

To show that the decree in this case is not joint I am referred to the cases of *Narayan v. Timmaya* (3) and *Kusari v. Vinayak* (4).

The first of these cases does not apply here, as the surety there became such only after the suit was filed and before the decree, and it was held that the words "passed jointly" in Article 179 (corresponding to the present Articles 182) do not refer to a case where the surety was not a party, but became liable by the aid of section 203 (now section 145), Civil Procedure Code. In the present case the surety was a defendant in the suit and the decree is against him too. In the second case a surety made himself liable for the principal sum of money only but not for interest and costs for which the principal debtor was the only person liable. The decree-holder applied for execution against the surety for principal and also interest and costs, and, when he failed to get the latter, he applied for them against the principal debtor, more than three years after the decree.

(3) 31 B. 50; 8 Bom. L. R. 807.

(4) 23 B. 478; 12 Ind. Dec. (N. S.) 313

It was held that the decree was one that distinguished portions of the subject-matter as payable or deliverable by each and that the former application could not support the second which was, therefore time-barred. In the judgment it was remarked: "The authorities cited on behalf of the appellant only go to show that where a decree imposes a joint liability upon several persons execution taken out against any one of them is a step-in-aid of execution against the rest."

The question is, whether the present decree is one that distinguishes portions of the subject-matter as payable or deliverable by each judgment-debtor, and a reference to the decree will show that defendants Nos. 1 and 2 are first made liable for the amount due both personally and by sale of their property, and that the third defendant is then made liable for the amount on their default. The liability of the surety is co-extensive with that of the principal debtors but is only deferred for a time. If the mortgage property had been destroyed and nothing could be got from defendants Nos. 1 and 2 the surety would have had to pay the whole amount. In the mortgage-deed it is distinctly stated that all three are jointly liable for the principal and interest together with expenses as also costs if the creditor has to sue. The suit was for the re-payment of money and I cannot see that there is any portion of the subject-matter of that suit, *which is to recover Rs. 1,157 due on a mortgage, which is payable or deliverable by one and not by the other*, and I must hold that the only effect of the decree is that the surety's liability is postponed until after recourse has been had to the property of the principal debtors. It is true that the Chetty's first application was for sale of the property, and could not have been made against the surety, but this is only a detail in the execution of the decree, which is for money for which all are liable.

I hold, therefore, that the decree was not barred against the surety when the Chetty applied for execution against him.

Even if it were otherwise, there is some authority for holding that if the Court issued execution even erroneously the payments made are not voluntary and that the error of the Court cannot be taken advantage of.



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refuse contribution [*Shib Ohunder Bidyaruttun v. Huree Doss Bhattacharjee* (5) and *Mangul Pershad Dichit v. Gria Kant Lahiri* (6)].

It seems to me that Article 181 actually applies to the present case and not Article 182. It has been held that the former Article 179 (now 182) only applies where there is a decree which is at once executable and not otherwise and that Article 178 (now 181) is the proper one where the application cannot be made at once. [*Chhedi v. Lalu* (7), *Ali Ahmad v. Naziran Bibi* (8)] In this case the Chetty could not apply against the surety at any rate till the mortgage property was sold and that was only confirmed on 7th December 1908. He would then have three years within which to apply against the surety. In any event, the application was not time barred.

As regards the other argument that Maung Kin's suit must be brought within three years of the dates of payments into Court, it is said that about Rs. 660 would be payable on this basis instead of Rs. 842.

No doubt, Article 81 applies and the only question is whether the surety has "paid the creditor" when his money is paid into Court or when the decree-holder draws it out. It is admitted that two cases relied on by the lower Court are authorities for the latter but it is urged that they are wrongly decided. As a matter of fact, both are cases of contribution, and the special Article 81 did not apply. They do, however, lay down the principle that the date of drawing out from Court governs limitation and not the date of realization by the Court.

It is urged on behalf of the appellants that immediately payment is made into Court the money passes out of the ownership of the judgment-debtor and can be attached by other decree holders, or rather that they can claim rateable distribution if they have satisfied the conditions of section 73, Civil Procedure Code. It is also urged that the lower Court should not have used the analogy of Article 182, and the cases under it, when Article 81 clearly lays down a limitation of three years from the payment by the surety.

(5) 13 W. R. 298.

(6) 8 C. 51 (P. C.); 11 O. L. R. 113; 8 I. A. 123; 4 Sup. P. C. J. 249; 4 Ind. Dec. (N. S.) 32.

(7) 24 A. 301; A. W. N. (1902) 60.

(8) 24 A. 512; A. W. N. (1902) 160.

What the lower Court followed were the rulings of a preponderance of the High Courts under Article 182 that an application to withdraw money from Court is a "step-in-aid of execution," and, therefore, creates a fresh starting point for the next application, but this, it is urged, does not justify holding that "payment to the creditor" under Article 81 is made only when an application to withdraw is filed or payment out of Court made. The Chetty in this case, it may be noted, applied on 16th August 1918 to withdraw an accumulation of monthly instalments and received payment on 20th September 1918. This will certainly keep alive the decree as against Maung Kin if necessary, but will it affect Maung Kin's right of suit against the appellants?

I do not see what connection there is between the two, and it seems to me that the only point is, whether the two cases of *Fackoruddeen Mahomed Ahsan v. Mohima Ohunder Chowdhury* (1) and *Pattabhiramayya Naidu v. Rimayya Naidu* (2) are rightly decided and should govern this case. They were both of them suits for contribution and Article 81 did not apply, and the case quoted by the respondent's Advocate, namely, *Abraham Serou v. Raphael Muthirian* (9), does not help as it only says that the right to sue arises when payment is actually made. The question here is what constitutes payment by the surety.

In the case of *Fackoruddeen Mahomed Ahsan v. Mohima Ohunder Chowdhury* (1) it was held that under Article 100 of the Act of 1871, corresponding to the present Article 99, the cause of action arose when the sale proceeds were drawn out of Court by the decree-holder and in the case of *Pattabhiramayya Naidu v. Rimayya Naidu* (2) the learned Judges said that they were disposed to follow this decision, assuming that the case came under Article 61. There was no argument on the point in either of these cases, and, therefore, nothing to show the grounds on which the decisions were based.

Article 81 makes limitation begin to run from the time when the surety pays the creditor and the principal debtor remains liable to be sued for three years only after

(9) 27 Ind. Cas. 337; 39 M. 288; 27 M. L. J. 746; 16 M. L. T. 569.

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this payment has been made. In this case the Chetty allowed nearly four years' instalments to accumulate before he withdrew the money, and it has been held that there is no bar of limitation for an application to withdraw money standing to a party's creditor in Court, so that even fifteen years after the money could be withdrawn [see *Apurba Krishna Roy v. Chundermoney Debi* (10)]. If so, and if the withdrawal starts limitation running, it is clear that a principal debtor's liability can be indefinitely extended by neglect of the decree-holder to take his money out of Court. This was surely not intended, and I think it is clear that the payment must be regarded from the point of view of the surety's parting with his money and crediting it to the decree-holder's account. It was definitely placed to his credit in Court in this case just as if it had been paid into his credit at his bank, and the Court could no more refuse to give it to him on his application than his bank could.

In the case of *Torab Ali Khan v. Nilruttun Lal* (11) it was held under Article 61 that the money was paid and the cause of action arose when the decretal amount was paid into Court, and if that constitutes payment under Article 61, I do not see why it does not equally constitute payment under Article 81. As the creditor in this case had got a decree the payments were made through the Court but it seems to me that they were payments to the creditors all the same. The surety could certainly sue the principal debtor at once without waiting till the Chetty chose to withdraw the money, and this seems to conclude the matter because, if the period of limitation once begins to run, it must continue without interruption (section 9) and will have run out in three years.

I must, therefore, respectfully differ from the findings to the contrary, and hold that in this case payment to the surety was made when the money was credited in Court.

The suit was brought on 20th February 1919 and the plaintiff sued only for the amounts withdrawn, including Rs 18 6 0 received in Court on 12th October 1918. He has specified the particular sums and,

although he has paid stamps to cover a larger amount than he will now get, I do not think I can allow him in this suit to include further payments in it, for which he has not sued.

The payments in which he can recover begin on 4th March 1916 and amount to Rs. 575-12-0. The Rs. 18-6-0 cannot be included as this was for balances not drawn of payments made in 1914 and 1915.

The decree of the lower Court will be modified and there will be a decree for Rs. 575-12-0 with costs on that amount.

*Decree modified.*

### MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1030 OF 1919.

August 31, 1920.

*Present:*—Justice Sir William Ayling, Kt.,  
and Mr. Justice Olgers

DEVULAPALLI VENKATA  
SUBBA ROW—PLAINTIFF No. 1—

APPELLANT

*versus*

KOLLURI SATYANARAYANAMURTHI  
AND ANOTHER—DEFENDANT NO 2 AND LEGAL  
REPRESENTATIVE OF DECEASED DEFENDANT  
No 1—RESPONDENTS

*Service inam lands—Enfranchisement in name of holder of office—Claim by divided member to share in enfranchised lands, how far maintainable—Burden of proof—Exclusive enjoyment of lands by office holder.*

The enfranchisement of service inam lands in the name of the office holder does not *per se* debar a divided member of the office holder from claiming a share in the enfranchised lands [p. 29, col. 1.]

Where a divided member sues for a share in the lands enfranchised the onus lies on him to prove that he is a member of the original service holder's family and that at any partition which has taken place among the members of the family the inam lands were kept out of partition as undivided property in which all the members retained joint rights. [p. 29, col. 2; p. 30, col. 1.]

The sole possession of the inam lands by the office holder is not *per se* adverse to the other members of the family divided or undivided so as to deprive them of any interest they might possess. [p. 29, col. 2.]

(10) 10 C. W. N. 354.

(11) 13 C. 155; 6 Ind. Dec. (N. S.) 102.

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The decision of the Privy Council in *Durga Prasad Singh v. Trebini Singh*, 48 Ind. Cas. 527; 46 C. 362; 24 M. L. T. 407; 28 C. L. J. 509; 9 L. W. 61; 21 Bom. L. R. 569; 45 I. A. 251 (P. C.) has not overruled *Pingala Lakshmipathi v. Chalamayya*, 30 M. 434; 17 M. L. J. 101; 12 M. L. T. 101 and *Gunnaiyan v. Kamakchi Ayyar*, 26 M. 339 at p. 349.

The opinion of Spencer, J., in *Audi Raju Pyrappa v. Audi Raju Syama Rao*, 49 Ind. Cas. 250; (1918) M. W. N. 849; 8 L. W. 614; 25 M. L. T. 177, dissented from.

Second appeal against the decree of the District Court, Godavary, at Rajahmundry, in Appeal Suit No. 20 of 1917, preferred against the decree of the Court of the Subordinate Judge, Rajahmundry at Cosanada, in Original suit No. 27 of 1915, (Original Suit No. 14 of 1914), on the file of the Court of the Subordinate Judge, Cosanada.)

FACTS appear from the judgment.

Mr. C. Rama Row, for the Appellant:—The office of *karnam* with its emoluments vested originally in the joint family of second plaintiff and first defendant. The partition of 1874 did not affect the rights of the divided members to share in the *inam* lands at time of enfranchisement. If the family had remained joint plaintiff could have claimed his share in the enfranchised *inam*. *Pingala Lakshmipathi v. Chalamayya* (1) and *Gunnaiyan v. Kamakchi Ayyar* (2) The fact of partition did not extinguish their rights. The co-parcenary revived on enfranchisement. See Second Appeal No. 49 of 1911, Appeal Suit 79 of 1917 and Appeal Suit 176 of 1917.

The first defendant's branch were in possession as they were doing the work of the office and no presumption can be drawn from that circumstance against the plaintiff's rights. Enfranchisement does not confer on the title holder any rights in derogation of those who are in possession or are interested in the office. *Gunnaiyan v. Kamakchi Ayyar* (2) and *Pingala Lakshmipathi v. Chalamayya* (1).

Mr. P. Narayanamurthy, for the Respondents:—The divided members can lay no claim to the enfranchised lands. Whatever may be the effect of enfranchisement, the effect of the partition of 1874 was to cut off the plaintiff's branch from first defendant's branch and they have been living separate since. There is no evidence

of an agreement between them that these lands were to be kept intact. The enfranchised lands became, on enfranchisement, the separate property of the office holder. See *Audi Raju Pyrappa v. Audi Raju Syama Rao* (3). See also Privy Council decision in *Durga Prasad Singh v. Trebini Singh* (4).

#### JUDGMENT.

AYLING, J.—No point of law arises in this appeal except in connection with Items Nos. 1—19 and 25 of plaintiff Schedule A.

These were originally *karnam* service *inam* lands and were enfranchised in 1906 in the name of first defendant who was then holding the office of *karnam*. Second plaintiff and first defendant belong to what was originally the same joint family in which the post of *karnam* vested. According to the plaintiff, partition never took place; but it is found as a fact that a partition did take place about 1874 and that second plaintiff's branch and first defendant's branch then became divided and have been living separately since. It is, however, contended that this does not affect plaintiff's claim to a share of the service *inam* lands in enfranchisement.

As it is expressed in paragraph 13 of the plaintiff: "The enfranchisement of the properties converts them into family property and enures for the benefit of all the members of the service holder's family existing at the time of enfranchisement, whether divided or undivided."

The sole question before us is, whether this contention is correct. It is admitted that before partition the office of *karnam* and the emoluments of that office vested in the family to which second plaintiff and defendants belong and it is not seriously disputed that, if the family had remained undivided up to the time of enfranchisement, plaintiff as a member of it would have been entitled to a share in the enfranchised property. The latter proposition in fact follows from the rulings *Gunnaiyan v. Kamakchi Ayyar* (2) and *Pingala Lakshmipathi v. Chalamayya* (1) and although some doubt was thrown on the latter by reference to the judgment of the

(3) 49 Ind. Cas. 250; (1918) M. W. N. 849; 8 L. W. 614; 25 M. L. T. 177.

(4) 48 Ind. Cas. 527; 46 C. 362; 24 M. L. T. 407; 28 C. L. J. 509; 9 L. W. 60; 21 Bom. L. R. 569; 45 I. A. 251 (P. C.).

(1) 30 M. 434; 17 M. L. J. 101; 12 M. L. T. 101.

(2) 26 M. 339 at p. 349.



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Privy Council in *Durga Prasad Singh v. Trebini Singh* (4) can find nothing in the latter which could be interpreted as overruling by implication these decisions which have so long been followed.

It is argued, however, on behalf of defendants that the effect of the partition of 1874 was to put an end to any interest in the office and its emoluments on the part of plaintiff and that, on enfranchisement, the enfranchised lands became the property only of the office holder, first defendant, and any persons who were joint with him at the time of enfranchisement. This argument has been accepted by the District Judge who has dismissed the appeal, relying on the decision of Spencer and Krishnan, JJ in *Audi Raju Pyrappa v. Audi Raju Syma Rao* (3).

It will be clear from a careful perusal of the judgments in that case that the two learned Judges took materially different views of the matter. Spencer, J., undoubtedly held that the fact of partition was conclusive that no member of a divided branch of the family would, in any circumstances, whatever have a right to claim a share in the enfranchised lands and that the latter vested, after enfranchisement, only in the last office holder in whose name it was enfranchised and in those persons who formed a joint family with him at the time of enfranchisement. Krishnan, J., as I understand his judgment, was not prepared to go so far. He draws attention to three unreported cases in which it has been held that members of the family of the original grantee who had become divided from the person who held office at the time of enfranchisement were nevertheless entitled to share in the enfranchised service *inam*. These cases are Second Appeal No. 49 of 1911, Appeal Suit No. 79 of 1917 and Appeal Suit No. 176 of 1917. Krishnan, J., says:—"The rulings thus show that even though a person may have been divided off from the person who subsequently obtained the title deed for the enfranchised land he may prove that his right was kept intact at the partition and may claim his share."

With this view I am in entire agreement. I was a party to two of the unreported cases above cited. In Appeal Suit No. 79 of 1917 as in the earlier case Second Appeal No. 49 of 1911 decided by Benson and Sundaram Aiyar, JJ., it

was found as a fact that the service *inam* lands were treated as joint family property after partition. In the last case, Appeal Suit No. 176 of 1917, the question of what happened at partition appears to have been decided mainly on the pleadings. The respondent in that case endeavoured to set up before us a specific allotment of the service *inam* to the share of his branch at partition. We disallowed this plea in appeal in the absence of any mention of such allotment in the written statement and on this disallowment it appears to have been accepted without demur on the part of respondent that the property remained joint in spite of partition. The plea of subsequent adverse possession was also disallowed and that plea is not now raised before us. The sole possession of an office holder being sufficiently explained by his indisputable right to exclusive enjoyment as long as he held office, could not be held to be, *per se*, adverse to other members of the family divided or undivided so as to deprive them of any interest which they might possess.

After further consideration of the point, I remain of opinion that the fact of partition from the person in whose name the service *inam* is enfranchised is not conclusive against a claim to co-parcenary rights in the enfranchised *inam* lands. Whether the co-parcenary right survives will have to be determined as a fact in each case. It may be that the office, with the *inam* attached to it, was allotted at partition to the co-parcener then holding office as a part of his share. In such a case persons divided from him would obviously have no rights after enfranchisement. It may be that, in view of the peculiar nature of the tenure and legal impossibility of severing the lands or any portion of them from the office, the *inam* was kept undivided on the understanding that, although till enfranchisement only the office holder could enjoy it, yet in the event of enfranchisement all members would be entitled to share. It may be that as in Second Appeal No. 49 of 1917 and Appeal Suit No. 79 of 1917 the other co-parceners were actually allowed by the office holder to enjoy some portion of the *inam* land or its profits. All that can be said is that, if a divided member claims to share in an enfranchise-

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ment service land, the onus lies on him of proving, not only that he is a member of the original service family, but that at any partition which has taken place, the *inam* was kept out of partition as undivided property in which all the sharers retained joint rights. This is in accordance with the law in all cases of partition.

If this onus is borne in mind I do not think the practical difficulties anticipated by Spencer, J., are likely to prove very formidable but, in any case, if my view of the law is correct they will have to be faced.

I would, therefore, set aside the decree of the lower Appellate Court as far as it relates to Items Nos. 1—19 and 25 of plaint Schedule A and remand the appeal for fresh disposal in the light of the above remarks.

In other respects, the decree of the District Judge may be confirmed. Costs in this Court may be provided for in the final decree of the District Judge.

ODGERS, J.—This is a suit for partition, and the point for decision, as stated by the District Judge, is whether the plaintiffs are entitled to a moiety of the *karnikam* service *inams* (Items No. 1—19 and 25 Scheduled A) or whether these lands became the exclusive property of defendants Nos. 1 and 2 on their enfranchisement. The parties originally formed one undivided Hindu family. Both the lower Courts held that the family became divided long prior to the enfranchisement of the *inams* in 1906 and there was no argument before us on this point. The Munsif held that plaintiffs were entitled to a share in the service *inams*, the District Judge relying on the decision of this Court reported in *Audi Raju Pyrappa v. Audi Raju Syma Rao* (3) held they were not.

It may be said at the outset that there is no direct evidence as to what was done at partition in respect of these *inams*. It may, of course, be that they were then expressly allotted to defendant's share as representing the office holder and his family at the time of enfranchisement. It may again be that the *inams* were expressly reserved for the divided members or again that nothing was said as to these.

Now, it is clear that no conclusion can be drawn from the fact that possession remained with defendant's branch, as they were admittedly doing the work of the office. The decision of the Full Bench of this Court in *Pingala Lakshmi pathi v. Ohalamayya* (1) stated that enfranchisement does not confer on the persons named in the title-deed any rights in derogation of those possessed by the person in the *inam* at time of enfranchisement. It is also clear that at the time of enfranchisement the whole family was interested in the *inam* i.e., they had a right more or less contingent to be appointed to the office, unless some binding arrangement in derogation of that right had been entered into. So Mr. Justice Bhasbyam Iyengar in *Gunnaiyan v. Kamakchi Ayyar* (2) said: "The freehold title will enure for the benefit of such person or family, as, at the time when the service *inam* was enfranchised was entitled to the hereditary office, no matter in whose name the enfranchisement was effected and the title-deed issued." It is true that the learned Judge in that case had not to consider the intervention of a partition, but the question is, would that necessarily make any difference. In my opinion it would not, unless, as before stated, some special arrangement was come to at partition whereby the *inam* was expressly reserved to a particular branch of the family.

The respondent's Vakil was willing to admit that the *inams* were not expressly reserved to defendant's branch at partition but submitted he is nevertheless entitled to succeed on the ruling in *Audi Raju Pyrappa v. Audi Raju Syma Rao* (3) where Spencer, J., held that no body belonging to a divided branch would have a right to come in and take a share of the property of the joint family and Krishnan, J., said "there is nothing to show that lands were treated as joint family property either before or after enfranchisement or that any rights were reserved after partition".

With deference, the opinion of Spencer J., goes too far. At the time of the partition the *inam* lands would naturally be impartible and would only subsequently become partible on enfranchisement and, further, it is clearly impossible to say in face of the authorities

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that the other members of the family could, under any circumstances, have a right to come in. Krishnan, J., was evidently impressed with the fact that the lands had all along been in the possession of the first defendant. The decisions quoted above show that this could not of itself effect the interest of the other members. Further, the learned Judge goes on to say that a divided member may show that his right was kept alive at the partition and may claim his share. He, however, holds, on the facts of the case before him, that there was no evidence to support such a claim. The onus would naturally be heavily on a divided member to establish his contention, which onus might be more difficult to discharge with lapse of time. This, however, is, of course, a totally different thing from debarring the divided member from the opportunity of proving such a claim.

There are three unreported decisions of this Court, Second Appeal No. 49 of 1911, Appeal Suit No. 79 of 1917 and Appeal Suit No. 176 of 1917 (now before the Privy Council). To the last of these my brother Ayling, J., was a party. It was held in all these that the divided members were entitled to share in the enfranchised *inam*. In Second Appeal No. 49 of 1911 it was said, "the land in question being emoluments of the Reddi office was left undivided at the time of the partition-deed, Exhibit A, but it is not disputed that it was then treated as property in which all the members of the family had an interest." In Appeal Suit No. 79 of 1917 it was not contended that the suit lands fell to the share of the first defendant's branch at partition and the learned Judges say there can be no doubt that the *inam* lands were enjoyed in common after partition.

In Appeal Suit No. 176 of 1917 Mr. Narayanamurthi who also appeared in Appeal Suit No. 79 of 1917 did not argue the effect of enfranchisement, having regard to the decision (delivered fifteen days previously) in Appeal Suit No. 79 of 1917 and, following that decision and relying apparently upon the fact that the defendant nowhere in his written statement set up an assignment to his branch, on partition the learned Judges passed a decree for plaintiff's

share in the *inam* lands. Thus Krishnan, J., in *Audi Raju Pyrappa v. Audi Raju Syma Rao* (3) disposes of these unreported decisions by saying that, "in all of these cases there were circumstances justifying the inference that, in spite of partition, the rights of the divided members were kept alive." The case reported in *Durga Prasad Singh v. Trebini Singh* (4) was quoted by the respondent's Vakil where their Lordships of the Privy Council held that the incidents of *ghatwali* tenure in that case was not such as to give the family any rights over the property while it was in the hands of the *ghatwal* and that the latter was not a trustee of or managing member of the family. In that case the plaintiff relied on and asserted actual possession and receipt of their share of the rents and profits by his vendor or their predecessors-in-title and his evidence on the point was disbelieved.

It will be observed that the decision was confined to a particular instance of *ghatwali* tenure and that the Madras decision [*Gunnaiyan v. Kamakchi Ayyar* (2)] was not quoted to or considered by their Lordships. I do not, therefore, understand this decision of the Privy Council as overruling the Madras case.

As a result of the foregoing observations, I must, with great respect, differ from the opinion of Spencer, J., in *Audi Raju Pyrappa v. Audi Raju Syma Rao* (3) and, on the basis of the judgment of Bashyam Aiyangar, J., in *Gunnaiyan v. Kamakchi Ayyar* (2), I agree with the order proposed by my learned brother.

M. C. P.

*Appeal allowed;  
Decree modified.*



KOTIKALAPUDI KATTAYYA v. RANGIAH VENKATU RAMAYA APPA ROW BAHADUR.

MADRAS HIGH COURT.

SECOND APPEAL No. 717 OF 1919

AND

APPEAL AGAINST ORDER No. 112 OF 1919.

August 18, 1920.

Present:— Justice Sir William Ayling, Kt.  
and Mr. Justice Odgers.

KOTIKALAPUDI KATTAYYA—

DEFENDANT—APPELLANT

versus

Sree RANGIAH VENKATU RAMAYA

APPA ROW BAHADUR AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

*Madras Estates Land Act (1 of 1908), ss. 45, 163—  
Eviction of trespasser—Mesne profits, recovery of, as  
damages—Civil Court, jurisdiction of, nature of.*

Under section 163 of the Madras Estates Land Act a Civil Court has no power to award anything else than the sum payable under section 45.

If a land-holder wishes to treat a trespasser as such and to recover mesne profits as damages from him, he must first apply to the Collector under section 45 of the Madras Estates Land Act to get the amount of the latter determined and then bring his suit in the Civil Court under section 163 of the Act.

Second appeal and Miscellaneous appeal against the decree of the Court of the Subordinate Judge, Kistna at Ellore, in Appeal Suits Nos. 78 and 92 of 1914, preferred against the decree of the Court of the District Munsif, Tanuku, in Original Suit No. 443 of 1912.

FACTS appear from the judgment.

Mr. P. Narayanamurthi (with him Mr. K. Kamanna), for the Appellant:—The Subordinate Judge should not have remanded the case. The Civil Court's powers under section 163 are limited. The land-holder should first apply to the Collector for determination of the mesne profits which he wishes to recover as damages from the trespasser, as no rent is fixed. Then only the Civil Court can award that sum. These are successive stages contemplated by sections 45 and 163 of the Estates Land Act.

Mr. T. Ramachendra Row, for the Respondents:—The Civil Court has the powers of the Collector under section 45 and can assess the damages. Section 163 which gives jurisdiction to a Civil Court to award as damages any sum payable under section 45 means that the powers of the Collector under section 45 are vested in it.

JUDGMENT.—The only question of law which arises relates to the interpretation of

sections 163 and 45 of the Madras Estates Land Act as bearing on plaintiff's claim to recover mesne profits as damages. In this connection we are disposed to think that the District Munsif is right and the Subordinate Judge wrong. Section 163 is a section which specifically gives jurisdiction to the Civil Court (1) to evict a trespasser and (2) to award (as damages for the trespass) "any sum payable under section 45." Such a section must, in our opinion, be strictly interpreted and we do not think the Civil Court can be held to have the power to award anything else than "the sum payable under section 45". But this sum where, as in the present case, no rent is fixed for the land, is a sum to be determined by the Collector and by no one else and we cannot follow the Subordinate Judge's reasoning that the Civil Court becomes vested with the Collector's power to fix the rent and assess the damages." It would seem to follow that, if the land holder wishes to treat the trespassers as such and to recover the mesne profits or damages from him, he must first apply to the Collector under section 45 to get the amount of the latter determined and then bring his suit in the Civil Court under section 163. This is no doubt a cumbersome procedure but not impracticable and in no other way do we see how to give effect to the provisions of both sections of the Act.

On this view, we must set aside the lower Appellate Court's order of remand and restore the decree of the District Munsif.

We make no order as to costs in this Court.

M. C. P.

*Appeal allowed.*

PUNNA LAL v. JAMITA MAL

## LAHORE HIGH COURT.

CRIMINAL REVISION No. 407 OF 1920.

July 16, 1920.

Present:—Mr. Justice Wilberforce.

PUNNA LAL—COMPLAINANT—

PETITIONER

versus

JAMITA MAL—ACCUSED—

RESPONDENT.

[Criminal Procedure Code (Act V of 1893), s. 195 (6)—  
Limitation Act (IX of 1908), Sch. I, Art. 154—Sanction  
to prosecute—Application to Appellate Court, whether  
appeal—Limitation, whether applicable.]

Although an application to an Appellate Court under clause (6) of section 195 of the Criminal Procedure Code is akin to an appeal and is treated as an appeal, it is not an appeal for the purposes of the Limitation Act.

Criminal revision from the order of the Sessions Judge, Lahore, dated the 14th of February 1920, affirming that of the Magistrate, First Class, Lahore, dated the 18th of December 1919.

Mr. Dev Rai, for the Petitioner.

Mr. Mehr Chand, for the Respondent.

**JUDGMENT.**—In this case the petitioner applied for sanction to prosecute under section 195, Criminal Procedure Code. The first Court refused to grant sanction, and an application was made to the lower Appellate Court under sub-section (6) of the same section. This application being put in on the 32nd day was dismissed as time-barred. Against this decision a petition for revision has been preferred.

The lower Appellate Court apparently considered the application under section 195 (6) as an appeal and thought that Article 154 of the Limitation Act was applicable. In this it was clearly in error as, though applications under section 195 may be akin to appeals, as has been held in *Hardeo Singh v. Hanuman Dat Narain* (1), and although they may be treated as appeals, yet they are not appeals for the purposes of the Limitation Act. This has been laid down clearly in *Bapu v. Bapu* (2). Following this judgment I hold the application to the lower Appellate Court as not time-barred and

(1) 26 A 244 (F. B.); A. W. N. (1904) 10; 1 Cr. L. J. 7.

(2) 14 Ind. Cas. 305; 39 M. 750 (F. B.); 11 M. L. T. 367; (1912) M. W. N. 499; 22 M. L. J. 419; 13 Cr. L. J. 209.

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remand it thereto for decision on the merits.

*Revision accepted.*

## PATNA HIGH COURT.

CRIMINAL APPEAL No. 14 OF 1920.

June 25, 1920.

Present:—Mr. Justice Jwala Prasad.

DUKHIT SHA AND OTHERS—ACCUSED—

APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 99, 103, 104, 105, 147, 441—Criminal trespass—Right of private defence of property, extent of—Resistance by trespassers, effect of—Rioting in village—Spectator, whether member of unlawful assembly.

Against criminal trespass the person in possession of the property has the right of private defence of property so long as the trespass continues and this right extends to causing to the trespassers any harm other than death subject to the restrictions mentioned in section 99 of the Penal Code, namely, that no more harm should be inflicted than is necessary for the purposes of defence and that there is no time to have recourse to the protection of the authorities. [p. 49, cols. 1 & 2; p. 50, col. 1.]

If, in the exercise of this right such resistance is offered by the trespassers that a reasonable apprehension is caused to the owners that death or grievous hurt would be the result, the right of private defence of person then arises and extends to the causing of death. [p. 49, col. 2; p. 50, col. 1.]

Criminal appeal against the order, dated 13th December 1920, of the Sessions Judge, Bhagalpore, was originally heard by Mullick and Sultan Ahmed, JJ., who delivered the following judgments on 11th March 1920:—

**JUDGMENT.**

MULLICK, J.—(March 11, 1920.)—I propose to consider first of all the evidence of title to the Khamar house in dispute. The fact that in 1877 Mauza Pipra was settled by the Settlement Authorities with Deolal, the father of the appellant Dukhit, and that Deolal was recognised by the Deputy Commissioner as "*mul raiyat*" does not necessarily prove that he was the exclusive owner. For Exhibit I, the *pattah* of 1883, shews that in 1883 Gopi, the father of the prosecutor Gober-



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ghan, got a *pattah* for some land in the Mouza and Exhibit 4, a judgment dated the 9th April 1901, shows that in 1901 Dukhit was at best only a co-sharer. I think, therefore, that there can be no doubt that Mauza Pipra remained the property of the joint family till April, 1901. The circumstance that a title-deed is in the name of one brother does not prove that he is the exclusive owner. The evidence shows that Gopi died in 1901 but it is not known whether before or after the judgment of the 9th April. And, as Goberdhan says that Mauza Pipra fell to the share of Gopi and Saukhi by reason of a partition between Gopi and his brothers, it is possible Gopi died after the judgment. There is, however, no corroboration as to the partition and I cannot accept Goberdhan's story that he and Saukhi became the exclusive owners of Pipra.

If, then, the property still continued joint, the appointment of Dukhit in 1900 as "*mul raiyat*" upon the death of his father and the Settlement *Pattah* of 1904 in his favour do not advance his case any further.

Similarly, the payment of rent by Saukhi and Goberdhan in 1912 and 1913 would not necessarily show the exclusive title of these two co-sharers. I do not for a moment believe the explanation given by learned Counsel that the payment was the payment of Dukhit and was to be subsequently adjusted against Dukhit's commission as *gomashtha*. Firms in India do not usually burden their books with the private account of their *gomashthas*. Moreover, the explanation is supported by no direct evidence at all. We have merely evidence to the effect that Dukhit as *gomashtha* was entitled to half the profits of the firm of Gopi-Saukhi. In my opinion, the entry in the account books is clear evidence that Dukhit was not the exclusive owner of the property. As to the payment of rents for previous years Goberdhan's explanation is that they are entered in the books of the firm and that these books are now in the custody of Saukhi who declines to give them up. Saukhi being now on the side of Dukhit and having ejected Goberdhan from his house, this explanation seems to me a reasonable one.

With regard to the partition suit of 1917 I feel some hesitation in drawing any inferences for the simple reason that neither side has thought fit to produce the plaint.

According to Goberdhan's evidence before the learned Judge, the suit was brought against Saukhi, Saukhi's son and Dukhit. We have no evidence to the contrary tendered by the defence. Assuming that Goberdhan's statement is correct, the omission of Mauza Pipra from the plaint is intelligible; for the suit being one for the partition of properties in which all the members of the joint family, inclusive of Dukhit, were interested, Mauza Pipra which is claimed by Goberdhan as the sole property of himself and Saukhi by reason of a previous partition would naturally be excluded, and in 1918 when Saukhi repudiated the position taken up by Goberdhan and filed written statement to the effect that the Mauza was the exclusive property of Dukhit, the amendment of the plaint by Goberdhan and the prayer for the partition of Mauza Pipra as the joint property of the plaintiff and the defendants, become intelligible enough.

If, on the other hand, Goberdhan omitted to sue Dukhit at all and merely asked for a partition as between himself and Saukhi I find it difficult to see why Mauza Pipra was omitted or why Saukhi in his written statement made any reference to Pipra at all and pleaded that Pipra was the exclusive property of Dukhit.

It is urged by learned Counsel that the omission of Pipra from the plaint shows that Goberdhan's original intention was to admit that Pipra was the exclusive property of Dukhit. This inference might, no doubt, be drawn from the omission but then it is not intelligible why Saukhi should have brought Pipra into the case at all by pleading that it was the property of Dukhit.

In the absence of further information, this part of the case must be left in some obscurity, but upon the evidence before me I think the inference may be reasonably drawn that although Mauza Pipra was joint family property it was omitted from the original plaint because Goberdhan wanted to claim it as the exclusive property of himself and Saukhi. Goberdhan's explanation that he forgot to sue for the village in the first instance cannot be accepted. Nor do I think that the facts before me support the inference that it was his original intention to admit Dukhit's sole title.

Bearing in mind the defence set up, namely, the right of private defence, it was incumbent



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upon the appellants to make good that position beyond all doubt and their failure to adduce evidence in support of the allegations put forward by their Counsel supports the inference that ownership was joint.

I do not think any question arises as to the prosecution being permitted to change their case in appeal. In a criminal trial the sole question is, what are the true facts. The Court is not to be bound by any technical rules of pleading. It is common practice among complainants to put their case too high and that Goberdhan should attempt to exclude his co-owner Dukhit while Dukhit should attempt to exclude Goberdhan and Saubhi is neither improbable nor unintelligible. I think it is perfectly open to me in appeal to decide between these inflated and untenable claims and to find that the real truth is a state of joint ownership.

This finding as to a joint title profoundly affects the question of possession, for then no matter that the Settlement *Pattah* were in favour of Dukhit's father and Dukhit and that he was actually collecting rent for many years previous to the occurrence, unless he can shew that he was in adverse and exclusive possession Goberdhan must be held, in the eye of the law, to be in joint possession of the village and the Khamar. He would, therefore, have the right to go to the Khamar and to demand the keys from Dukhit's servant Gooli and to occupy the Khamar in the manner in which he claims to have done. There would be no question at all, in these circumstances, of any right of private defence of property. There might, under certain circumstances, arise a right of private defence of the person but with this I will deal later.

Let us assume, next, that this view as to joint ownership is incorrect and that Dukhit had sole title and possession. In that event, the right of private defence would justify the infliction of bodily harm to Goberdhan's men subject to certain limitations. To deal with this position it is necessary to examine the evidence as to the alleged trespass by Goberdhan's men.

The learned Counsel on behalf of the defence has asked us to reject *en bloc* the account given by Goberdhan's men as to the manner in which they occupied the Khamar and has urged that, in fact and in truth, what

took place was the Dukhit came to the Khamar with Gooli on the evening of Friday the 30th May, and that early the following morning when he went with Gooli to open the door, he was suddenly attacked by Goberdhan's men. The learned Counsel is unable to tell us how many men were with Dukhit, or where he spent the previous night, or how it is that while the injuries of Dukhit and Gooli were comparatively slight. Seven men were injured on the other side of whom one died the following day while being taken to the *thana*. There is no substantive evidence upon which we can accept this version of the occurrence. Nor does it seem to me probable that Goberdhan would have attempted to take possession in this manner. If Dukhit had been in undisturbed possession for over 20 years and if, as is admitted by the prosecution, the villagers were mostly in his favour, it is inconceivable that a force consisting of only seven men or at most 15 men, if we accept the uncorroborated statement made by Gooli to the Police, would be sent to take possession of a village so large as Manza Pipra. Nor can I understand why Goberdhan should at all have conceived the idea of laying claim in this forcible manner to a property of which his cousin had been in undisturbed and peaceful possession for so long a period. To my mind, the story set up by the defence is so improbable that it cannot for a moment be accepted. On the other hand, there is no difficulty in accepting the sworn testimony of Goberdhan's men as substantially true with regard to the occupation of the Khamar and the attack.

There is no evidence to rebut the statement that Dukhit was away in Calcutta and that he returned home to Deoghar about the 28th May. What is more natural than that Goberdhan, if he wanted to assert his claim as co-sharer, should have taken advantage of Dukhit's absence in Calcutta to send his men to take possession of the Khamar Kutchery. It is contended that the story that the seven men arrived in three batches of 2, 3 and 2 respectively was never told to the Police. I cannot regard this as a very serious omission.

Then it is said that the delivery of the keys to Ajodhya is a concoction, that Gooli never parted with the keys till the Police took them from him after the occurrence, and

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that the explanation now given by Ajodheya that they were taken from him while he was unconscious after the assault is a pure concoction. The allegation that Dukhit came to the Khamar immediately after his return from Calcutta and asked for the keys from Goberdhan's men has been made from the very outset. It was told to the Police in the first information within five hours of the occurrence, it was repeated by five of the injured men. The same day it is contained in Soorju's dying declaration recorded at about mid-day on the next day and I am quite unable to believe that the story is a concoction. I am also greatly impressed by Soorju's statement, and, in the absence of any evidence that he was tutored by Goberdhan's men, I must and do hold that he has substantially spoken the truth. It is noticeable that he cannot name any of the men who struck him. If there had been any tutoring there is no doubt that he would have ascribed the fatal blow to Dukhit. This man was not only beaten most severely with *lathis* and *Farsis* but was carried to the river "Chandan" two miles off and thrown into the water. There he appears to have remained the whole of that day and was found the following day by the Police with his body in the water and his head just out of it. There is evidence to shew that he was in a state of extreme collapse. I cannot imagine that it would be possible to tutor a man in this condition. Having regard to the fact that Manza Pipra was hostile to Goberdhan and that his men fled in various directions after the occurrence, I cannot see that there was any time or opportunity for tutoring. The Sub-Inspector deposes that he arrived at Pipra on the afternoon of the 31st May and could get no information as to Soorju and Paryag. On the following day he found Paryag under a tree in a jungle and Soorju, as stated, in the river. Goberdhan himself was not in Pipra either on the 31st or the following day and, beyond the mere allegation of learned Counsel, I can find nothing to support the theory that there was tutoring either of Soorju or of the other injured men. If there had been, the matter would have immediately been brought to the notice of the Police. Then, again, I fail to see what necessity there was of concocting this story as to the keys. It is said that the object was to make out some kind of constructive posses-

sion in the Khamar although direct physical possession was with Dukhit and it is suggested that Goberdhan's legal advisers must have concocted the story when the first informant Antu arrived at Deogbar. Now Deogbar is 8 miles from the place of occurrence and the first information was lodged at 11 o'clock. The evolution of a subtle plea of this kind in proof of legal possession required more time and, having regard to all the circumstances, I must reject the contention that it was the brilliant inspiration of some legal practitioner in the Bar library.

It is contended that Gooli Singh would never have given over the keys to Goberdhan on the mere asking, but the reply seems to be that if Goberdhan was a co sharer, Gooli Singh might, being a servant, not have had the courage to resist him in the absence of Dukhit. There is nothing improbable in his having proceeded after delivering the keys to prevent the villagers from doing any work for Goberdhan's men.

It is asserted by the Sub Inspector that Ajodheya did not tell him that the keys and his Dhoti were taken away from him, but Ajodheya was not cross-examined upon this point and it may be that he did not consider it a matter of vital importance. Indeed, to any ordinary person the possession of the keys would not appear to be very material if the house and its contents were the property of Dukhit. A claim to possession of the house could not be supported by mere possession of the key and I do not think it was worth while inventing such a story. On the other hand, if, as is now alleged, the story was the product of the subtle mind of some legal adviser, then we should have expected a detailed elaboration of it in the statements of witnesses during the Police investigation. In my opinion, therefore, no adverse view can be drawn from the evidence given by the Sub-Inspector.

Then, as to Dukhit's visit two days before the occurrence. It is not quite clear whether the visit took place on Wednesday the 28th or Thursday the 29th. For the defence it is contended that it did not take place till the 30th and that it has been ante-dated in order to shew that there was time for Dukhit to seek the protection of the Police. There is evidence that Dukhit was seen in his house at

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Deoghar on the 28th May. This is un rebutted. It is natural that he should, immediately on return from Calcutta, go to the Khamar because he must have known that Gobaradhan had already sent his men. Dukhit is now living with Sankhi and the doings of Gobaradhan, who also lives in Deoghar, must have been known to him. Gooli Singh, moreover, must have informed him of the arrival of the servants of Gobaradhan. In these circumstances, it is improbable that Dukhit would have delayed his visit till the 30th. Here again, it is to be observed that while the story of the prosecution is supported by sworn testimony we have no legal evidence on the other side to support the suggestions now put forward by the learned Counsel.

I accept, therefore, the account given by the prosecution witnesses, *firstly*, as to the mode in which Gobaradhan's men occupied the Khamar, *secondly*, as to the delivery of the keys, and *thirdly*, as to the visit of Dukhit on the 28th or 29th May.

It may be conceded that no real cultivation was done and that only the Khamar and its contents were inspected and that the men were in reality *lathials* and Gobaradhan was prepared to have a fight.

In view of these findings, it does not appear to me that there could have been any right of private defence of property even on the assumption that Dukhit was the sole and exclusive owner in possession. There is no right of private defence of property unless the invasion amounts to a crime. In this case it is abundantly clear that, even if Dukhit was in exclusive possession, the trespass by Gobaradhan's men was at most a civil trespass in the furtherance of an intention to assert civil right. What then was the remedy of Dukhit? Either he should have gone to the Police as Gobaradhan says he himself did, or he should have, on the morning of the 31st of May, when Gobaradhan's men declined to open the Khamar, pushed the trespassers out of the Khamar without violence. Having regard to the fact that he had 50 or 60 men with him this would not have been impossible. The law both in England and in India does not permit the owner of property to repel a civil trespass by violence. It does permit him gently to press the trespasser away and if resisted to continue the pressure

while protecting his own person against any violence that may be offered. Dukhit did not commit any offence in assembling the 50 or 60 men but he had no right to order them to attack Gobaradhan's men even though he was the exclusive owner of the property. The evidence on this point, again un rebutted, shows that it was Dukhit who struck the first blow and that under his orders the 50 or 60 men fell upon the seven men who were there on Gobaradhan's side.

But if we assume for the sake of argument, although the facts do not establish this, that the first blow was struck by one of Gobaradhan's men, then the trespass would become criminal trespass and the right of private defence arose. But then the injury inflicted must be not greater than is necessary. In the present case there were 50 or 60 armed men against 7. There can be no doubt that the right of private defence of property was exhausted. The subsequent treatment of Soorja clearly shows that the appellants and their companions were animated by cruel and vindictive motives.

It is contended that the object of the assembly was perfectly lawful. Assuming that it was lawful in the beginning, it clearly became unlawful as soon as the right of private defence was exhausted, that is to say, when the assembly had inflicted punishment sufficient for the purpose of defence, and took up the part of aggressors animated by the desire for revenge they became an unlawful assembly within the meaning of section 141, Indian Penal Code. It is unnecessary for the prosecution to show who struck the fatal blow or who passed the boundary line. It would be impossible in an attack by such large numbers to fix the responsibility of each and the circumstances clearly show that the whole assembly was animated by the common object of committing an illegal assault. It was open to the appellants to show that they did not share the common object of the assembly after it became unlawful, for instance, by evidence that they attempted to leave them after a certain point or to prevent the infliction of the fatal injuries on Soorja; but they have not made the slightest effort to discharge the burden which lay so heavily upon them.



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Therefore, even upon the assumption that Dukhit was the sole owner and in possession and that the first assault was committed by Goberdhan's men the appellants must be convicted of offences under sections 304 and 149, Indian Penal Code.

I will now briefly deal with the question of the right of private defense of the person.

Firstly, if, as I have found, Goberdhan was the co-owner and his men were in occupation of the vernadab, Dukhit had no right of private defense of the person unless the first blow was struck by Goberdhan's men. Of this there is no evidence.

Next, if he had no title but merely committed a civil trespass by taking possession during Dukhit's absence in Calcutta, then, too, no right of private defense would arise till the first blow was struck by Goberdhan's men.

In either event, the evidence shows that the right did not arise, or that, if it arose at all, it was exhausted.

The result is that, in the view that I take of the facts, there was no right of private defense either of property or of the person. If there was, it was exhausted and the appellants Dukhit, Goberdhan and Varma have been rightly convicted under section 304 read with 149, Indian Penal Code.

Finally, let us assume that the facts are as put forward by Mr. Manuk on behalf of the appellants. There is no legal evidence in support of his statement that 10 or 15 of Goberdhan's men came in the early morning and attacked Dukhit while he was opening the Khamar. It is suggested that Dukhit had others with him, the precise number not being known, but that he was justified in inflicting the injuries that were found upon his assailants.

Now, this part of the case rests upon the mere statement of Dukhit and his Counsel; but assuming that it represents the truth, even then I think that Dukhit's men were members of an unlawful assembly. An attack by Goberdhan's men, if Dukhit had sole possession and title, would perhaps be criminal trespass and raise the right of private defence both of property and of the person; but as I have said before, the overwhelming numbers on Dukhit's side and the injuries inflicted

would warrant the finding that his adherents were guilty of rioting and the right of private defense was exceeded. If, as I hold, title and possession were joint, then the right of private defense of the person alone could arise and that only if Goberdhan's men struck the first blow. The evidence, however, in the case is that the first blow was struck by Dukhit's men and there is no evidence to the contrary.

With regard to Budhog and Ganpat the evidence of identification is weak and I agree with my learned colleague that they should be acquitted. With regard to Gooli it is a fact that he was not identified by Paryag on the 3rd June and it is contended that if Gooli gave up the keys to Ajodheya on the first day when Prayag was present. Paryag ought to have been in a position to identify him on the 3rd June. Prayag, however, may possibly have seen Gooli only on two occasions. He may be an unobservant man and, in the absence of any cross-examination upon the point, I do not feel disposed to hold that his omission to identify Gooli indicates that the account given by him of his visit to the Khamar is false.

As, however, there is a difference of opinion with regard to the appellants Dukhit, Gooli and Varma between my learned colleague and myself, the case of all the appellants will be referred to a third Judge.

SULTAN AHMED, J.—(March 11, 1920).—The appellants were convicted by the Sessions Judge of the Santal Pergannahs under sections 148 and 304 read with 149 of the Indian Penal Code and sentenced to various terms of rigorous imprisonment. The prosecution case is that there were four brothers, Gopi, Saukhi, Gokhul and Deo Lal, members of a joint Hindu family. Goberdhan, the complainant, is the son of Gopi and Dukhi, the chief accused in the case is the son of Deo Lal. The case of the prosecution is that under a *pattah* a certain plot of land in village Pipra, which is the scene of the occurrence, was settled with Gopi, the father of the complainant, in 1883. Gopi died in 1901 but previous to his death there was a settlement of Pipra with Deo Lal, the father of the accused Dukhit, but as all the four brothers were joint at the time this was really a settlement in favour of the

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joint family, and that this was so was admitted by Dukhit himself in a suit brought by him in the year 1901 for declaration of his right to remove timber from the jungle of village Pipra. There was a resettlement in 1904 of Pipra with Dukhit, but the prosecution allege that this was also for the benefit of the joint family. Goberdhan says that there was a partition between the brothers some years ago and Pipra fell into the share of Gopi and Sankhi, and his case is that after the death of his father they were in joint possession of village Pipra and that Dukhit has nothing to do with it. His case is that in 1917 he got half the produce in Pipra and his uncle Sankhi got the rest. In 1918 he got nothing because there was no produce at all, and as he had no faith in the Barahil Gooli Singh, one of the accused in the case, he went with Ajodheya and Paryag on or about the 22nd May last to Pipra. On his arrival there he got the key of the Khamar from Guli Singh and made it over to Ajodheya and returned to Deoghar after leaving Ajodheya and Paryag at the Khamar. Two days later he was informed that Gooli was preventing the *raiya*s from cultivating the lands and he, therefore, sent Murari, Surja and Subha to help Paryag and Ajodheya in the cultivation of the lands. Then again at Paryag's request he sent Antu and Jai Nath to Pipra. It appears that on the 25th of May Dukhit, who was said to be away in Calcutta, returned to Deoghar and as Goberdhan apprehended that his return might mean an attack on his men who had been sent by him to Pipra, he went and reported his apprehension to the Police at Deoghar, but the latter replied that the *Chowkidar* had been warned about it. On the 29th Dukhit is said to have gone to Pipra and asked Antu to open the Khamar but the latter refused. So Dukhit it is alleged returned to Deoghar. On the 31st of May, at 5 o'clock in the morning, when Goberdhan's men were sleeping in the verandah of the Khamar, Dukhit with 50 men is said to have arrived there armed with *lathis* and *Farsas* and asked them to open the lock of the room and to leave the Khamar. This having been refused, the prosecution allege that Dukhit and his party attacked Goberdhan's men and caused serious injuries to all of them. The first information report was lodged at 11 A. M. at Deoghar which is eight miles

from Pipra by Antu after he consulted with Goberdhan in the Bar Library. Soon after, Ajodheya, Murari and Jainath arrived at the *Thana* and as they and Antu had injuries on them they were sent to the hospital by the Police. Sub-Inspector Bhupendra Nath Singha then started for the place of occurrence. On the way he met Subha Singh who also had injuries and he sent him also to Deoghar. On arriving at the Khamar he searched for Paryag and Sarju but did not find them. On the 1st of June he found Paryag under a tree about a quarter of a mile from the Khamar with injuries on his head and body. He sent him to Deoghar in a cart and he then started to search for Sarju whom he ultimately found lying in the Chandan River about two miles from the Khamar. The Sub-Inspector took down his statement and sent him to the hospital on a bed. Sarju, however, died on his way to the hospital. Dukhit was arrested on the 1st of June, Gooli was arrested on the 2nd and the other accused were subsequently arrested and were sent up for trial and ultimately convicted by the Sessions Judge as stated above. The most important evidence in the case consists mainly of the six eye witnesses, because they not only speak to the actual occurrence on the 31st but also speak to all the incidents which the prosecution allege took place before the 31st. The evidence of the investigating officer, the medical evidence and evidence of possession given by a number of cultivators practically complete the prosecuting evidence. Before I consider the evidence of the occurrence itself it is necessary to come to a finding as to who was in possession of the Khamar on the 31st morning. The Record of Rights is in favour of Dukhit and, in my opinion, the evidence to prove his possession of the Khamar, at any rate before the 22nd of May, is overwhelming. The learned Sessions Judge also found that Goberdhan had hitherto not been in direct possession of the Khamar and both the assessors were of the same opinion. It is now to be considered whether Dukhit was dispossessed between the 22nd and 31st of May. The prosecution story upon this point, as I have stated above, is that on the 22nd of May Goberdhan went to Pipra and took the key from Gooli and placed it in the hands of Ajodheya and placed the latter in charge of the Khamar. The evidence on this point,



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consists of some of the eye witnesses. It is, however, to be noticed that there is not a word about Gooli making over the key to Goberdhan or Ajodheya in the first information report. No one mentioned this transfer of the key to the Police when the witnesses were examined by the Sub-Inspector. It is further to be noticed that the prosecution case is that the eye witnesses were sent to Pipra by Goberdhan because Gooli had not allowed them to cultivate the lands. It is also found by the learned Sessions Judge that the men of Pipra were supporting Dukhit. Under the circumstances, it seems highly improbable that Gooli would so easily, on the mere asking of it, hand over the key to Goberdhan. It is also remarkable that Ajodheya does not say one word about this incident although the prosecution case is that the key was taken from Goberdhan and handed over to Ajodheya. Another important piece of evidence to refute this part of the prosecution story is that the key was found actually in the possession of Gooli by the Police. The prosecution anticipating this difficulty tried to prove through Ajodheya that Gooli took away the key from him after he fell down. But this explanation is palpably untrue as no mention of it was ever made to the Sub-Inspector. The learned Sessions Judge himself says that there is some doubt whether the keys of the Khamar were taken from Gooli and were taken back from Ajodheya when he was assaulted. Under these circumstances, I hold that this story of the taking over of the key by Goberdhan from Gooli and of then handing it over to Ajodheya is one which cannot be accepted. The second incident relates to the alleged visit of Dukhit Sha to Pipra on the 29th of May. It is alleged that on that day he visited Pipra and demanded the key from Antu and as that was refused he returned to Deoghar. On this point also the evidence is unreliable. In the first information Dukhit is said to have asked Antu to open the house. Antu says the demand was made from him but he replied that Ajodheya had the keys. Ajodheya, however, does not say one word about this. Paryag speaks of the visit but says nothing about the key. Murari and Sankhi are silent about it. Therefore, it is obvious that there is no reliable evidence that Dukhit visited Pipra on the 29th as is

alleged by the prosecution. There is, however, the dying statement of Sarju that the fight began on Dukhit asking Goberdhan's men to open the house. The relevant portion of the dying statement runs thus: "Dukhit Sha came with about 50 or 60 men at about 5 A. M. and said 'open the door of the house,' we said, we will not open without the order of the *malik*. On this Dukhit went to break the lock and we resisted. Then Dukhit gave orders to beat us."

On this it is contended that the men of Goberdhan must have taken possession of the Khamar and they must have been in possession of the key, otherwise they would not have been asked to open the house. To begin with, there is no mention of any key in the dying statement and, secondly, I am not satisfied that the deceased Sarju did not come in contact with the men of his party before he was found by the Police. The medical evidence in the case strongly indicates that Sarju must have been given some food only a few hours before his death and Mr. Mannk contends that it must have been given by men of his party. There is nothing on the present record to suggest that it could not be so. In this connection I may also notice certain inherent improbabilities in this part of the prosecution story. It is said that the eye witnesses were sent by Goberdhan in driblets. One of them was admittedly a *sipahi* and it is difficult to understand why a *sipahi* and men of the class of the eye witnesses were sent for purposes of cultivation. Secondly, no explanation is given why they were sent in driblets and why no mention of their going in batches was made to the Police by them. Then, as regards acts of possession exercised by the witnesses, I find that Antu says "I entered the Khamar. I saw the paddy, but don't know how much it was. I did nothing but watch the mango and jack fruit trees. The others did the same." Paryag, however, says: "We sowed some of the ploughed lands with seeds taken from the Khamar." On this point he is contradicted by Antu as noted above. In cross examination he admits that he never went inside the Khamar to do any work himself, except cut some earth with an axe and he alleged that nothing else was done owing to want of rain." Jainath



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says he cut some earth. He did not know what was inside the Khamar, and knew nothing about the cattle. Murari says he scraped some earth and did nothing else. Subha says he only went to collect rents for Goberdhan. The only one man who gives some details about the Khamar and its contents is Ajodheya but I am not satisfied that his evidence is at all convincing or reliable. While dealing with the question of possession I may as well shortly discuss the title under which the complainant claims to be in possession. I do this simply for the purpose of deciding the question of possession. In his deposition in Court Goberdhan says: "There was a partition between the brothers, Sankhi managed for me on my father's death, I being 6 years old. Pipra fell into the share of my father and Sankhi." Then later he says: "Pipra was settled with Dukhit, at the last Settlement when I was 7 or 8 years old." It is, therefore, clear that there was a partition before the settlement with Dukhit and the subsequent settlement of Pipra with Dukhit in 1904 for 15 years to my mind is a strong piece of evidence to show that under the partition Pipra fell to the share of Dukhit. This view is confirmed by the plaint filed in 1917 by Goberdhan against Sankhi and others for partition of ancestral properties. It is remarkable that Pipra was left out in the schedule of properties and it was only after the written statement had been filed that he applied for the amendments of the plaint and prayed for including Pipra. It comes to this that in this Court he claims to be in joint possession of Pipra with Sankhi to the exclusion of Dukhit, while at a very late stage of the partition suit he claimed to be in possession jointly with Dukhit and others.

If his statement that there was a partition before 1904 is true he has got no case at all inasmuch as the settlement in 1904 was with Dukhit alone. The learned Assistant Government Advocate, however, has argued that in fact Goberdhan was joint with Dukhit in Pipra on the day of occurrence and he relies upon the partition suit of 1917 and also Exhibits 2 and 3 which are entries in the handwriting of accused Dukhit in the account book of the firm of Gopi and Sankhi showing rent paid to the landlord. We have not got

the partition proceedings on record, but the oral evidence with reference to it, far from supporting Goberdhan's present claim, throws, as I have shown above, heavy cloud on the same. Then as regards Exhibits 2 and 3 the explanation is simple. Admittedly, Dukhit was a *gomashita* in the firm of Goberdhan and Sankhi and he used to get half the profits for looking after the firm and the entry may be consistent with Dukhit's explanation that the rent was paid by him from the firm's till, which would be set off against his share in the profits on adjustment of accounts. In my opinion, the position taken up by the Assistant Government Advocate is not available to him in the face of the clear case set up by Goberdhan and in the absence of the partition proceedings in this record. We cannot change the whole nature of the claim of complainant in appeal.

Then, there is a convincing refutation of this part of the prosecution story. After the arrest of the accused and during Police investigation, two test identifications were held. On the first test Gooli was not identified by Paryag and Suba, and on the second occasion he was not identified by any except Murari. This is remarkable, if the prosecution story that these witnesses were at Pipra long before the occurrence and have had continuous dealing with Gooli is true. How could they possibly fail to identify Gooli from whom they had got the key of the Khamar and who later had been interfering with their cultivation? These test identifications afford, in my opinion, ample material to discredit the whole case of the prosecution that these witnesses had been at the Khamar long before the occurrence.

On a careful consideration of the whole of the evidence on this point, I am satisfied that the story of the key having been made over by Gooli to Goberdhan about 10 days before the occurrence and the subsequent possession of the Khamar by the men of Goberdhan has not been established. At any rate, there is no reliable evidence to justify me in holding that the men of Goberdhan took possession of the Khamar at any time before the occurrence.

I now proceed to consider the evidence with respect to the occurrence itself.

Anto, P. W. No. 1, says that "at sunrise Dukhit with 50 persons armed demanded

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the keys from Ajodheya who refused. He abused us and went into the verandah and tried to break the lock but was stopped by Sarju and Murari with a *lathi*. He ordered his men to turn us out and they began to throw bricks and strike with *garasa* and *lathis*. I got blows on head and body." The other five witnesses Paryag, Murari, Jai Nath, Subha and Ajodheya, substantially support him in Court. All the six witnesses identify the accused in dock. A desperate attempt has been made by the witnesses in Court to attribute to Dukhit the blow on the deceased Sarju's head which resulted in his death. But the Sub-Inspector says that no body mentioned to him that Dukhit had struck any one any particular blow. Again, in the first information, Antu alleged that Dukhit gave Murari a *lathi* blow but there is no mention of Sarju being struck by Dukhit. As regards identification, it may be pointed out that, as I have stated before, there were two test identifications held by the Sub-Deputy Magistrate. On the first test, *i.e.*, on the 3rd of June, accused Gooli and Kaktu were produced. Gooli was identified by Antu, Murari, Jainath and Ajodheya, and Kaktu was identified by Paryag, Murari, Jainath and Ajodheya. On the second occasion, that is, on the 8th July, Gooli, Ganpat, Burma and Budu were produced. Gooli was identified by Murari only, Ganpat by Suba only, Burma by Murari only, Budu by Paryag only.

Therefore, Ganpat, Burma and Budu were identified by only one witness, which, in my opinion, would be insufficient evidence to convict the accused in a rioting case.

Dukhit and Gooli were admittedly there. Their case and that of Kaktu will have to be considered on the main ground whether they were members of an unlawful assembly.

The defence case may be best stated in the words of Dukhit himself. In his statement to the Sessions Judge under section 342, Criminal Procedure Code he states as follows: "On Friday, the 30th May I went to Mauza Pipra. My Barahil Gooli Singh was there. I enquired of him what had been done. He replied that 12 maunds had been sown and more would be sown the following day. On Saturday morning, I asked Gooli to bring labourers

and I went to take out paddy by opening the Khamar. Just as I went to open the lock 10 or 15 men came up and prevented me from opening it. Then Ajodheya struck me and I became unconscious. I recovered my senses two hours after. Then at night I came to Deoghar." This is substantially the same story as that given to the Sub Inspector on the 1st of June, *vide* Exhibit F. I have already found that Goberdhan's men were never in possession of the Khamar and the whole story of the passing of the key is false. I have held that they never came to Pipra in batches but came there for the first time on the morning of the 31st having been probably sent to Pipra for the purpose of setting up a claim to the Khamar adversely to Dukhit. Dukhit having been there with his labourers must have resisted their act of aggression on which, as the learned Sessions Judge has found, "blows were exchanged and after Dukhit had been struck his men in a body attacked Goberdhan's men and drove them out." The result of my finding necessarily is that endeavour of Dukhit's men to open the Khamar would be lawful and if resisted would give Dukhit the right of private defence of property. Who started the first blow the Sessions Judge does not find, but obviously before Dukhit was struck the exchange of blows was neither effective nor serious and so, after Dukhit was struck and received 10 injuries three of which were severe lacerated wounds on the head, he would at once have the right of private defence of person and property. There would be no question of taking recourse to public authorities under these circumstances. There can, however, be no doubt that this right was exceeded by some of Dukhit's men. Who they were has not been found nor has it been found that the accused or any of them committed any assault after they became aware that the right of private defence had been exceeded by any of them. Under the law as I understand it, any one who would be guilty of exceeding the right of private defence would be liable for his act but his individual act would not turn the lawful assembly into an unlawful assembly, except as indicated above. This proposition of law has been approved of in the cases of *Kales Mundle*, *In the matter of* (1), *Baij Nath Dhanuk v.* (1) 10 C. L. R. 278 at p. 280.



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*Emperor* (2). The result is that no unlawful common object of the accused has been established and the charges under sections 147 and 304/149, Indian Penal Code, must, therefore, fail, and the accused are entitled to be acquitted.

Owing to this difference of opinion the appeal was referred to Jwala Prasad, J., for disposal.

Messrs. Manuk, G. O. Pal and Parmeshwar Dayal, for the Appellants.

The Assistant Government Advocate, for the Crown.

**JUDGMENT.**—This case has been referred to me on account of difference of opinion between the learned Judges, Mullik and Sultan Ahmed, JJ., who originally heard this appeal.

The appellants are six in number: (1) Dukhit Sha, (2) Gooli Singh, (3) Kathku Singh, (4) Budha Singh, (5) Ganpat Singh and (6) Brama Singh. They were tried by the Sessions Judge of Sonthal Perganae with the aid of two Assessors in respect of charges under sections 148 and 304 read with section 149, Indian Penal Code. The Assessors returned a verdict of not guilty. The learned Sessions Judge disagreeing with their verdict convicted and sentenced them to various terms of rigorous imprisonment.

The common object of the unlawful assembly was stated in the charge to be to assault Ajodhya Singh and others and turn them out of the Khamar house of a village called Pipra. The latter are partisans of one Goberdhan Sha, first cousin of the principal accused Dukhit Sha. Each of them claimed to be in exclusive possession of village Pipra and the Khamar house in respect of which the occurrence took place. The accused plead right of private defence and it is, therefore, necessary at the outset to determine who was in possession of the Khamar house at the time of the occurrence.

Gopi, Sankhi, Gokbul and Deo Lal were four brothers of whom Sankhi alone is now alive. We do not hear of Gokbul in this case. Gopi and Deo Lal died some time before April 1901, but the exact date is not known. Goberdhan, the complainant, is son of Gopi, and Dukhit is son of Deo Lal.

(2) 1 Ind. Cas. 973; 36 C. 296; 13 C. W. N. 677; 9 Cr. L. J. 443.

The family settled at Deoghar. The four brothers were joint, and had a shop and a house at Deoghar. On the 26th October 1877 they obtained settlement of the village in the name of Deo Lal, who was recognised as *mul raiyat* of the village by the Deputy Commissioner per *pattah*, dated the 26th October 1877 and his name was recorded in the Settlement Record of Rights; that all the brothers were jointly interested in this settlement is clear from the *pattah* (Exhibit 1, dated the 31st January 1883). In it, it is stated that although the settlement was in the name of the younger brother, Deo Lal, Gopi (complainant's father) was also all along in possession of the village, and hence some of the lands that were excluded from that settlement on account of some boundary dispute with the Zemindar of the neighbouring village, Khajuria Jore, were settled in the name of Gopi in 1883. The judgment, Exhibit 4, dated the 4th April 1901 also shows that the village was the joint family property of all the brothers. This is a judgment in a case brought by accused Dukhit as plaintiff against certain other persons, Mahananda, etc, concerning the right to take wood and timber from the jungle of the *mul-raiyati* village Pipra. Dukhit's case was that the property was acquired by the four brothers jointly in the name of Deo Lal and was held jointly by plaintiff Dukhit, son of Deo Lal, deceased, Goberdhan (complainant) son of Gopi, deceased, and Sankhi and Gokbul. Sankhi is stated to have exercised the right of possession by cutting timber from the jungle on behalf of the family which led to criminal case and afterwards the civil suit, terminating in the judgment (Exhibit 4) in favour of Dukhit representing the family.

Thus, up to April 1901, the village was a joint property of the family including the complainant and the accused. Hence the re appointment of Dukhit prior to this, per order of the Sub-Divisional Officer, dated the 27th July 1900, Exhibit A, will not make him the exclusive owner of the property. His re appointment as *mul raiyat* was confirmed and the village was re settled in his name by Government in 1904 per *pattah* (Exhibit D) for 15 years at an enhanced rent over that of the previous settlement and was followed by *parcha* and the Record of Rights in his name.



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Thereafter, the history of the family or of the village is obscure. There appears, however, to be a firm by the name of Gopi (Goberdhan's father) and Saukhi at Deoghar. Dukhit was managing this firm and writing the account-books, as is proved by Exhibits 2 and 3 of 1912 and 1913. He was receiving half the share in the profits of the firm. It is contentious whether he was a *gomashia* or a sharer in the firm and in what capacity he receives the profits.

Saukhi was aged now about 70 years of age, Goberdhan was minor all this time. Dukhit was a young man, now 37 years of age, and was probably taking active part in the family.

Soon after the complainant Goberdhan attained majority in 1916, he began to assert himself and commenced an action in the Civil Court for partition of certain properties against Saukhi by filing a plaint on the 12th of March 1917. The record of the partition suit was not produced in the Court below. Hence what actually was the case of the parties was left vague and the learned Judges who originally heard this appeal had some difficulty in finding out what it was. The record of the partition suit had, however, come to this Court in Miscellaneous Appeal (No. 122 of 1919). I have, therefore, with the consent of the parties, looked into it and have placed the paper-book containing the pleadings of the parties on the record of this case.

Originally, Saukhi and his son only were made defendants in that suit on the allegations that Saukhi and Gopi had separated themselves from the other two brothers and lived together and were joint in business and property. After the death of his father the complainant, who was a minor, continued to be joint with and under the guardianship of his uncle Saukhi, and consequently he was entitled to have a share in the properties.

Saukhi filed his written statement on the 10th December 1917 and denied that he was ever joint with Goberdhan and stated that all the four brothers separated in every respect during their lifetime, and said that some of the properties in suit belonged to Dukhit.

On the objection of Saukhi, Goberdhan applied for the amendment of the plaint and for adding Dukhit and the members of his

family and those of Goberdhan's to be made parties to the suit. The amendment was allowed on the 3rd or 4th September and Mauza Pipra, indispute in the present case, and some other properties were added in the schedule to the plaint with the allegation that they were the joint properties of Goberdhan and Saukhi and that through the fraud and collusion of Saukhi and Dukhit, Mauza Pipra was entered in the Settlement Record in the name of Dukhit.

Dukhit filed his written statement on the 22nd October 1918 supporting Saukhi in the allegation set forth above regarding the separation of the four brothers during their lifetime. He claimed Pipra as belonging exclusively to him. Issues regarding the additional pleas of Dukhit were framed on the 21st February 1919. The case proceeded to the 7th of April 1919 when the record came to this Court on account of the Miscellaneous Appeal filed on the 7th of May 1919. This brings us near the date of occurrence which happened in the last week of May 1919.

In the present case the complainant in his evidence adheres to his allegations made in the partition suit that his father Gopi and Saukhi separated themselves from the other two brothers during their lifetime and that village Pipra fell to their share. He excludes Dukhit altogether from the village.

The case of Dukhit, on the other hand, is that there was a complete separation among all the four brothers and the village has exclusively fallen to his share. Except their own statement, there is no evidence of any partition among the four brothers during their lifetime. On the other hand, the judgment, Exhibit 4, shows that even after the death of Gopi and Dao Lal, the family continued to be joint and village Pipra was held jointly by their sons Dukhit and Goberdhan and the surviving brothers Saukhi and Gokbul.

On the other hand, there is a suggestion made by the accused in the cross-examination of the complainant Goberdhan that there were mutual deeds of release in 1916 between Saukhi and Goberdhan and that in accordance therewith a decree in the name of Saukhi was realised by Goberdhan. It has further been suggested that Goberdhan "wrote to Saukhi that the lands will remain with them in whose name they stand." The suggestion is for the purpose of show-

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ing that by some arrangement village Pipra remained with Dukhit in whose name it stood. The suggestion made by the accused shows that till then there was no regular partition among the members of the family. There may have been some arrangement, but we do not know definitely what it was.

The entries (Exhibits 2 and 3) in the account-books of the firm showing payment of rent in respect of the village are also contentious. The entries show that the rents were paid in 1913 and 1914 by the firm of Gopi and Sankhi. Upon this the complainant founds his claim of exclusive possession of the village Pipra by himself and Sankhi. The explanation of the accused Dukhit is that these payments were, as a matter of fact, made by him, as they were subsequently adjusted against his share in the profits of the firm.

Goberdhan challenges this suggestion and says that the account books of the firm, which are in the possession of Sankhi, would show that the rents for the previous years were all paid by the firm. No certain inference can be drawn from this kind of evidence.

The deeds of release referred to in the cross-examination of the complainant or the account-books of the firm, have not been filed in this case. They must be with Sankhi and he is on the side of Dukhit. Sankhi has not been even examined. It would have been well if he were examined and the aforesaid papers were called for from him. The evidence on the record is too meagre to hold whether there was any arrangement between the parties and, if so, what were the terms thereof, and as to there being a regular partition of the family properties between them the evidence on the record is almost nil.

The parties are now making their statements in the criminal case with a view to suit their purpose in the partition case. We cannot, therefore, rely and decide with confidence in this case as to whether or not there was a partition between the parties and whether by any partition or arrangement the village in question fell to the share of Dukhit alone or that of Goberdhan and Sankhi. The matter is *sub judice* in the partition case and I decline, upon the evidence on the record, to decide as to the rights of the parties in the village in ques-

tion. It was also suggested in cross-examination that the claim of the complainant before the Sub-Inspector was that he and Dukhit held the village jointly. This case if adhered to by the complainant would have been somewhat plausible, for the village was originally obtained in the name of Dukhit on behalf of the four brothers and continued to be the joint property at least up to 1901 and there is no evidence in this record of any regular partition of the village or allotment of it to Dukhit in whose name it stood in the Settlement Record. Nor the complainant's case that Dukhit was excluded altogether from the village is substantiated by evidence in this case. Some of the prosecution witnesses (Nos. 9, 14 and 15) say that the village and the Khamar belong to and are in possession of Sankhi and Gopi, while others (witnesses Nos. 17, 18 and 19) say that they belong to Dukhit. But all of them admit that Dukhit was directly in charge of the village and was looking after the cultivation and making collection from the tenants and granting receipts, whether he was doing so on behalf of the entire family or only as a *gomashta* of Sankhi according to the case of the complainant or as the sole and exclusive owner thereof as claimed by him. This is, however, certain that, after he filed his written statement in the partition suit on the 22nd October 1918 claiming the property as his own he would not allow the complainant to go near the village even if he had a right to do so. The complainant admits that he did not get any share in the income or produce of the village in the year 1918, although he explains it by saying that Sankhi said that there was no produce. He did not accept this explanation of Sankhi. Certainly, he understood that he was being excluded from any participation in the profits of the village and was being ousted therefrom, for he at once resolved to take direct possession of the Khamar (store house and Kutehri) which had *mejote* and *bari* or garden land attached to it and to cultivate all the lands himself excluding not only Dukhit but also Sankhi, his admitted co-sharer.

Gooli, accused, was the Barahil of the village and he was directly under Dukhit. He and the other villagers were on the side of Dukhit. The complainant was fully cognizant of this. He, therefore, engaged



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new men to assist him in obtaining direct possession of the village. The key of the Khamar house in the village, where the occurrence is said to have taken place, was in the possession of Gooli. According to the complainant, therefore, his first step towards obtaining possession of the Khamar house was to obtain the key from Gooli. He says that about the 22nd of May he went to the village with Ajodheya, a servant of 2 or 3 years' standing, and Paryag, a *sipahi*, who was engaged only 5 or 6 months before, asked for the key from Gooli and got it and made it over to Ajodheya, asked Gooli to act under him and placed Ajodheya and Paryag at the Khamar and came away.

This did not prove effective, for Paryag reported to him that Gooli was preventing *raiya*s from cultivating, and accordingly two days after he sent Murari and Sarja, who were engaged that very day, and Suba (brother of Paryag) who was engaged a month before; and again two days after he sent Antu and Jai Nath whom he engaged that very day, as re-inforcement.

On the 28th of May, he says he learnt that Dukhit had returned from Calcutta and was staying with Sankhi and would attack his men at Pipra, and consequently he informed the Daroga.

The complainant thus makes out a case of having the key of Khamar on the 20th or the 22nd being in charge of it though the afore-said seven persons whom he had employed for the said purpose about the time or shortly before the deputation up to the time of the occurrence which took place at 5 A. M. on the 31st. These persons apparently did nothing and do not know what was in the Khamar and in the state of affairs then prevailing, i. e., when Gooli, the Barahil and the entire village were against the complainant, they could not have been permitted to remain in charge of the Khamar, and admittedly from the earliest time they were being obstructed.

The story about the complainant having got the key from Gooli and handing it over to Ajodheya is not proved and is highly improbable. No mention of it is made in the first information lodged on the 31st May, at 11 A. M., nor in the dying declaration of Sarja to the Sub-Inspector although the Sub-Inspector says that he told him that Dukhit came and asked for the keys. The keys

were found, after the occurrence, in the possession of Gooli and he made them over to the Sub-Inspector. Ajodheya in his evidence in Court states that the keys and his Dhoti were snatched from him by Dukhit after he fell down but he did not make this statement to the Police. The explanation now offered as to how the keys went into the possession of Dukhit and produced by Gooli, is an after-thought. The learned Sessions Judge himself doubts the story about the keys. Upon the evidence in the case it is impossible to hold that the story of the key is at all true. This throws great doubt as to the complainant's case that he was in possession of the Khamar or that his men were in charge thereof at any time before the occurrence. Even Ajodheya and Paryag seem to be ignorant of what the contents of the Khamar were. They might have been loitering about the village now and then previous to the occurrence in order to reconnoitre and to engineer their plan to take possession of the Khamar. On the 31st of May, therefore, they occupied the Khamar for the first time unnoticed by Dukhit, Gooli, his Barahil, or other men. The prosecution story relating to the incident prior to the occurrence must, therefore, be rejected.

Now let us see what happened at the time of the occurrence.

The occurrence is said to have taken place at 5 A. M. on the 31st May. The first information report was lodged at 11 A. M. at Deoghar, which is 8 miles from Pipra, by Antu after consultation with the complainant Goberdhan.

Soon after, Ajodheya, Murari and Jai Nath arrived at the *Thana*. Their statements were taken down and they, along with Antu, were sent to the hospital by the Police for examination of their wounds. The Sub-Inspector immediately proceeded to the place of occurrence. He met Suba on the way who also had injuries and was sent to the hospital. The Sub-Inspector did not find Sarja and Paryag that day at the Khamar.

The next day, on the 1st of June, he found Paryag under a tree at quarter of a mile from the Khamar, with injuries on his head and body. Lastly, he found Sarja lying in water in the Chandan river about two miles away from the Khamar, off the



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Deoghar Road. He took down his statement and sent him to the hospital on a bed. Sarju, however, died on his way to the hospital.

Dukhit was arrested on the 1st of June and Gooli on the 2nd, and the other accused were arrested subsequently.

Briefly speaking, the case of the prosecution is that the aforesaid 7 persons deputed by Goberdhan were at the time of the occurrence on the verandah of the Khamar house. They state that Dukhit came with 50 persons and asked them to open the lock and on refusal he himself went into the verandah and tried to break open the lock. Dukhit was stopped by Sarju and Murari. Then he struck Sarju and Murari with a *lathi* and ordered his men to turn the complainant's party out, whereupon the people of Dukhit began to throw brickbats and strike the complainant's men with *garases* and *lathies*, the result of which was that all the seven persons on behalf of the complainant were more or less severely injured, and Sarju ultimately died the next day on his way to the hospital. The version of the accused is given by Dukhit himself on the 1st of June at 7 A. M. to the effect that he went to his Khamar to get seeds and he told his Barahil, Gooli Singh, to open the lock of the Khamar house, but Antu Dhanuk did not allow him to do so, saying that he would not allow him to do so so long as Goberdhan did not come. After this, Dukhit himself went to open it. Antu Dhanuk struck a *lathi* blow on his head and so did Ajodheya with a *lathi*.

The learned Sessions Judge has summarised the medical evidence as to the injuries received by the complainant's and the accused's parties. All the seven persons, Paryag, Suba, Jai Nath, Ajodheya, Murari, Antu and Sarju had a number of injuries more or less severe on different parts of their persons both front and back, on their heads, hands, neck, shoulders, and thighs, shins, cheeks. The deceased Sarju died on account of compound fracture of the skull and consequent injury to the brain.

Dukhit, on behalf of the accused, had three severe lacerated wounds on the forehead and one on the back of the head. He had also some ecchymosis and abra-

sions on the back, right arm, knee and finger. Gooli had slight abrasions on the right shoulder.

The wounds on both sides were caused in Doctor's opinion with *lathi* blows, while the incised wounds on Goberdhan's men were caused by a sharp instrument like *Farsa*. The number of men injured on the side of the complainant and the accused was 7 to 2, and the injuries also were much more in number on the side of the prosecution than on the side of the accused.

Six accused were arrested and placed on their trial. Two test identifications were held by the Sub-Deputy Magistrate, Maulvi Amjad Ali. On the first occasion, the 3rd of July, accused Gooli and Katku were produced. Gooli was identified by Antu, Murari, Jai Nath and Ajodheya, and Katku was identified by Paryag, Murari, Jai Nath and Ajodheya.

The second identification was on the 8th July, when Gooli, Ganpat, Burmah and Budhu were produced; Gooli was identified by Murari only; Ganpat by Suba only; Burmah by Murari only; and Budhu by Paryag only.

Thus, Ganpat, Burmah and Budhu were identified by only one witness. This was considered as insufficient evidence by Sultan Ahmed, J., for the purpose of their conviction. Mullick, J., agreed with him with regard to Budhu and Ganpat but not with regard to Dukhit, Gooli and Burmah. He does not give any reason to show how the case of Burmah is distinguishable from that of Ganpat and Budhu.

The learned Assistant Government Advocate contended that the case of Burmah was distinguishable from that of Ganpat and Budhu and invited our attention to the statement in the first information, where Antu stated that he would be able to identify the man who aimed a *Farsa* blow at him but whose name he did not know and also upon the fact that Bhodal Manjhi, *chowkidar*, produced a *Farsa* before the Police and said that he got it from one of the assailants of Burmah. His evidence is most unsatisfactory on the point. To the Deputy Magistrate he told that he did not know from whom he took the *Farsa* and in

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cross examination in the Sessions Court he said that he was induced to make this statement by Sankhi. No reliance can be placed upon the statement of such a witness. Antu himself did not recognize Burmah when he was produced at the test identification on the 8th of July. His statement in Court that he received the blow from Burmah Singh appears to be an after-thought after the *chowkidar* had made the statement that he recovered the *Farsa* from Burmah. If he failed to identify Burmah as his assailant when he was first produced on the 8th of July, his subsequent statement in Court cannot be accepted.

I would, therefore, hold that the evidence against Budhu, Ganpat and Burmah is insufficient for their conviction, whether there was an unlawful assembly or not.

Katku, no doubt, was identified on the 3rd of July by Paryag, Murari Jai Nath and Ajodhya. In the whole record there is absolutely no evidence to show that he took any part in the riot and the learned Sessions Judge also comes to the same conclusion. It has not been shown that he had any interest on behalf of Dukhit and Gooli, or how he helped them at riot. There is nothing to show that he was more than a mere spectator, and in a riot of this kind occurring in a village the mere presence at the place of occurrence will not make one a member of the unlawful assembly. Apparently, Mullik, J., also was of the same opinion, for he omits him altogether from his consideration. I would, therefore, acquit him also.

The case of Dukhit and Gooli, who admittedly were there and were interested in driving the complainant's party from the Khamar, requires serious consideration.

First, let us consider whether they actually struck any body on the side of the complainant. In the first information, or in the evidence of witnesses, (except Jai Nath and Murari) Gooli is not said to have struck anybody. Murari says that he was struck by Gooli and Jai Nath supports him; but Murari said to the Sub-Inspector that he could not say who struck him, so did Jai Nath. He was not identified either by Antu, Paryag or Jai Nath on the 8th of July. The evidence about his having struck anybody is unsatisfactory.

As to Dukhit, in the first information Antu stated that he gave Murari a *lathi* blow. In his evidence in Court he stated that Dukhit struck both Sarja and Murari with a *lathi*. Murari, Ajodhya, Prayag, Jai Nath, and Suba stated in their evidence that Dukhit struck Sarju on the head with a *lathi*. They did not say that he struck Murari. Sarju himself in his dying declaration does not say that he was struck by Dukhit. He only says that Dukhit ordered an attack, whereupon he was beaten and he fell down. He said he would recognize his assailants but he did not know their names. After Sarju is dead, the prosecution witnesses are now attributing his death to the blows given by Dukhit. This was not the case in the first information. To the Police none of these witnesses said that Dukhit struck any one. It is thus not proved that Dukhit gave the fatal blow to Sarju or that he actually gave any blows. On the other hand, it appears that he called his men to help and ordered an attack as stated by the deceased. This would naturally be when he himself was being struck when he went to open the Khamar house according to the case of both the parties. Dukhit, on behalf of the accused, must have been first wounded, for after the attack upon the complainant's men it was not possible for them to assault Dukhit, as according to their case they were severely wounded and fell down. They could not therefore, have been able to repel the attack and assault Dukhit. The learned Sessions Judge also holds that after Dukhit had been struck, his men in a body attacked Gobaradhan's men and drove them out. This is a plausible theory.

Thus, the severe injuries on the complainant's men were caused after Dukhit himself was struck. It is possible that there might have been some exchange of blows between Dukhit and Sarju and Murari when they were wrangling about the opening of the lock on the Khamar house. Dukhit and Gooli went to open the lock, the complainant's men resisted and there was then an altercation. Murari and Sarju would not permit him to open the lock. It is not clear as to what happened at that stage, but this is certain that the fight commenced on account of the resistance offered to Dukhit and Gooli in opening the lock, by



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the complainant's people, which led to an altercation in the course of which Dukhit received the injuries described by the Doctor. He called out to his men. This was responded to and the villagers, who were on the side of Dukhit, belaboured the complainant's men with *lathi*.

The question then is, whether Dukhit and Gooli are responsible for the assault on the complainant's men.

Dukhit was for a long time in direct possession of the Khamar house either on his own behalf or on behalf of the other members of the family including the complainant. The Assessors have found possession with him. His direct possession did not cease for a single moment. At least from a year before, when he filed his written statement in the partition suit on the 22nd October 1918, he has been claiming adversely to that of Goberdhan and he was thus in any case in adverse possession. The complainant was not present at the time of the occurrence but sent his hired men, the aforesaid seven wounded persons, to take sole possession of the Khamar, excluding Dukhit and Saukhi, his admitted co-sharer. He says that he meant to cultivate for himself and to give a share to Saukhi. He was thus trying to oust Saukhi and Dukhit from the Khamar house. The complainant's men occupied the Khamar on the morning of the 31st and were there merely as trespassers. They were Rajput Lathials, one of them being a *sipahi* Ajdheya, who was in service for the last two or three years, must have known of the partition suit and the rival claims of the parties. He and Paryag were the leaders of the party. Their object necessarily was to deprive Dukhit of his direct possession. Under section 441 of the Indian Penal Code, dealing with criminal trespass, possession only and not title, is to be considered. There was, therefore, a criminal intent in their occupation of the Khamar and thereby they were committing a criminal trespass. Against this trespass Dukhit had the right of private defence of property, so long as the complainant's party continued to be in the occupation of the Khamar, under section 105 of the Indian Penal Code. Under section 104 this right extended to causing to the trespassers, the complainant's men, any harm other than death subject to the

restrictions placed upon it by section 99 of the Indian Penal Code, that is, of inflicting no more harm than was necessary to inflict for the purpose of defence. According to the case of the prosecution, Dukhit and Gooli went there simply to open the lock and to take out seeds from the Khamar house which admittedly was kept there by them. This was within their rights. The complainant's men admittedly resisted. This was clearly wrong and entitled Dukhit and his men to use such force as was necessary to turn them out. Altercation ensued and, according to the finding of the learned Sessions Judge, blows were exchanged. At that stage it is not known whether any harm more than what was necessary to turn them out was caused to the complainant's men. The learned Sessions Judge holds that, after Dukhit had been struck, his men in a body attacked Goberdhan's men and drove them out. The injuries on the person of Dukhit are, therefore, the result of that attack by the complainant's men. Three injuries on the head of Dukhit were severe; besides a number of injuries on different parts of his body, back, right arm, knee, finger and shoulder were caused. The attack on Dukhit by the complainant's men and their actually striking him with *lathis* must reasonably have caused an apprehension to him and his men that death or grievous hurt would be the result, and, as a matter of fact, some of the injuries were on the head and were severe. The right of private defence under section 103, clause (4), therefore, extended to the causing of death to the assailants, the complainant's men, subject, of course, to the restrictions placed by section 99.

The complainant's men are not shown to have ever desisted from the trespass, or that they would have done so unless they were beaten by Dukhit's men, and, therefore, no injury in this case appears to have been caused to them more than what was necessary for the defence of person and property. All of them had to be at once attacked and were, as a matter of fact, so attacked, so as to prevent any of them from striking Dukhit and causing his death. Unfortunately, Sarju, one of the complainant's men, received a serious injury on the head which resulted the next day in his death but that injury was necessarily the result



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of the exercise of the right of private defence by Dukhit and his men. Thus, the first restriction placed by section 99 does not apply to the case.

The next restriction placed upon the right of private defence is, that there should have been no time to have recourse to the protection of the authorities. The learned Sessions Judge apparently thinks that Dukhit or his men had time enough to go to the Police which was close at hand. The Thana is 8 miles away. The complainant's men had already occupied the Khamar house. The time for cultivation had arrived, inasmuch as both the parties went to commence the cultivation and Dukhit had already gone to take out seeds from the Khamar house. The trespass was already committed by the complainant's men. There was no time left to Dukhit to inform the Police. His immediate remedy was to turn them out. He simply went there and wanted to take out seeds, but the complainant's men resisted by means of force. The right of private defence of person then arose. There was not time to have recourse to the Police. Dukhit and his man, Gooli, had, therefore, a right of private defence and had not exceeded it. I agree with the learned Sessions Judge in his view that Goberdhan's conduct was unjustifiable, so also of his men who had hired themselves to support him. I also agree with him, as already observed, that after Dukhit was struck, his men in a body attacked Goberdhan's men and drove them out. But I disagree with him in the view that the right of private defence did not arise, or that they had exceeded that right, or that there was time enough to have recourse to the authorities. The men on behalf of Dukhit were not members of an unlawful assembly, whether they had gathered there from before or had suddenly appeared, for their object was simply to protect Dukhit's direct possession over the Khamar house and defend against an aggression and trespass to the property of that house. They never became, at any subsequent stage of the occurrence, members of an unlawful assembly. Dukhit and Gooli are also, therefore, entitled to acquittal, and for the matter of that all the other four accused persons whose case on identification has already been considered even if they were held to have

been present there and taken part in the occurrence.

I have arrived at this conclusion after having fully considered the authorities cited on both sides: *Moher Sheikh v. Queen Empress* (3) and *Baij Nath Dhanuk v. Emperor* (2) on behalf of the Crown and *Fouzdar Rai v. Emperor* (4), *Sunder Buksh Singh v. Emperor* (5), *Ohandulla Sheikh v. Emperor* (6) on behalf of the appellants and I need hardly discuss them.

The result is that all the accused are entitled to acquittal and are hereby acquitted and set at liberty. Their conviction and sentences are accordingly set aside and their bail bonds are cancelled.

*Conviction set aside.*

(3) 21 C. 392; 10 Ind. Dec. (N. S.) 893.

(4) 44 Ind. Cas. 33; 3 P. L. J. 419; 4 P. L. W. 111; 19 Cr. L. J. 241; (1918) Pat. 254.

(5) 48 Ind. Cas. 163; 8 P. L. J. 653; (1918) Pat. 359; 19 Cr. L. J. 983.

(6) 22 Ind. Cas. 993; 18 O. W. N. 275; 15 Cr. L. J. 209.

## LAHORE HIGH COURT.

CRIMINAL APPEAL No. 541 OF 1920.

December 21, 1920.

Present :— Mr. Justice Scott-Smith.

LADHA SINGH—CONVICT—

APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 301, 307—  
Attempt to poison one person—Poison administered to  
several—Small quantity of poison—Offence.

Accused sent some sweetmeats containing arsenic to A. with the intention of causing her death. B and C. also shared the sweetmeats with A. and although all three of them became ill none of them died:

Held, (1) that the accused was guilty of an attempt to murder not only A. but also B. and C.; [p. 52, col. 2]

(2) that the mere fact that the amount of arsenic was not sufficient to cause the death of A. made no difference. [p. 52, col. 2.]

Appeal from the order of the Magistrate, First Class, with section 30 powers, Montgomery, dated the 29th May 1920.

Dr. Nand Lal, for the Appellant.

## LADHA SINGH v. EMPEROR.

Mr. H. A. Herbert, Government Advocate, for the Respondent.

**JUDGMENT.**—Ladha Singh has been convicted by a Magistrate, invested with section 30 powers, of attempting to murder three persons, *vis*, Musammât Amar Kaur, Musammât Gulab Devi and Gian Singh, and under section 307, Indian Penal Code, has been sentenced to seven years' rigorous imprisonment for the attempted murder of Musammât Amar Kaur, and to three years' rigorous imprisonment for the attempt to murder each of the other two persons, the sentences to run concurrently. The prosecution story, which will be found in the evidence of Nanka Singh (P. W. No. 2), is set forth in great detail in the judgment of the Magistrate and need not be repeated. The theory for the prosecution is that Ladha Singh mixed arsenic in *peras* and sent them by the hand of his step-son Bakhshish Singh (P. W. No. 13) to his step-daughter Musammât Amar Kaur with the intention that she should eat the poisoned stuff and die. She shared the sweetmeats with her neighbour Musammât Gulab Devi and with Gian Singh, her brother-in-law, who came up and asked for some of it. It is proved by the evidence of Nanka Singh and others that after the death of Musammât Jowala Devi, the appellant's wife and mother of Musammât Amar Kaur and Bakhshish Singh, relations became strained between the appellant on the one side and Musammât Amar Kaur and her husband's relations on the other. It is in evidence that Musammât Amar Kaur had gone to live in her husband's house, that Ladha Singh wanted her to return to his house in order that she might help to look after his one year old baby whose mother had died, that Musammât Amar Kaur refused to return and that he tried to persuade her and on the last occasion went away saying that he had come for the last time. It is, I consider, clearly proved by the evidence of Mul Singh, Labh Chand and Uttam Singh (P. Ws. Nos. 15, 6 and 4) that some ten days before the occurrence the appellant through Mul Singh purchased 9 *mashas* of arsenic from Labh Chand. The purchase was entered in Labh Chand's register in the name of Mul Singh because the latter was known to Labh Chand whereas the appellant was not known to him. I see absolutely no reason to disbelieve this

evidence. In addition to this, we have very reliable evidence of Nihal Singh, Ishna Singh and Hardit Singh (P. Ws. Nos. 8, 10 and 16) to the effect that during the Police investigation the appellant produced a packet containing some 8 *mashas* of arsenic from his house. It has been contended that Hardit Singh the Head Constable, bore a grudge against the appellant, but, in my opinion, no such grudge has been proved and I see no reason to suppose that Hardit Singh has made up a false case against the appellant. Munshi Ram (P. W. No. 3) has given evidence as to the purchase by the appellant of *peras* from him, and Bakhshish Singh (P. W. No. 13) has described how the appellant gave a part of the *peras* to him to eat, and mixed some stuff which he took out of his *dab* with the remainder, and sent it by his hand to his sister Musammât Amar Kaur. Musammât Gulab Devi and Musammât Amar Kaur (P. Ws. Nos. 11 and 12) have given evidence as to Bakhshish Singh's bringing the sweetmeat to Musammât Amar Kaur and saying that *Bhaiya*, meaning thereby Ladha Singh, had sent it to her. Nanka Singh and Musammât Amar Kaur have deposed to all the previous circumstances and I am fully satisfied that the appellant had a motive for causing injury to Musammât Amar Kaur. It is possible, as she says, that the appellant had been making overtures to her, and it may be, because she rejected these and would not return to his house, that he made up his mind to kill her. Proof of an adequate motive, however, is not necessary if the evidence that the appellant sent poisoned sweetmeats is otherwise strong. Shortly after they had partaken of the sweetmeats, Musammât Gulab Devi, Musammât Amar Kaur and Gian Singh were all taken ill with vomiting and purging, and the medical evidence, together with the Chemical Examiner's report, satisfies me that their illness was due to arsenical poisoning. The mere fact that in Musammât Gulab Devi's excreta no arsenic was found is not at all conclusive proof that she did not eat any arsenic, because it is quite possible that all the arsenic taken was expelled when she first began vomiting and purging and that the vomit and excreta subsequently collected and sent to the Chemical Examiner did not contain any arsenic. It is, in my opinion, very clearly proved by reliable evidence that Ladha Singh sent

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poisoned sweetmeats to *Musammam Amar Kaur* with the intention of causing her death and that *Musammam Amar Kaur*, as well as *Musammam Gulab Devi* and *Gian Singh*, to whom she gave a part of the sweetmeat, all became seriously ill as a consequence of partaking it.

Dr. Nand Lal has raised two legal points. The first is that even if the appellant can be convicted of attempting to murder *Musammam Amar Kaur*, he cannot be convicted of any offence in regard to *Musammam Gulab Devi* and *Gian Singh* as he did not administer poison to them or intend that they should partake of the poisoned sweetmeats which he sent to *Musammam Amar Kaur*. Now, section 301, Indian Penal Code, deals with the case of culpable homicide by causing the death of a person other than the person whose death was intended. Having regard to this section, I am quite clear that if either *Musammam Gulab Devi* or *Gian Singh* had died as a consequence of eating the poisoned sweetmeats, the appellant would have been guilty of murder because he would indirectly have caused their death. In the case reported in *Public Prosecutor v. Mushunooru Suryanarayana moorty* (1) decided by a Full Bench of the Madras High Court the facts were as follows:—S., with the intention of killing N., gave him poisoned *halwa* to eat. N. ate a little and threw the rest away. This was picked up by R. who ate it and died. It was held that on these facts S. was guilty of murdering R. The law is fully dealt with in the judgment of the Court and I agree with the reasoning contained therein. If *Musammam Gulab Devi* and *Gian Singh* had died the appellant would have been guilty of murder. As they did not die but recovered, the appellant is guilty of the offence described in section 307, Indian Penal Code.

The second point urged is that the appellant cannot be convicted of an attempt to murder because it is not proved that the amount of arsenic which he caused to be taken was sufficient in the natural course to cause death. The facts in the case reported in *Queen Empress v. Tulsha* (2) are very similar

to those of the present case. There it was found that a woman of twenty years of age had administered *datura* to three members of her family. They all recovered from the effects of the *datura* but it was held that she must be presumed to have known that the administration of *datura* was likely to cause death, and her conviction under section 307, Indian Penal Code, was maintained. Similarly, the appellant must be held to have known that the administration of a deadly poison, such as arsenic, was likely to cause death, and as he administered it with the intention of causing death and serious illness resulted therefrom from which the person to whom the arsenic was administered recovered, his conviction under section 307 is justified. The appellant's act was intended to cause death and he did all he thought necessary for the carrying out of his object. He cannot escape conviction merely because through some cause or other the persons to whom he administered the arsenic recovered. The present case is on all fours with the Allahabad case and Illustration (d) of section 307, Indian Penal Code, also appears to meet the case. The point, moreover, is not very important, because the appellant, even if he could escape conviction under section 307, Indian Penal Code, could certainly be convicted under section 328, Indian Penal Code, and if I thought it necessary to alter the conviction to one under that section, I should maintain the sentence. The appeal is dismissed.

*Appeal dismissed.*

### MADRAS HIGH COURT.]

CRIMINAL REVISION CASE No. 336 OF 1920.

CRIMINAL REVISION PETITION No. 271 OF 1920.

September 27, 1920.

Present:—Mr. Justice Oldfield and

Mr. Justice Hughes.

BHOGIRAVATHU SOMANNA—ACCUSED

—PETITIONER

versus

KANDIVADA CHELAPATHI RAO—

COMPLAINANT—RESPONDENT.

*Workman's Breach of Contract Act (XIII of 1859), s. 1*

(1) 13 Ind. Cas. 833; (1912) M. W. N. 136; 11 M. L. T. 127; 13 Cr. L. J. 145; 22 M. L. J. 833.

(2) 20 A. 143; A. W. N. (1897) 226; 9 Ind. Dec. (N. S.) 463.



BHOJIRAVATHU SOMANNA V. KANDIVADA CHELAPATHI.

—'Compositor,' whether 'artificer, workman or labourer'  
—Agreement to re-pay advance by periodical deductions from wages, whether within Act.

A compositor in a Printing Press is an 'artificer' for the purposes of section 1 of the Workman's Breach of Contract Act.

*Natuthodi Kunhi v. Chamu Nair*, 43 Ind. Cas. 787; 41 M. 182; 33 M. L. J. 607; 22 M. L. T. 435; 19 Cr. L. J. 211; 6 L. W. 745; (1917) M. W. N. 825, distinguished.

An agreement between an employer and a workman whereby the latter agrees to re-pay the advance received by him by periodical deductions from the amount of his wages and by working out the amount, is an agreement which falls under section 1 of the Act.

*Abdul Rasul v. Ismailji, In re*, 11 Ind. Cas. 586; 13 Bom. L. R. 848; 12 Cr. L. J. 402 and *High Court Proceedings*, 9th January 1880, 1 Weir 681, distinguished.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Stationary Sub-Magistrate, Ellore, dated the 1st June 1920, in C. C. No. 223 of 1920.

FACTS appear from the judgment.

Mr. K. R. Shenai, for the Petitioner.—The petitioner is a compositor in a Press. Though his work involves manual labour, the work of setting up types involves, to some extent, the use of brains also. It is not down right manual work. He cannot be called an artificer, workman or labourer *Natuthodi Kunhi v. Chamu Nair* (1).

The agreement in this case provides for re payment of the advance within a specified time. The relationship created is that of debtor and creditor and not servant and master. See *Abdul Rasul Ismailji, In re* (2) and *High Court Proceedings*, 9th January 1880 (3). Petitioner cannot be dealt with under Act XIII of 1859.

Mr. V. L. Ethiraj, for the Public Prosecutor, for the Crown and Mr. V. Suryanarayana, for the Respondent.—A compositor has mainly to do manual work. He is an artificer.

Exhibit A, the agreement, provides for re-payment of the advance by periodical deductions from the petitioner's wages. The petitioner has to work out his advance. This is different from the agreements that were

(1) 43 Ind. Cas. 787; 41 M. 182; 33 M. L. J. 607; 22 M. L. T. 435; 19 Cr. L. J. 211; 6 L. W. 745; (1917) M. W. N. 825.

(2) 11 Ind. Cas. 586; 13 Bom. L. R. 848; 12 Cr. L. J. 402.

(3) 1 Weir 681,

in question in the cases cited by the petitioner's Vakil.

ORDER.—The first question argued in this revision petition is whether the petitioner, who is a compositor, is an artificer, workman or labourer within the meaning of Act XIII of 1859. A compositor is defined in the Century Dictionary as one who sets up type. Mr. Shenai on petitioner's behalf contends that, because he has to use his brains to some extent in order to set type, he does not come within the scope of the Act. Mr. Shenai has relied on the judgment of Aiyang, J., in *Natuthodi Kunhi v. Chamu Nair* (1), but that is not in point. We think that a compositor, in ordinary parlance, would be regarded as an artificer, if not as a workman. This point, therefore, fails.

The remaining argument is that Exhibit A, the agreement between the petitioner and his master, simply creates a relation of debtor and creditor, not as a master with a workman who has received an advance. Reliance is placed on the construction put by the Court on what are alleged to be similar agreements in *Abdul Rasul Ismailji, In re* (2) and *High Court Proceedings*, 9th January 1880 (3). Neither of these cases is, in our opinion, analogous to the present. In the first the last sentence of the agreement provided, quite generally, for re-payment of the advance made within a period which was specified although, no doubt, from the workman's wages. In the second, similarly, the deposit or loan was to be refunded at the close of the period of the contract. In neither was there anything resembling the provision in Exhibit A by which the advance to the workman is to be re-paid by periodical deductions from the amount of his wages and should in any case be worked out by him.

The revision petition fails and is dismissed.

M. C. P.

*Petition dismissed.*

BARKAT V. EMPEROR.

## LAHORE HIGH COURT.

CRIMINAL APPEAL No. 496 OF 1920.

October 29, 1920.

Present:—Mr. Shadi Lal, Chief Justice.

BARKAT—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 35—  
Conviction for several offences at one trial—Separate  
sentences, whether can be passed.*

Where a person commits house-trespass and attempts to murder an occupant of the house he may be convicted of both these offences, but a separate sentence for each offence is not justified.

*Queen-Empress v. Malu*, 23 B. 703 (F. B.); 1 Bom. L. R. 142; 12 Ind. Dec. (N. S.) 472, followed

Appeal from the order of the Magistrate, First Class, Kasur, District Lahore, with powers under section 30, Criminal Procedure Code, dated the 8th July 1920.

Lala Rama Nand, for Maclvi Ghulam Muhy-ud-Din, for the Appellant.

Sardar Mehtab Singh, S. B., Public Prosecutor, for the Respondent.

**JUDGMENT.**—The appellant, Barkat Ali, has been found guilty of having, on the night of the 10th/11th May 1920, made an attempt to murder one Buti; and has been sentenced under section 307, Indian Penal Code, to rigorous imprisonment for seven years. There can be no doubt that the victim was brutally assaulted on the night in question, and the medical evidence shows that his nose bone was smashed into innumerable fragments, and that the wound inflicted upon him was 2 inches deep.

The assault by the convict is deposed to not only by Buti, but also by his mistress Amda who was actually on the same bed with him at the time when he was struck. Further, we have the evidence of the witness Kamil (who was admittedly living in the same *haveli* with Buti) to the effect that upon hearing the noise he came up to the spot and saw the appellant going away from the courtyard where the victim was lying wounded on a *charpoy*. I have carefully perused the evidence of all these witnesses and see no valid reason to distrust it.

The convict puts forward the usual story that there was a fight between him and the victim in the course of which the latter fell down on a piece of wood and accident-

ally injured his nose. This story is perfectly absurd and deserves no serious consideration.

It appears that the offender had made immoral advances to Buti's mistress Amda, which were not responded to by the latter. This incensed the convict and led to a quarrel on the day preceding the night of the occurrence. Some friends, however, intervened, and there is evidence on the record to show that the appellant departed with the threat that Amda would not spend the ensuing night with Buti.

That there was a motive for the assault does not admit of any serious doubt, and upon the direct testimony referred to above it is clear that it was the appellant who committed the assault. The only question is whether the case fulfils the requirements of section 307, Indian Penal Code, or falls under section 325, Indian Penal Code. Now, the medical evidence shows that the blow was struck with tremendous force, and the bone of the nose, as stated above, was smashed into a large number of small pieces. There was profuse bleeding, and it was at one time feared that the victim might die. It is, further, clear that the offender intended to kill his victim or to cause such injury as he knew was likely to cause death. In these circumstances, I am of opinion that the conviction under section 307 is justified, and there is no adequate ground for interfering with the sentence.

The learned Magistrate has convicted the appellant also under section 452, Indian Penal Code, and sentenced him to three years' rigorous imprisonment. Now, the conviction for criminal trespass is technically correct, but I do not think that a separate sentence is justified, *vide Queen Empress v. Malu* (1).

Accordingly, I accept the appeal so far as to set aside the sentence imposed under section 452, Indian Penal Code. In all other respects the appeal is dismissed.

*Appeal dismissed.*

(1) 23 B. 706 (F. B.); 1 Bom. L. R. 142; 12 Ind. Dec. (N. S.) 472.

MANIKKAM PILLAI, *In re*.

**MADRAS HIGH COURT.**

CRIMINAL REVISION CASE No. 412 OF 1920.

CRIMINAL REVISION PETITION No. 340  
OF 1920.

October 8, 1920.

*Present:*—Justice Sir Abdur Rahim, Kt.

*In re* MANIKKAM PILLAI—PETITIONER.

*Criminal Procedure Code (Act V of 1898), s. 528—  
Transfer, order of, by competent Magistrate—Cancellation  
of order by superior Magistrate without notice to  
party who obtained original order, legality of.*

When a complainant has obtained from a competent Magistrate an order of transfer of a case made after hearing both the parties, a Magistrate of superior jurisdiction should not cancel the order and re-transfer the case to the original Magistrate without hearing the complainant in support of the order of transfer.

Petitioner, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Additional District Magistrate, Tanjore, dated the 1st July 1920, in D. Dis. No. 455 M. of 1920, preferred against the order of the Court of the Sub-Divisional Magistrate, Kumbakonam, in D. Dis. No. 205 Magl. of 1920 (C. C. No. 164 of 1920, on the file of the Court of the Stationary Sub Magistrate, Papanasam).

FACTS appear from the judgment.

Mr. R. Srinivasa Aiyangar, for the Petitioner.—No order should be passed to the prejudice of a party without notice to him and without giving him an opportunity of being heard against the order. It was especially necessary in this case where the Sub-Divisional Magistrate had already made an order of transfer to the very Court from which the District Magistrate re-transferred it. Though notice is not required under the Code, it has been the invariable practice to act under the transfer sections only after hearing both parties.

Mr. V. L. Ethirai, for the Public Prosecutor, for the Crown.—Section 528, Criminal Procedure Code, does not require that action should be taken under it only after hearing both the parties. The issue of notice is a matter in the discretion of the Court.

ORDER.—In this case the Additional District Magistrate should have given notice to the petitioner, who was complainant in the case, before making the order of transfer. The complainant had obtained an order for transfer of a certain criminal charge

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filed in the Stationary Sub Magistrate's Court of Papanasam to the Sub-Magistrate's Court of Kumbakonam on the ground that he had reasons for apprehending that his case would not be properly tried. Thereupon the accused applied to the Additional District Magistrate of Tanjore for re transfer of the case from the file of the Sub-Magistrate of Kumbakonam to that of the Stationary Sub-Magistrate of Papanasam and the Additional District Magistrate made an order of transfer without giving any opportunity to the complainant in the case to be heard in support of the order of transfer which he had obtained from the Sub-Divisional Magistrate transferring the case from the file of the Stationary Sub-Magistrate of Kumbakonam. It may be, as contended by the Public Prosecutor, that the law entitles the complainant to no notice, when a Magistrate proposes to act under section 528, Criminal Procedure Code. At the same time, it is obvious that when the complainant has obtained an order of transfer from a competent Magistrate who made that order after hearing both the parties, a Magistrate of superior jurisdiction should not cancel the order and re-transfer the case to the original Magistrate without hearing the complainant in support of the order of transfer which he had obtained. I set aside the order of the Additional District Magistrate and direct the case to be restored to the file of the Sub-Magistrate of Kumbakonam.

M. C. P.

*Order set aside;  
Case restored to file.*

**LAHORE HIGH COURT.**

CRIMINAL REVISION PETITION No. 1113 OF  
1920.

December 16, 1920.

*Present:*—Mr. Justice Chevis.

DANI—ACCUSED—PETITIONER

*versus*

EMPEROR, THROUGH GIANI—COMPLAINANT  
—RESPONDENT.

*Criminal Procedure Code (Act V of 1898) s. 437—*



## MAKSUD ALI v. EMPEROR.

*Further enquiry, order for, when to be made—Penal Code (Act XLV of 1860), ss. 323, 325—Evidence that fight occurred, whether sufficient for conviction.*

Where the whole of the available prosecution evidence has been recorded, an order for further enquiry means simply a second trial on the same evidence.

The mere fact that the District Magistrate places a different value on the evidence from that placed by the Trial Court is not a good ground for directing further enquiry under section 437 of the Criminal Procedure Code.

Unless the evidence is good enough to warrant a clear finding as to the facts and as to the guilt of the accused no conviction under sections 323 and 325 of the Penal Code can be arrived at simply on the ground that enmity and a fight have been proved and that serious injuries have been caused in the fight.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Rohtak, dated the 10th April 1920, reversing that of the Magistrate, Second Class, Sonapat, District Rohtak, dated the 12th January 1920.

Lala Har Gopal, for the Petitioner.

Dr. Nand Lal, for the Respondent.

**JUDGMENT.**—The learned Magistrate in this case passed an order of discharge after recording a lengthy judgment in which he fully discussed the evidence for the prosecution. In that judgment he points out the various discrepancies, and holds that the evidence of the complainant is not to be trusted, and that the offence has not been proved.

The District Magistrate has set aside the order of discharge and has ordered the case to be sent to the Sub-Divisional Magistrate for trial. I presume that this means a re-trial. Apparently, all the evidence available has already been recorded, so a re-trial will simply be a second trial on the same evidence. The same discrepancies will again occur, unless the witnesses re-shape their evidence so as to avoid this.

The District Magistrate gives the following reasons for ordering a re-trial :

1. The medical evidence shows that Giani received six injuries including a broken skull.

2. There was previous enmity and on the day in question there was a fight between the two parties.

3. The District Magistrate does not think the discrepancies in the evidence or the reasons given by the Magistrate sufficient for a discharge.

As to No. 1 there is, of course, no doubt that Giani received injuries.

As to No. 2 also, no doubt there was enmity and a fight occurred. But unless the evidence is good enough to warrant a clear finding as to the facts and as to the guilt of the accused no conviction can be arrived at.

As to No. 3 the Magistrate's judgment is not, in my opinion, either manifestly perverse or foolish [See *Emperor v. Kiru* (1)], and I do not think that the mere fact that the District Magistrate places a different value on the discrepancies is a sufficient reason for a re-trial. The discrepancies pointed out are certainly not, in my opinion, such as can be regarded, as worthy of no consideration at all.

In my opinion, there is no good and sufficient ground for setting aside the order of discharge, and I accept this application and set aside the District Magistrate's order.

*Order set aside.*

(1) 11 Ind. Cas. 132; 10 P. R. 1911 Cr.; 24 P. W. R. 1911 Cr.; 12 Cr. L. J. 364; 205 P. L. R. 1911.

**PATNA HIGH COURT.**  
**CRIMINAL APPEAL No. 166 OF 1920.**  
October 2, 1920.

*Present:*—Mr. Justice Jwala Prasad and  
Mr. Justice Sultan Ahmed.

**MAKSUD ALI AND OTHERS—**  
**PETITIONERS—APPELLANTS**

*versus*

**EMPEROR—PROPOSITE PARTY.**

*Confession, retracted, value of—Value of confession as against co-accused—Criminal Procedure Code (Act V of 1898), ss. 164, 532—Confession, defective record of—Procedure*

Though, as a matter of law, a conviction may be based upon a retracted confession if the Court can come to the unhesitating conclusion that the confession is voluntary, yet, as a matter of prudence, no conviction should be based upon such a confession. Whatever value may be attached to the retracted confession of an accused person as against himself, the value to be attached to such a confession as against a co-accused is exceedingly weak. [p. 58, cols. 1 & 2.]

Where it does not appear from the record that the Magistrate recording a confession gave due

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warning to the accused, the confession is defective, but the defect can be cured under section 533 of the Criminal Procedure Code, if the Court on taking the evidence of the Magistrate is satisfied that the warning required by law was actually given. [p. 59, col. 1.]

Criminal appeal against the order, dated the 14th July 1920, of the Sessions Judge, Purnea.

Mr. G. O. Pal, for the Appellants.

The Government Pleader, for the Crown.

**JUDGMENT.**—The appellants, together with one Fidvi Hussain, were tried under section 302, Indian Penal Code, by the learned Sessions Judge of Purnea with the aid of two assessors.

The present appellants were convicted by the learned Sessions Judge under section 302, Indian Penal Code and sentenced to transportation for life. The trial was with the aid of two assessors, one of them holding that the charge under section 302 had not been established against the appellants while the other assessor was of opinion that the case had been satisfactorily proved against them.

The prosecution case may be stated as follows:—

The deceased Akbar Ali was the uncle of one of the prosecution witnesses, Tamizuddin, who lived jointly with the deceased at Mauza Rubia.

On the morning of the 19th of March Tamizuddin came to know that his uncle Akbar Ali was missing. He made a search for him but to no purpose. No trace of Akbar Ali was found. In the evening on the 19th Tamizuddin, therefore, lodged an information at the *Thana* as regards the disappearance of his uncle.

On his return from the *Thana* Tamizuddin met one of the witnesses in the case named Zulfat Hussain, and subsequently he also met another witness in the case named Sahar Ali and learnt from them that the appellant Chaharu was seen by them to have taken away his uncle Akbar Ali from the Baithaka of Zulfat Hussain on the preceding day, that is, the 18th March, in the night. Getting this information Tamizuddin sent for Chaharu but he was absent from his house. On the Sunday following he again sent for Chaharu at his house and questioned him as to the whereabouts of Akbar Ali. It is admitted on all hands

that Chaharu had been a very great friend of Akbar Ali. Chaharu first of all, the prosecution case is, denied any knowledge of the whereabouts of Akbar Ali, but being pressed hard he told Tamizuddin that he had taken Akbar Ali while he was strolling about his door up to a Bansbari when certain persons seized him and carried him away towards Karakbasti. Chaharu also mentioned that Faiz Bux, accused, had seen this incident and, therefore, Tamizuddin went and questioned him and Faiz Bux seems to have corroborated the statement of Chaharu. Tamizuddin getting this information from Chaharu and Faiz Bux that possibly his uncle has been killed by the residents of Karakbasti went and reported the matter at the *Thana* next day stating that his uncle was probably murdered by some of the residents of Karakbasti.

After lodging the information he returned home the same day. On the following Tuesday Amiruddin, one of the witnesses in the case, informed Tamizuddin that he had learnt from some fishermen that they had come across a dead body in the Kanohan Jhil while they were fishing there. Upon this information two constables and several villagers were sent to that Jhil and they kept guard over it for that night. Next morning the Daroga Havildar and others came to the Jhil to search for the dead body which was found and recognised as the dead body of Akbar Ali. The dead body was ultimately sent to Kisesganj for *post mortem* examination and after investigation the accused were sent up by the Police for trial. It is alleged that there had been several disputes between Akbar Ali and Fidvi Hussain accused, and that on Friday preceding that Thursday on the night of which Akbar Ali disappeared, there was a certain ceremony in the house of Fidvi Hussain in connection with which there was a feast. It was alleged by the prosecution that Akbar Ali having had disputes with Fidvi Hussain refused to go and persuaded others not to go to that feast. This is said to have annoyed Fidvi Hussain and he thereupon instigated the appellants to murder the deceased. Fidvi Hussain and the appellants, therefore, on these facts were sent up for trial as I have stated above, but Fidvi Hussain was acquitted.

The accused Faiz Bux was arrested on



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the 25th March. On the 27th he was taken to the Sub Divisional Officer, Kissanganj, and his confession was recorded. Before his confession was recorded it appears that he made a statement to the Police that a *dhoti* belonging to the deceased could be found in the Kanshan Jhil. Accused Jagdeo was arrested on the 15th April and his confession was recorded on the 17th April.

It also appears from the evidence that a pair of shoes belonging to the deceased was found in the house of the appellant Chaharu, and *chadar* belonging to the deceased was found in the house of the appellant Maksud Ali.

The conviction of Faiz Bux rests on his confession and the discovery of the articles. The conviction of Jagdeo rests entirely upon his confession. The conviction of Maksud Ali depends entirely upon the discovery of a *chadar* in his house coupled with the statement made by the confessing accused. The conviction of Chaharu is based upon the discovery of the pair of shoes belonging to the deceased in his house as well as the evidence of Zulfat and Sahar Ali who said that they last saw the deceased in his company on the 18th of March, the night of the occurrence.

The case of Faiz Bux will be dealt with after we have dealt with the cases of the other three appellants.

Before we deal with the case of these accused individually, it may be pointed that the confession of the accused persons were retracted in the Court of the Committing Magistrate.

The case of Jagdeo rests, as I have stated above, upon his retracted confession, and though, as a matter of law, a conviction may be based upon a retracted confession if the Court can come to the unhesitating conclusion that the confession is voluntary, yet, as a matter of prudence, as has been held in the case of *Safiruddeen*, *In re* (1), *Queen-Empress v. Amanullah* (2), *Queen-Empress v. Jadub Das* (3), *Queen-Empress v. Mahabir* (4), no conviction should be based upon such a retracted confession. That being the consistent practice

of all the Courts in India, we have absolutely no hesitation in refusing to act upon the retracted confession of this accused and convict him. We, therefore, direct that he be acquitted forthwith.

The conviction of accused Maksud is based upon the discovery of the *chadar* and the retracted confession of the co-accused, whatever value may be attached to the retracted confession of an accused, the value against the co-accused of such a retracted confession is exceedingly weak. In fact, cases have gone to the length of holding that no Court would be justified in acting upon such a confession. But even if that confession is considered, the corroboration which the discovery of the *chadar* affords is not such on which we can unhesitatingly come to the conclusion that the charge under section 302, Indian Penal Code, has been brought home to this accused. The result, therefore, is that this accused must also be acquitted.

The evidence against Chaharu consists of the discovery of the pair of shoes and the retracted confession of the co-accused. In his case, however, there is an additional fact that he was last seen by Zulfat and Sahar with the deceased. This additional fact, however, does not carry the case further than the case against accused Maksud whom we have just acquitted. Chaharu must, therefore, also be acquitted.

We now come to the case of Faiz Bux. Against him there is the retracted confession plus the discovery of certain articles. There can be no doubt that the Police found the cloth (*dhoti*) in the Jhil after statement was made by him. There can also be no doubt that he had mentioned in his confession that Chaharu had taken home the shoes of the deceased and Maksud had taken the *chadar* and they were found exactly as Faiz Bux had stated. These are circumstances which can undoubtedly afford corroboration of the confession and if this confession is admissible we think that effect should be given to it and the accused should be convicted. The learned Vakil appearing on behalf of the appellant has, however, contended that the irregularities committed by the learned Magistrate in recording the confession are such that the confession should not be admitted at all. The learned Sub-Divisional Officer, it appears from the record of the confession itself, started by putting a question to the accused,

(1) 2 C. L. R. 132.

(2) 21 W. R. Cr. 19; 12 B. L. R. App. 15.

(3) 27 C. 295; 4 C. W. N. 129; 14 Ind. Dec. (N. S.) 194.

(4) 18 A. 76; A. W. N. (1895) 227; 8 Ind. Dec. (N. S.) 757.



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"what do you want to say?" Then he got down the statement of the accused. In the end, he put the following question:—

*Question.*—Did you make this statement out of your own free-will. Did nobody tutor you?

*Answer.*—I am making these statements out of my own free-will.

*Question.*—When did the Police arrest you?

*Answer.*—Day before yesterday at Chatti.

Then follows the usual certificate. There is no record that he gave any warning to the accused before recording his confession. It has repeatedly been pointed out that confessions so recorded are extremely defective. Prejudice that may be caused to the accused persons by such a record cannot be exaggerated. This case itself affords an illustration. This accused will be convicted upon a confession which, on the face of it, however, does not show that any warning was given to the accused. Reference to cases of *Ragho Laya v. Emperor* (5) and *Jiubodhan Bhuian v. Emperor* (6) clearly shows that the Magistrate must satisfy himself that the confession which he is about to record is voluntary. Such a confession, in the absence of any other provision of law which would by extraneous evidence make it admissible, could not be admitted at all. But the Legislature has, however, provided under section 533, Criminal Procedure Code, that defects of this character can be remedied. Mr. Sharling has been examined in the case and he has pledged his oath that he gave due warning before recording the confession. He tells us that he told the accused that he was a Magistrate and any statement that he would make may go against him, that he should not make any statement which he did not think proper to make. In short, he gave the accused all the warning that the law required him to give. In the face of the oath that he has taken in this case, it is difficult for us to say that the nature of the confession was anything but voluntary and once we hold that the confession is voluntary we are bound to act upon it, and if we are bound to act upon it, we are bound

to convict the accused. If there had been no other circumstances to corroborate this confession we would have hesitated to convict the accused upon this confession. But when we find that there is evidence corroborating the statement of the accused in material particulars we are bound to accept the finding that the confession was voluntary. We accordingly uphold the conviction of accused Faiz Bux. The result is, that his appeal must be dismissed and the appeal of the other accused is allowed and they are directed to be released forthwith.

*Appeal partly allowed and partly dismissed.*

### LAHORE HIGH COURT. CRIMINAL REVISION No. 332 OF 1920.

July 17, 1920.

*Present:*—Mr. Chevis, Acting  
Chief Justice, and Mr. Justice Dundas.  
EMPEROR—APPELLANT

*versus*

PAKHAR SINGH—RESPONDENT.

*Northern India Canal and Drainage Act (VIII of 1873), s. 70 (4)—"Authorised distribution", meaning of—Distribution made by proprietary body of village, whether authorised.*

The words "authorised distribution" in clause (4) of section 70 of the Northern India Canal and Drainage Act, mean a distribution made by some authority. A distribution made simply by the proprietary body of a village cannot be regarded as an "authorised distribution", within the meaning of the clause. [p. 60, col. 2.]

Appeal from the order of the District Magistrate, Ludhiana, dated the 17th February 1920, reversing that of the Deputy Collector and Magistrate, Second Class, Jagraon, District Ludhiana, dated the 3rd October 1919.

Sardar Mehtab Singh, S. B. Public Prosecutor, for the Crown.

**JUDGMENT.**—This is an appeal by Government against an order of acquittal. The facts are as follows:—Pakhar Singh mortgaged 14 *lighas* of his land to Budh Singh. According to the arrangement, which is in force in the village to which the parties belong, every man is allowed to use the water from the canal for a period of one *ghari* (= 24 minutes) for every seven *bighas* of land. Pakhar Singh's

(5) 40 Ind. Cas. 721; 18 Cr. L. J. 721.

(6) 39 Ind. Cas. 991; (1917) Pat. 149; 1 P. L. W. 368; 18 Cr. L. J. 623.

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original turn lasted for six *gharis* but in consequence of his having mortgaged 14 *bighas* to Budh Singh he had to give up two *gharis* of his turn to Budh Singh. When Pakhar Singh had used the water for four *gharis*, Budh Singh wanted to take his turn, but Pakhar Singh would not agree and drove Budh Singh away. Pakhar Singh's defence is that he only mortgaged the land but did not give up his rights of irrigating the remaining land for the full period of six *gharis*. This defence was overruled by the Magistrate who held that the right to use the water went with the land, so the Magistrate convicted Pakhar Singh under section 70 (4) of the Canal and Drainage Act, VIII of 1873, and sentenced him to a fine of Rs. 10 or in default one week's rigorous imprisonment. Pakhar Singh appealed to the District Magistrate who agreed with the Magistrate on the merits, but held that the distribution of water with which Pakhar Singh interfered was not an "authorized distribution" within the meaning of section 70 (4).

We are informed by Sardar Mehtab Singh, who appears in this Court on behalf of the Crown, that the Canal Authorities distribute the water between the different villages, deciding how long each village is to have the use of the water, but that the internal distribution in any village is left to be settled by the proprietary body of that village. The question is, whether the distribution made by the villagers themselves is an authorised "distribution" within the meaning of section 70 (4). It is, as the learned District Magistrate describes it, a *waribandi*, based merely on mutual agreement between the persons who use the water. No doubt the canal authorities are quite content to leave it to the villagers to settle the internal distribution themselves, and so long as the arrangement works smoothly there is no need for the Canal Authorities to interfere. But still we find ourselves unable to hold that such distribution can be properly described as an "authorized distribution." By the words "authorized distribution" we understand, as does the District Magistrate, a distribution made by some authority, and we cannot regard a distribution made simply by the proprietary body as an

"authorized distribution" within the meaning of section 70 (4).

It has been argued before us that it is merely a case of the Revenue Authorities delegating their own authority to the villagers, and that the arrangements made by the villagers are confirmed by the Revenue Authorities inasmuch as the latter realise water-rates in accordance with the distribution and thereby ratify the arrangements made by the villagers. No doubt, the Canal Authorities are quite willing to accept the arrangements made by the villagers and to levy the water-rates accordingly, but the mere fact that they accept the distribution made by the villagers does not, in our opinion, make that distribution an "authorized distribution" within the meaning of the Act. It is urged that if the Canal Authorities are driven to make the internal distribution within each of the villages, this will entail a tremendous amount of extra trouble and labour, but we are unable to see why each village should not be called on to submit a scheme for its own distribution which can be sanctioned by the Canal Officer concerned. In other words, the villagers can still continue to make their own arrangements as before, but when the arrangement has once been made in the village it can be put up before a Canal Officer for sanction. When that officer has once sanctioned the proposed arrangement, the distribution, though actually arranged by the village proprietors, will become a distribution sanctioned by the Canal Officer and will then have his authority. In the present case we are unable to find that the distribution made by the villagers has ever been submitted to any Canal Officer for approval or sanction. All that appears is that, so long as no trouble arises, the Canal Authorities are content to leave it to the villagers to make their own arrangements. We think it would be straining the law to hold that a distribution made by the village proprietors is an "authorized distribution" within the meaning of section 70 (4). We, therefore, agree with the finding of the learned District Magistrate and dismiss the appeal.

*Appeal dismissed.*

ISRI PRASAD CHAWDHRI v. WARASAT HUSAIN.

## PATNA HIGH COURT.

CRIMINAL REVISION No 425 OF 1920.

October 2, 1920.

Present:—Mr. Justice Jwala Prasad.

ISRI PRASAD CHAWDHRI AND OTHERS,

1ST PARTY—PETITIONERS

versus

Shaikh WARASAT HUSAIN, 2ND

PARTY—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 145—  
proceedings initiated on Police report—Jurisdiction.*

A Magistrate does not act without jurisdiction when he initiates proceedings under section 145 of the Criminal Procedure Code upon a Police report that there is a dispute likely to cause a breach of the peace. [p. 61, col. 1.]

Mr. J. N. Maitra, for the Petitioners.

Mr. Sami, for the Opposite Party.

JUDGMENT.—This application was admitted on the ground that the Police report, upon which the proceeding of the Magistrate under section 145 of the Code of Criminal Procedure was drawn up, did not disclose any apprehension of a breach of the peace. In the proceeding the Magistrate has referred to the report of the Police Sub Inspector, dated the 2nd November 1919, and says that he is satisfied from that report that there is a dispute likely to cause a breach of the peace. This report is, therefore, the basis of the proceeding, and if that report does not afford any material for the Magistrate to be satisfied as to the existence of a "dispute likely to cause a breach of the peace", the Magistrate will have no jurisdiction for instituting the proceeding under section 145 of the Code. I entirely agree with the view expressed by Mr. Justice Sultan Ahmed in the case of *Ram Saroop Chaudhury v. Musammatt Darsano Koer* (1) that if the Police report upon which the proceeding of the Magistrate is founded, does not disclose any dispute likely to cause a breach of the peace, the proceeding and the order of the Magistrate as to possession under section 145 based upon it will be *ultra vires*. I also agree with the view that the previous report of any Police Officer not referred to by the Magistrate in the proceeding will be of no avail to show the existence of such a dispute. We have, therefore, to confine ourselves

(1) 58 Ind. Cas. 252; 1 P. L. T. 387; 21 Cr. L. J. 748.

to the Police report in the present case in order to see whether there was any material in that report to justify the Magistrate to say in the proceeding that he was satisfied of the existence of a dispute likely to cause a breach of the peace.

The enquiry of the Sub-Inspector was started upon the report of the *chawkidar* to the effect that the parties were collecting mobs to plough the land in dispute and that consequently there would certainly ensue a severe rioting. A copy of this report of the *chawkidar*, noted in the Station Diary, was incorporated in the report of the Sub-Inspector. The Sub-Inspector made enquiries and concluded his report by a request to the Magistrate to take preventive action in order to put a stop "to the apprehended breach of the peace." From this it would seem that the Sub-Inspector accepted the report of the *chawkidar* and assumed it to be correct for there was no meaning in his request for his recommendation to the Magistrate to take preventive action. The Magistrate also could not ignore the *chawkidar's* report of the parties collecting mobs and of there being a likelihood of a serious riot in consequence of the dispute between the parties, inasmuch as the *chawkidar's* information was made a part and parcel of the Sub-Inspector's report. It was not a separate independent previous report such as is referred to in the decision of Mr. Justice Sultan Ahmed in the aforesaid case relied upon by Mr. Haque. Apart from the *chawkidar's* report, there was material in the Sub-Inspector's report itself contained in the concluding passage already referred to, upon which the Magistrate was entitled to be satisfied in his mind of the existence of a dispute likely to cause a breach of the peace.

We cannot look into the sufficiency or otherwise of the material. If there was no material at all in the Police report, the Magistrate would have no jurisdiction to institute a proceeding under section 145 of the Code. But this is not the case here. The concluding words of the Police report may not be sufficient in the minds of others, yet they might be sufficient to satisfy the Magistrate. This would not oust the jurisdiction of the Magistrate to take action under section 145 of the Code.



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This has been made clear by the Full Bench decision of this Court in the case of *Parmessar Singh v. Kailaspati* (2) *Chamier, O. J.*, observes as follows:—

“For instance, at one time it was said that a High Court could examine the information that there was a likelihood of a breach of the peace, on which the Magistrate initiated the proceedings with a view to testing its reliability or sufficiency, but it is now well-settled that the sufficiency of the information is entirely a matter for the Magistrate and that the High Court will not require it to be furnished to him in any particular form.”

It will be dangerous to hold otherwise. The Magistrate being responsible for peace and order, his discretion to institute a proceeding under section 145 should be unfettered, provided he has before him material, however slight, for his being satisfied as to the existence of a dispute likely to cause a breach of the peace. The Legislature has purposely laid down in clause (1) of section 145 of the new Code that all that the Magistrate need be satisfied of, for the purpose of instituting proceeding under section 145, is “that a dispute likely to cause breach of the peace existed”. No longer the danger need now be imminent or immediate. No longer the Magistrate should wait till the matters precipitate into a riot ending, perhaps, in bloodshed, which only a timely action under section 145 can avoid or prevent. I, therefore, hold that upon the materials in the present case the Magistrate was entitled to start the proceeding under section 145 and his action was not without jurisdiction. I need not refer to the other authorities cited by Mr. Haque, for he conceded that the ruling already referred to [*Ram Saroop Chaudhury v. Musammatt Darsano Koer* (1)] is the strongest and approaches more nearly to the present case than others. True, as pointed out by Mr. Haque, witnesses during the enquiry do not speak of any danger to a breach of the peace. But there is no necessity of any evidence being recorded on the point, for, after the proceeding is legitimately started under clause (1) of the section, the enquiry under clause (4) is restricted the finding out

of the possession of the parties. For the same reason, the Magistrate is not required to record a finding on the existence of a danger to the breach of the peace in his final order under clause (4), declaring one of the disputing parties to be in possession of the propriety. The petitioners did not offer any evidence of there being no danger to the breach of the peace, nor did they, it is conceded, urge this point in argument before the Magistrate. They did not avail themselves of clause (5) of the section, under which it was open to them to show to the Magistrate that no such dispute, as was mentioned in the proceeding drawn up under clause (1), existed. The fact stated in the proceeding, that the Magistrate was satisfied as to the existence of dispute likely to cause a breach of the peace, remained, therefore, unchallenged at the trial. This shows that the Magistrate was right in the interpretation of the Police report and in his coming to the conclusion upon that report that a dispute likely to cause a breach of the peace existed. This also shows that the petitioners would not have raised this objection if the decision of the Magistrate was not adverse to them on the question of possession. I do not think they can be permitted to take this objection in revision unless there was a clear want of jurisdiction: *Vide Kulada Kinkar Roy v. Danesh Mir* (3). Their Lordships of the Calcutta High Court observe as follows:—

“But he contends that, as the Police report, upon which the Magistrate proceeded to draw up the initial order, was defective and did not set out sufficient facts to justify an apprehension of the breach of the peace, the whole proceedings were without jurisdiction, and it is the duty of this Court to set aside the final order. We have no hesitation in holding that we ought not to accede to this contention. Here the petitioner, in the language of Coleridge, J., in *Marsden v. Wattle* (4), chose to wait and take the chance of judgment in his favour, and he cannot now be heard to complain of excess of jurisdiction and to claim as matter of right that the proceedings should be quashed. The rule laid down by the Court of Appeal in

(3) 83 O. 33 at p. 46; 2 O. L. J. 271; 2 Cr. L. J. 670; 10 O. W. N. 257 (F. B.).

(4) (1854) 3 El. & Bl. 695 at p. 701; 2 Com. L. R. 1707; 23 L. J. Q. B. 263; 18 Jur. 578; 2 W. R. 455; 97 R. R. 711; 118 E. R. 1802.

(2) 35 Ind. Cas. 801; 1 P. L. J. 336 at p. 341; 1 P. L. W. 95, 17 Cr. L. J. 369; (1917) Pat. 1.

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*Harguharon v. Morgan* (5), namely, that where total absence of jurisdiction appears on the face of the proceedings in an inferior Court, the superior Court is bound to interfere, does not, even in its limited form, apply to the circumstances of this case, and so far as we are aware, has never been adopted by the Courts of this country."

I, therefore, overrule the principal objection, upon which this application was admitted and the Rule was issued.

Mr. Haque then contends that the order of the Magistrate is wrong, inasmuch as he has discarded the documentary evidence of the parties as being valueless, has omitted to consider the mortgage-bonds and other documents produced by the petitioners and exhibited in the case and has based his finding of possession in favour of the second party upon insufficient documentary evidence.

I have carefully considered this argument and at first it appeared to me to be plausible, but on a full consideration I am unable to agree with the contention of Mr. Haque. The Magistrate has considered the oral and documentary evidence adduced by the parties. No doubt, he thought the oral evidence adduced by the parties as valueless. He was, however, of opinion that the documentary evidence was overwhelming and conclusive as to the possession of the second party. He has detailed them *seriatim* A to B. It would appear that the road cess *jamabandi* filed by the proprietors including the family of Isri, the first party, and the decision of the *butwara* officer in the presence of first party whereby the names of the second party were recorded, conclusively proved their possession of the land. The recent *butwara* paper, particularly after contest, is under the law conclusive as to possession in a proceeding under section 145 of the Code. The name of the second party is further recorded in the Zemindar's *Sarishta* and rent receipts were granted by the first party, Isri Chawdhri and his co partners. The oral evidence supported by the aforesaid documents, though in itself valueless, might very well cause preponderance of evidence in favour of the second party. Therefore, the Magistrate's finding is unchallengeable when he says:—

"I am satisfied on the consideration of the

(5) (1894) 1 Q. B. 552; 63 L. J. Q. B. 474; 9 R. 02; 70 L. T. 152; 42 W. R. 306; 53 J. P. 495.

entire facts and evidences that the second party is in possession."

In face of this clear statement, it cannot, with any propriety be said that the Magistrate did not consider the documents on behalf of the first party. There is, therefore, no error of jurisdiction in the order passed by the Magistrate.

The application is accordingly rejected.

*Rule discharged.*

## UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 383 of 1920.

May 10, 1920.

Present:—Mr. Heald, A. J. C.

EMPEROR—PROSECUTOR

*versus*

NGA PO SIN—ACCUSED.

*Burma Towns Act (III of 1907), ss. 7 (1) (k), (l), 9 (2)—Headman, duties of, whether include conveyance of dak—Refusal to assist headman—Offence.*

It is no part of the ordinary duty of a ward headman to provide coolies to take out a Deputy Commissioner's letters from his headquarters. [p. 64, col. 1.]

Therefore, where a person residing within a ward is requested by the headman to convey letters to the Deputy Commissioner's camp and he fails to do so, he is not guilty of an offence under section 9 (2) of the Burma Towns Act. [p. 64, col. 1.]

JUDGMENT.—The headman of Mingyaunggon ward in Bhamo Town was ordered by the Sub-Divisional Officer of Bhamo to provide a cooly to take letters to the Deputy Commissioner, who was on tour. The ward headman ordered one Po Sin, who is a fisherman, to go, but Po Sin failed to go, because, as he says, he was footsore and his daughter was ill. The headman complained to the Sub-Divisional Magistrate, who transferred the complaint to the Additional Township Magistrate "for trial under section 9 (2) of the Burma Towns Act." The Magistrate tried Po Sin and convicted him under that section, fining him Rs. 5.

The District Magistrate, who is of course also Deputy Commissioner, called for the record in revision, and reported it to this Court for a ruling as to whether or not Po Sin was rightly convicted.

Section 9 of the Towns Act says that

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every person residing in a ward shall, on the requisition of the headman, be bound to assist him in the execution of his public duties and that if he refuses or neglects to comply with any lawful requisition of the headman he shall, in the absence of reasonable excuse, be liable to fine.

Section 7 specifies the public duties of a headman and the District Magistrate suggests that the duty "generally to assist all officers of the Government in the execution of their public duties," may possibly cover the present case.

There seems to be no ruling in either Upper or Lower Burma exactly on the point.

The case of *Queen Empress v. Nga Kauk* (1) was in some respects similar, but the wording of the clause on which the decision was based was different.

The meaning of clause (n) of section 8 of the Village Act, which corresponds to the clause (l) of section 7 of the Towns Act to which the District Magistrate refers, was considered in the case of *King Emperor v. Lu Pe* (2), but the circumstances of that case were different and the ruling is of little, if any, help towards the decision of the point raised in the present case.

It seems to me that it is impossible to lay down any general rule and that each case must be decided on its own merits.

It is possible to conceive circumstances under which the refusal of a villager or resident of a ward to take a message from the headman to the Deputy Commissioner would be punishable under section 9 (2) of the Towns Act, but it seems to me that it is no part of the ordinary duty of a ward headman to provide coolies to take out a Deputy Commissioner's letters from his head-quarters and that, in the absence of proof of any emergency, the Sub Divisional Officer's requisition calling on the headman to perform that duty was not warranted by the provisions of section 7 of the Towns Act.

The clause (k) of section 7 to which the Township Magistrate referred, was obviously inapplicable. It says merely that it is the duty of a ward headman to collect and furnish guides, carriage, and means of transport for troops or Police and provides that payment for those services must be made in advance. In the present

case there is no suggestion that any payment was ever tendered, and the services required were not those mentioned in that clause.

I am of opinion that the conviction in this case was mistaken, and, as the case has been reported by the District Magistrate, I set aside the conviction and sentence and direct that the accused be acquitted and that the fine which has been paid be refunded.

*Conviction set aside.*

### MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 253 of 1920.

CRIMINAL REVISION PETITION No. 215

OF 1920.

October 8, 1920.

*Present:*—Justice Sir Abdur Rahim, Kt.

*In re* PONNUSAMI PILLAI—ACCUSED—  
PETITIONER.

*Madras Regulation (II of 1816), s. 10—Village Magistrate, powers of—Confinement in front of temple, legality of.*

Under section 10 of Madras Regulation II of 1816 a Village Magistrate has power to enforce a sentence of confinement only in the village choultry and nowhere else. Confinement of an accused person in front of a temple is illegal.

Petition, under sections 107 of the Government of India Act, and clause 27 of the Letters Patent, praying the High Court to revise the judgment of the Court of the Village Magistrate, Vellai Adambar, in C. C. No. 1 of 1919, dated the 31st December 1919.

Mr. R. Ganapathi Aiyar, for the Petitioner.

Mr. V. L. Ethiraj, for the Public Prosecutor, for the Crown.

ORDER.—Section 10 of Regulation II of 1816 authorises the Village Magistrate to sentence a person guilty of certain offences of a trivial nature to confinement in the village choultry for a period not exceeding 12 hours. In this case the accused was sentenced and placed in confinement in front of a temple which is said to be a public place in the village of Vellayathambur. The Village Magistrate has power only to enforce the sentence of confinement in the village choultry and nowhere else. [See *Kumarasami Ohetty, In re* (1)]. The sentence is, therefore, set aside.

M.C.P.

*Order set aside.*

(1) 1 Weir 524.

(1) U. B. R. (1892-96) 1, p. 321.

(2) 4 L. B. R. 150; 7 Cr. L. J. 450.



MIYAN KHAN v. SARFARAZ KHAN.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1436 OF 1917.

June 21, 1920.

Present :—Mr. Justice Walsh and

Mr. Justice Sulaiman.

MIYAN KHAN—PLAINTIFF—

APPELLANT

versus

SARFARAZ KHAN AND OTHERS—

DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. II, r. 2—  
Suit to recover immoveable property—Subsequent suit  
for mesne profits, whether barred.*

Inasmuch as a claim for mesne profits is based on a cause of action distinct from a claim for the recovery of immoveable property, Order II, rule 2 of the Civil Procedure Code will not operate to bar a suit for mesne profits brought subsequently to a suit for possession. [p. 68, col. 1.]

Second appeal against the decree of the District Judge, Badaun, dated the 20th May 1917.

Mr. Lakshmi Narain, for the Appellant.

## JUDGMENT.

WALSH, J.—On the authority of the case of *Nandan Singh v. Ganga Parshad* (1) and the case of *Ponnammal v. Ramamirda Aiyar* (2), I think that we have no alternative but to restore the decree of the first Court, allowing the appeal with costs here and hitherto.

SULAIMAN, J.—This is an appeal arising out of a suit for mesne profits. It appears that on the 17th of August 1878 one *Musammal Mohan Kuér* who was only a limited owner, made a mortgage of the property for which mesne profits are now claimed in favour of the defendants. It is now admitted that on the death of *Mohan Kuér*, *Piarey Lal*, her daughter's son, succeeded to the full proprietary interest in the property, the mortgage being good only for her lifetime. On the 30th of September 1915, *Piarey Lal* sold his rights and interest to the plaintiff. After this the plaintiff brought a suit for recovery of possession of the property covered by the sale deed without claiming any mesne profits. The exact date on which the suit was brought is not apparent from the record. On the 16th of August 1916 a decree for recovery of possession was passed

in favour of the plaintiff. After this decree, the plaintiff brought a suit for recovery of mesne profits for the year 1323 *Fasli*, on the 16th of September 1916. I may note that the year 1323 *Fasli* begins from a period previous to the execution of the sale-deed and extends right up to the 11th of September 1916, that is to say, sometime after the passing of the decree for possession. The Court of first instance decreed the suit. The learned District Judge dismissed the suit, holding that the present claim was barred by Order II, rule 2 of the Code of Civil Procedure. The plaintiff comes up in second appeal to this Court, and the case has been referred by a Single Judge of this Court to a Bench of two Judges. On behalf of the plaintiff it is contended that a claim for mesne profits arises out of quite an independent and distinct cause of action from that on the basis of which a suit for recovery of possession is brought, and that, therefore, the present claim was in no way barred by the provisions of Order II, rule 2 of the Code of Civil Procedure. In the old Act, VIII of 1859, in section 10 there was an express provision under which a claim for mesne profits was deemed to be based on a distinct and separate cause of action from a claim for recovery of possession. Act XIV of 1882 apparently introduced an alteration. The words of the present Act, V of 1908, Order II, rule 4, are similar to section 44 of Act XIV of 1882, and are as follows :—  
“No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, except claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof.” On behalf of the appellant it is contended that as Order II, rule 4 is worded it is quite clear that the Code contemplates that the claim for mesne profits is based on quite a distinct cause of action from the claim for the recovery of immoveable property. If the question had been *res integra*, I might have had some difficulty in accepting this interpretation of the rule, but the Full Bench case of *Ponnammal v. Ramamirda Aiyar* (2) has interpreted this rule in the way contended for by the learned Vakíl for the appellant; and in the Full Bench case of *Nandan Singh v. Ganga Parshad* (1)

(1) 20 Ind Cas 892; 35 A. 512; 11 A. L. J. 786.

(2) 27 Ind Cas. 679; 36 M. 89; 7 M. L. T. 125, 28 M. L. J. 127; (1915) M. W. N. 130.

## ALAJI ISEEK SABIB v. VENGU CHETTY.

an opinion has been expressed which to some extent supports his contention. In this latter case it was distinctly held that a claim for arrears of rent is not on the same cause of action as a claim for possession of the property. Now, a claim for mesne profits and a claim for arrears of rent stand on the same footing so far as Order II, rule 4, is concerned. I, therefore, think that the view expressed by the Full Bench is binding on this Court. The claim is not barred by Order II, rule 2 of the Code of Civil Procedure; but the plaintiff is entitled to mesne profits only from the date of his sale-deed, dated the 30th of September 1915, up to the end of the *Fasli* year. This amount had been granted to him by the Court of first instance. I would, therefore, restore the decree of the first Court.

By THE COURT.—The order of the Court is that the decree of the lower Appellate Court is set aside and the decree of the Court of first instance is restored with costs in all Courts.

*Order set aside.*

## MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 250 OF 1919.

August 18, 1920.

Present:—Justice Sir William Ayling, Kt.,  
and Mr. Justice Odgers.

ALAJI ISEEK SAHIB

AND ANOTHER—DEFENDANTS NOS. 2 AND 3—

APPELLANTS

*versus*

VENGU CHETTY AND OTHERS—PLAINTIFF

AND DEFENDANTS NOS. 1, 4, 5, 6 AND 7—

RESPONDENTS.

*Civil Procedure Code (Act XIV of 1882), s. 315—  
Civil Procedure Code (Act V of 1908), O. XXI, r. 93  
—Auction-sale held under Act of 1882—Declaration of  
absence of saleable interest in judgment-debtor after  
enactment of new Code—Right of purchaser to refund  
of purchase-money.*

A purchaser at a Court sale held while Act XIV of 1882 was in force has the right to claim refund of the purchase-money by suit where it is afterwards declared that the judgment-debtor had no saleable interest in the property even though the

declaration is made after the enactment of the new Civil Procedure Code of 1908. [p. 67, col. 2.]

*Mohideen Ibrahim v. Mahamed Meera Levvai*, 17 Ind. Cas. 437; 23 M. L. J. 487; 12 M. L. T. 43; (1912) M. W. N. 1130, *Tirumalaisami Naidu v. Subramaniam Chettiar*, 45 Ind. Cas. 109; 40 M. 1009 and *Abbott v. Minister of Lands*, (1895) A. C. 425; 64 L. J. P. C. 167; 11 R. 466; 72 L. T. 402, distinguished.

*Colonial Sugar Refining Co. v. Irving*, (1905) A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. B. 513, applied.

Appeal against the order of the District Court, North Arcot, in Appeal Suit No. 765 of 1917, preferred against the decree of the Court of the District Munsif, Chittur, in Original Suit No. 547 of 1916.

FACTS appear from the judgment.

Mr. L. A. Govindaragava Aiyar, for the Appellants.—The plaintiff's suit is not sustainable having regard to the provisions of Order XXI, rule 93, Civil Procedure Code. Though the sale was held while the Civil Procedure Code of 1882 was in force the judicial declaration that the judgment-debtor had no saleable interest in the property sold was made only after the passing of the new Code. The plaintiff, the Court auction-purchaser, cannot claim the benefit of section 315 of the old Code which gave him the right to restitution of the purchase-money. Order XXI, rule 93 of the new Code, which corresponds to the old section 315, does not prescribe such remedy for the auction-purchaser unless, on his application to set aside the sale under rule 91. See *Mohideen Ibrahim v. Mahamed Meera Levvai* (1) and *Tirumalaisami Naidu v. Subramaniam Chettiar* (2). Also *Abbott v. Minister of Lands* (3).

Mr. S. T. Srinivasagopalachari, for the Respondents.—The cases relied on by the other side are applicable only to sales held under the new Code. The statutory right to a refund of the purchase money in the eventuality of the judgment-debtor being found to have no saleable interest was acquired by the purchaser the moment the sale was held under section 315. The sale, which is the potent factor, was held under the old Code. The right of the purchaser cannot be divested merely because the judgment-debtor's absence of interest was

(1) 17 Ind. Cas. 437; 23 M. L. J. 487; 12 M. L. T. 43; (1912) M. W. N. 1130.

(2) 45 Ind. Cas. 109; 40 M. 1009.

(3) (1895) A. C. 425; 64 L. J. P. C. 167; 11 R. 466; 72 L. T. 402.

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declared after the passing of the new Code. The purchaser would not have bid at the auction if he had not the statutory safeguard provided by section 315.

**JUDGMENT.**—The facts antecedent to this case are thus summarised by the learned District Judge: "The first defendant's late husband obtained a decree against two persons, Manisami and Arumugam, and attached certain property and brought it to sale on 20th August 1906. The plaintiff purchased certain items and paid the money which was applied to the decree in rateable distributions. A third party then sued the plaintiff and first defendant's late husband. The suit was dismissed in 1907, but the first appeal was allowed in 1910 and the second appeal confirmed this in 1912. It was declared that the judgment debtors had no saleable interest and the sale was, therefore, set aside.

On this, plaintiff sued to recover from first defendant, as the representative of her late husband, the portion of the sale price paid by him, which had been paid over to her husband in rateable distribution. The District Munsif dismissed the suit as not maintainable. The District Judge, on appeal held that the suit was maintainable and remanded it for disposal on its merits. Against this the present appeal is preferred.

The sole question is, whether the suit will lie. Mr. Govindaragava Aiyar for appellants draws our attention to the difference between section 315 of the old Civil Procedure Code and the corresponding provision of the present Code, (Order XXI, rule 93) and argues that under the present Code where the judgment-debtor is found to have no saleable interest in the property sold, the auction purchaser has no remedy at all except in cases where he himself applies under rule 91 within the prescribed time to have the sale set aside. As authority he relies on the judgment of Napier, J., in *Mohideen Ibrahim v. Mahamed Meera Levasi* (1) and of a later Bench of this Court in *Tirumalaisami Naidu v. Subramaniam Chettiar* (2). If the question has to be decided solely with reference to the provisions of the present Code these cases are certainly authority for Mr. Govindaragava Aiyar's contention, though we desire to guard ourselves against expressing concurrence (as at present advised) in the

conclusions therein arrived at. It is, however, unnecessary for us now to decide the somewhat difficult question of the position of the auction-purchaser in such cases, because there is an important differentiating factor in the case before us. The sale with which we are concerned was held in 1906 under the old Code and that Code declared that, "when it is found that the judgment-debtor has no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase-money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid." (Section 315). Plaintiff in the present case would undeniably have been entitled to the right thus declared if the old Code had remained in force and, in our opinion, he is not deprived of its benefit by reason of the supersession of that Code by the present enactment. The sale was held under the Civil Procedure Code of which the section above quoted was a part: this was in effect one of the conditions of sale and a most important one at that. As already stated, we do not propose to discuss the state of affairs under the present Code. But it cannot be denied that the right of an auction purchaser to recover back his money where it turns out that the judgment-debtor had no interest in the property is a very potent factor in determining the amount a reasonable man would bid. The absence of such a remedy and the consequent necessity of guarding himself against the risk of total loss of his money must tend to make a prudent man limit his bidding to something materially below what he may estimate to be the market value of the property. In the present case plaintiff must be taken to have made his bid in reliance on the guarantee of remedy in a certain eventuality given him by section 315 of the Code then in force and he is, in our opinion, both equitably and legally entitled to the benefit of that provision in spite of the fact that the Legislature did not choose to reproduce it in the present Code, which governs the sales that take place after its enactment. It is true that the absence of saleable interest in the judgment debtor was not declared till 1910, but this is immaterial,



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He is none-the-less entitled to the benefit of the express declaration of the law under which he purchased, that in a certain eventuality he should have his remedy. We think the decision of their Lordships of the Privy Council in *Colonial Sugar Refining Co. v. Irving* (4) is very much in point in this connection. To quote the words of Lord Macnaghten this is more than a matter of procedure, it touches a right in existence at the time of the passing of the Act. We do not think the case relied on by appellants' Vakil, *Abbott v. Minister of Lands* (3), has any bearing on the question. That case turned on the right to exercise an option, which was not in fact exercised until the law conferring it was abrogated. The right to recover in a certain eventuality claimed in the present case was a right which accrued the moment plaintiff paid the sale price.

The conclusion we have taken on this point is identical with that arrived at by the learned Judges in *Tirumalaisami Naidu v. Subramaniam Chettiar* (2).

We dismiss the appeal with costs of first respondent.

*Appeal dismissed.*

M. C. P.

(4) (1905) A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513.

# ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1174 OF 1917.

July 5, 1920

Present:—Mr. Justice Piggott and  
Mr. Justice Gokul Prasad.

GANGA PRASAD AND ANOTHER—  
DEFENDANTS—APPELLANTS  
versus

RAM SARUP AND OTHERS—PLAINTIFFS AND  
DEFENDANTS—RESPONDENT.

*Hindu Law—Joint family—Father, as manager, right of, to alienate family property—Necessity—Burden of proof.*

A father, as manager of a joint Hindu family, has not a general right to dispose of joint family property by way of sale or mortgage. Even though the money raised is used by him in some business by which he expects to make more money. Where a

mortgage of family property by a father is sought to be enforced, the burden lies heavily on the person seeking to enforce it, of proving the existence of legal necessity for the transaction [p. 69, cols. 1 & 2.]

Second appeal against the decree of the District Judge, Cawnpore, dated the 23rd May 1917.

Dr. K. N. Katiu, for the Appellants.

Mr. Damodar Das, for the Respondents.

JUDGMENT.—This was a suit on a mortgage of the 2nd of May 1909. The mortgagors were two brothers, Newazi and Dhanna. The suit is brought by the mortgagee against these two, along with Ganga Prasad and Basant, the minor sons of Dhanna. The property alienated was a share in an ancestral house, of which share the present owners are admittedly the four defendants. The object of the suit, of course, is to bind the interest of the two minor defendants in the property sought to be brought to sale. The mortgage-debt is stated in the deed in suit at Rs. 500. It was made up as follows:—Rs. 269 was already due to the mortgagee upon a series of loans advanced to the mortgagors on their personal security; a sum of Rs. 231 was to be paid over at registration. The minors filed a separate written statement raising various defenses. We are only concerned at present with the fact that they challenged the plaintiff to prove that the sum of Rs. 231 was actually advanced and, secondly, that, if advanced, it was borrowed by the mortgagors for any such legal necessity as would entitle them to charge the ancestral joint family property.

The Court of first instance found for the plaintiff on all issues so far as these concerned the sum of Rs. 269, and the appeal now before us does not challenge the right of the plaintiff to obtain a decree for sale in respect of this sum with interest.

The Trial Court, however, upheld the defence of the minors in respect of the item of Rs. 231 to its full extent, holding that it was not proved that this cash advance had ever been made by the mortgagee to the mortgagors. On this finding, of course, the question of legal necessity for this loan did not arise. In appeal the learned District Judge held that Rs. 231 had, in fact, been paid over by the mortgagee to the mortgagors at the time of registration, though not in the presence of the Sub-Registrar. This is a find-

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ing effect by which we are bound and which is not challenged in the memorandum of appeal before us. The question remains, whether this sum of Rs. 231 represents a debt incurred for legal necessity. On one point which has only incidentally been taken by the learned District Judge, the appellants are certainly right. It appears that of the two appellants in this Court, namely, the two minor sons of Dhanna, Ganga Prasad, the elder, was in existence at the time when the mortgage in suit was contracted while Basant, the younger, was born subsequently. The learned District Judge has remarked incidentally that, under these circumstances, Basant, at any rate, is not entitled to challenge the alienation. On the principles laid down by a Bench of this Court in *Tulshi Ram v. Babu Lal* (1) it is sufficient that the elder of the two minors, Ganga Prasad, was in existence at the time of the alienation to enable this defense to be set up on behalf of his younger brother as well as of himself. There remains the question whether the learned District Judge's finding that there was legal necessity for this loan of Rs. 231 is a correct finding, or is one with which we can or should interfere in second appeal. The question of legal necessity is usually a mixed question of fact and of law. The evidence on which the learned District Judge has seen fit to proceed is undoubtedly slender, but we are prepared to accept so much of his decision as can be treated as a finding of fact. It appears then that, at the time when this transaction was entered into, Newazi and Dhanna were carrying on a business as contractors for the Saddle and Harness Factory at Cawnpore. They borrowed this sum of Rs. 231 for the purpose of this business. There the evidence stops, and the learned District Judge himself has recorded no finding which goes beyond this. He seems to be of opinion that a father, as manager of a joint Hindu family, has a general right to dispose of joint family property by way of sale or mortgage, provided that the money thus raised is used by him in some business by which he expects to earn more money. In our opinion this is not a correct statement of the powers of the manager of a joint Hindu family, and a heavier burden of proof lay upon the plaintiff mortgagee in this case

before he could succeed as regards this loan of Rs. 231. We are content to refer to what is practically the latest authority on this point, the decision of their Lordships of the Privy Council in *Sahu Ram Chandra v. Bhup Singh* (2). We refer particularly to the remarks regarding the onus of proof in such a suit as the present, which are to be found at page 445 of the report. In our opinion this appeal must succeed.

We set aside the decree of the lower Appellate Court and restore that of the Court of first instance so far as these present appellants are concerned. The appellants in this Court will be entitled to their costs in this and in the lower Appellate Court. The costs in this Court will include fees on the higher scale. We formally enlarge the time for payment to three (3) months from the date of this decree.

*Decree set aside.*

(2) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 693; 1 P. L. W. 557; 15 A. L. J. 447; 19 Bom. L. R. 493; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 433; 22 M. L. T. 24; 6 L. W. 213; 44 I. A. 126 (P. C.).

### MADRAS HIGH COURT.

SECOND CIVIL APPEAL No 1791 of 1919.

August 12, 1920.

*Present*:—Mr. Justice Sadasiva Aiyar  
and Mr. Justice Napier.

EMPIRE OF INDIA LIFE ASSURANCE  
COMPANY LIMITED, BOMBAY—

DEFENDANT No. 1—APPELLANT

*versus*

S. NANU AIYAR—PLAINTIFF—

RESPONDENT.

*Life Assurance Company—Agent, right of, to receive commission on premia paid subsequent to his dismissal.*

In the absence of a definite agreement to that effect, an Agent of a Life Assurance Company is not entitled, on the termination of his services, to commission on subsequent premia paid by policy-holders in respect of policies secured by him, as his right to receive commission on such policies lapses on his dismissal. [p. 74, cols. 1 & 2.]

(1) 10 Ind. Cas. 203; 8 A. L. J. 733; 33 A. 654.

EMPIRE OF INDIA LIFE ASSURANCE CO. LTD., BOMBAY v. NANU AIYAR.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Vellore, in Appeal Suit No. 2 of 1919, preferred against the decree of the Court of the District Munsif, Vellore, in Original Suit No. 307 of 1917.

FACTS appear from the judgment.

Mr. A. Krishnaswami Aiyar, (with him Mr. M. Patanjali Sastri), for the Appellant.—The lower Court erred in allowing commission to the respondent on premia paid by policy-holders after the termination of his agency. The respondent does not base his suit as for damages for wrongful dismissal. The lower Court has ignored the book 'Instructions to Agents,' Exhibit T, which is part of the contract between the parties. Article 29 of that book clearly sets forth that the commission was payable only so long as the premiums were paid and the agent continued to represent the company. Even if there was no such contract, the agent who is paid commission for services to be rendered will not be entitled to it when he is no longer in a position to render any service to the company. See *Albert Life Insurance Arbitration, Lewin's case* (1). Generally, the services for which an agent is paid by way of commission are more substantial than the introduction of policy-holders. They are in the Book of Instructions, *vide* Articles 31 and 41, and it is only reasonable that the commission lapses on the termination of his agency.

Mr. T. A. Venkatarama Sastri, for the Respondent.—Generally, the commission is for the agent's introducing business to the company. He is entitled to commission on whatever is paid by customers whom he introduced. In *Bilbee v. Hass & Co.* (2), *Salomon v. Brownfield* (3) and *Gerahty v. Baines* (4), the commission agent was allowed commission even after his severance from the principal.

#### JUDGMENT.

NAPIER, J.—This second appeal arises out of a suit by one S. Nannu Iyer against the Empire of India Life Assurance Company of Bombay. The plaintiff alleges that he was once an agent of the company and claims a declaration and an account in respect

of all premia paid by the policy holders in respect of all policies procured by the plaintiff after the termination of the plaintiff's services as agent. The plaintiff does not allege that he was wrongfully dismissed or claim damages for wrongful dismissal. The lower Appellate Court has found that he was an agent employed by the company and was properly dismissed for misconduct but, on the terms of his engagement, as found by itself, has held that the plaintiff is entitled to premia on the original policies obtained through his efforts for three years prior to the suit. I accept the finding as to the agency, but the important question remains whether the lower Appellate Court has based its finding as to the terms of engagement on proper materials. The plaintiff alleged that he was engaged on certain terms, but in his plaint did not state whether his engagement was in writing or oral. In his evidence he endeavoured to establish that he was engaged on the terms of a letter, which is Exhibit F in the case, his evidence being "the terms written to me by Venkatachela Iyer (that is the chief agent) are mentioned in Exhibit F" The lower Appellate Court has found that Exhibit F was not addressed to him nor any letter in those terms, and as Exhibit F is not a letter but a circular and as he has proved no other letter there can be no doubt that this finding is correct. But the lower Appellate Court has held that he was engaged on the terms set out in a letter, Exhibit S. Now, Exhibit S is not a letter addressed to the plaintiff, but a letter addressed by the Chief Agent for Madras to the Company at Bombay in 1913 and is his report about the plaintiff after the date of his dismissal. In that letter the agent states that the plaintiff had been working under him until the 30th March 1912 under the terms of 10 per cent. commission on the first year's premia, 5 per cent. on renewals plus a bonus of one per cent. on new collections up to Rs. 1,000, 2 per cent. up to Rs. 3,000 and 3 per cent. above Rs. 3,000 and he states that he gave one copy of the book of "Instructions to Agents" to the plaintiff. The admissions by this servant of the company must, of course, be taken altogether and the statement that the sub-agent was supplied with a copy of the "Instructions to Agents" is part of the admission as to the terms of percentage,

(1) 15 Solicitor's Journal 825.

(2) (1889) 5 T. L. R. 677.

(3) (1896) 12 T. L. R. 239.

(4) (1908) 19 T. L. R. 554.



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This "Instructions to Agents" is Exhibit T in the case. This has been ignored by the Subordinate Judge, whereas it should have been treated as part of the contract.

The "Instructions to Agents" sets out the terms of commission and bonus commission and, as the evidence shows those rates have been altered, the contract is varied to that extent, but other terms undoubtedly apply. Article 29 which is in that part of the book dealing with commission is as follows:—"The commission is allowed so long as the premia are paid and the agent continues to represent the company." This clause was, in my opinion, part of the contract and this being so the claim must fail *in toto*.

Even if Article 29 was not incorporated in the contract, I should be of the same opinion. This claim by an agent or sub-agent to be entitled to renewal premia after his connection with the company was severed, was a subject of a suit, O. S. No. 100 of 1899 on the Original Side of the High Court. In that suit the plaintiff alleged that he was wrongfully dismissed and that he was entitled to receive the future premia. Boddam, J., held that he was properly dismissed for improper and fraudulent conduct and dismissed the suit. The case went on appeal (O. S. Appeal No. 42 of 1899) before Shephard and Davies, JJ., and their Lordships held that, in the absence of any specific agreement for such payment, the agreement must be treated as binding only as long as the agency lasted.

Another suit was filed on the Original Side of the High Court in 1903, O. S. No. 178 of 1903. In that suit the plaintiffs, who were the head Madras Agents, had their agreement terminated by notice and not for misconduct. They claimed that they were entitled to commission on renewal premia as long as any policy remained in force which had been obtained by them or their sub agents. The case was tried by Moore, J., who found that the agreement in that case was founded on Exhibits O and P, two Instruction Books, and he states that nothing is said in either of them as to whether the commission is to continue to be paid after the termination of the agency or not. The learned Judge held that, as there was no claim for damages as com-

pensation for wrongful termination of the agency, the claim could not be sustained. An appeal was filed from that decision but withdrawn.

The claim has lately been renewed in a suit on the Small Cause Side of the District Munsif's Court of Cuddapah in Small Cause Suit No. 991 of 1915, which was brought before a Bench of this Court in Civil Revision Petition No. 933 of 1916. That suit was against the defendants in this suit by another dismissed agent. There, too, the plaintiff did not claim that he was wrongfully dismissed. The difference between that suit and this is, that the Court found that the terms of the contract were in a letter, which was Exhibit A in that case, and which contains the terms set out in Exhibit F in this case, and it does not appear that the book of "Instructions to Agents" was sent to the plaintiff. Anyhow, it is not found to have been part of the terms of the contract. The District Munsif dismissed the suit relying upon a statement of law in Halsbury's Laws of England, Volume I, page 185, the judgment of the Bench of this Court in O. S. Appeal No. 42 of 1899 and the judgment of Mr. Justice Moore in O. S. No. 178 of 1903. The Bench has distinguished those cases on grounds which, with all respect, I am unable to appreciate. The decision presents one difficulty in that there is a seeming contradiction on a finding of fact. The learned Judges say that the "respondent did not contend that any part of petitioner's claim related to renewals or to anything except the payments of ordinary premia on the original policies obtained through his efforts." The defendant being the same as in this suit it is easy to ascertain what is meant by the word "renewals" in respect of which the petitioner is stated not to be claiming. As a matter of fact, subsequent premia on original policies are renewals and are called renewals in the books of this company, and are known as renewals in ordinary insurance parlance. When, therefore, the Bench distinguishes the other Madras cases on the ground that they deal with the agent's right to commission on payments made in consequence of renewals they are, with all respect, making a distinction that does not exist, for the claim in the Madras cases,

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was exactly the same as the claim in that case with which they were dealing, namely, subsequent premia on original policies which are in fact renewals.

The only insurance case to which our attention has been called is a decision of Lord Cairns, L. C., reported in *Albert Life Insurance Arbitration, Lewin's case* (1). In that case the Directors of the Albert Company entered into an agreement with one Mr. Lewin that he should act as an agent for the Insurance Company on a salary of £ 250 with a commission of 10 per cent. on the renewal premia on all policies effected through him and in case of his retirement from his agency a commission of 5 per cent. for the remainder of his life on the renewal premia on all policies which had been effected through him. The Company went into liquidation and Mr. Lewin claimed to rank as a creditor in respect of the premia, which he would have earned after the close of his services, basing his claim on the last clause above referred to. The Lord Chancellor held that it was entirely *ultra vires* of the Directors to provide for the payment of commission on renewal in case of retirement of Mr. Lewin from the agency. In that case there was salary as well as commission; but his Lordship thought that it was unreasonable and improper to agree to pay commission after the retirement of the agent from his service just as it would have been to agree to pay salary. Both salary and commission must be for services rendered and not for services which are not rendered. It is to be noted that it was not suggested in this case that the general language that the plaintiff was to have a commission of 10 per cent. on the renewal premia on all policies effected through him would entitle him to recover commission on premia after retirement but that there was a specific contract to that effect. This case is of value for the proposition that a specific clause being so unreasonable the absence of a specific clause either allowing or refusing in terms cannot lead to the inference that such a right was contemplated or implied in the agreement. With reference to his Lordship's observation that commission is for services rendered, it is to be noted that Exhibit T shows a class of services required of agents in respect of renewals. Article

31 of "Instructions to Agents" gives directions to the agent for action to be taken when a policy holder desires to have his policy altered in any particular. Article 41 deals with the duty of an agent on the death of any person assured in his agency and those duties are of a distinctly exacting nature. One very important duty of an agent will always be to impress upon policy holders the value of keeping up their premia and this is especially a work necessary for the earning of the premia which, in the view taken by the Bench in the case under consideration, would have to be done by some other agent while the original agent or his executors or his trustee in bankruptcy drew the proceeds for doing nothing at all. So far for insurance cases.

Mr T. R. Venkatarama Sastri in the course of his able argument invited our attention to a series of cases on commission in respect of other business. The first case is *Bilbee v. Hassé & Co.* (2), a decision of Lopes, L. J., sitting at *Nisi Prius*. In that case both the parties were butter merchants the plaintiff having a large and extended business and the defendants only a small business. The defendants agreed with the plaintiff to do business with persons introduced by him and, "as regards your commission you have agreed to allow  $1\frac{1}{2}$  per cent. upon all orders executed by us and paid for by the customers arising from your introduction." After a certain time the defendants gave notice to the plaintiff to close his transactions on defendants' behalf, and a suit was brought to recover commission on business done, after his severance with the defendants with persons who had been introduced by the plaintiff. No cases were quoted and the learned Lord Justice thought that the remedy in the hands of the defendants was to give up business transactions with persons introduced by the plaintiff. He held that the plaintiff was entitled to recover the commission.

The next case is *Boyl v. Mathers* (3), a decision of the Court of Appeal. The plaintiff was an advertising contractor and the defendant, the proprietor of a newspaper. The terms of the contract were that the plaintiff should act as advertising contractor and canvasser

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in connection with the paper and should receive from the defendant a commission of 25 per cent. on renewal orders of advertisements obtained from the plaintiff. The plaintiff's employment was terminated and he brought a suit for a declaration that he was entitled to commission on renewals which were received after the determination of his employment. Kekewich, J., dismissed the suit and his decision was upheld by the Court of Appeal. Lindley, L. J., said that he could not read the letters as amounting to a contract that the plaintiff was to receive a commission on all advertisements appearing in the paper after he ceased to have anything to do with it. He was to be paid commission in respect of his services and after he had ceased to be in a position to render any services he was not to receive anything. Bowen, L. J., and Kay, L. J., concurred.

*Salomon v. Brownfield* (3) is a case tried at *Nisi Prius* by Mathew, J. The defendants were pottery manufacturers who employed the plaintiff to go to Australia and travel for them upon terms of their paying  $7\frac{1}{2}$  per cent. on the net amount of cash in payment of goods orders for which were obtained through him. The plaintiff's services were terminated in 1895 on three months' notice and he sought for a declaration that he was entitled to the commission on all orders obtained from persons originally introduced by him though after the termination of his agency. Mathew, J., took the same view as Lopes, L. J., and gave judgment for the plaintiff but the decision of the Court of Appeal in *Boyd v. Mathers* (5) was not brought to his notice.

The next case is the case *Gerahty v. Baines* (4), a case tried by Lord Alverstone, C. J. The plaintiff in that case was an advertising agent and claimed a declaration that he was entitled to a commission of 10 per cent. on all advertisements received, the newspaper belonging to the defendants, from advertisers introduced by the plaintiff, even subsequent to the determination of his employment as the defendant's canvasser. The terms of the contract gave no such specific right, the only reference to renewal orders being that he should have 10 per cent. on all renewal orders of such advertisements so long as they were sent in within two years of the next previous order. A mass

of evidence was called to prove custom and the cases of *Bilbie v. Hise & Co* (2), *Boyd v. Mathers* (5) and *Salomon v. Brownfield* (3) were brought to the notice of the Court. The Lord Chief Justice told the Jury that no custom had been established and left to them the question whether there was any agreement between the plaintiff and the defendants that the plaintiff should be entitled to a commission on renewals of advertisements after the expiration of his employment as canvasser, if so, whether it was for any definite time and if so, for what time and on what terms. The Jury found that there was no such agreement between the parties and that the point had never been raised between them. The Lord Chief Justice, agreeing with the Jury, said that, in his opinion, the claim must fail. The plaintiff was the defendant's canvasser and it made no difference that his services were paid for by commission and not by salary. These words have, I think, reference to the language of Lord Cairns in *Albert Life Insurance Arbitration, Lawin's case* (1). He then continued: "The position of a canvasser was that of an agent who, so long as he was acting for his employers, was daily or weekly soliciting advertisements or renewals," and stated that, in his opinion, there must be a special bargain proved to entitle an advertising agent to recover commission for renewals after the termination of his employment.

The last two cases are the judgments of the learned Judges of the Chancery side, *Wilson v. Harper* (6) and *Levy v. Goldhill & Co.* (7). These were cases of independent traders who were able, without interfering with their own business, to introduce customers to the defendants in the two cases. In the one case the language used was 'half profits on receipt of orders. Same applies to repeats on any accounts introduced by you,' in the other case '5 per cent. on all goods supplied to customers introduced by you. We shall be pleased

(6) (1908) 2 Ch. 370; 77 L. J. Ch. 607; 99 L. T. 301.

(7) (1917) 2 Ch. 297; 93 L. J. Ch. 693; 117 L. T. 447; 61 S. J. 633; 33 T. L. R. 479.



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to pay you the said 5 per cent. as long as we do business with those you place on the books.' In *Wilson v. Harper* (6) the conflicting rulings were brought to the notice of Mr. Justice Neville and he held that the plaintiff, not being an agent, was entitled to recover on the terms of the contract. In the latter case all the former cases, with the exception of the decision of the Court of Appeal in *Boyd v. Mathers* (5), were brought to the notice of the learned Judge: and he appears to have followed the decision of the Court of Appeal on appeal from the decision of Lopes, L. J., in *Bilbee v. Hass & Co.* (2). Unfortunately, we have no report of that decision of the Court of Appeal which was only reported in the Times Newspaper. Paterson, J., relies on the reported language of Bowen, L. J., and we do not know whether the learned Lord Justice, distinguished or dissented from his former judgment in *Boyd v. Mathers* (5). Those are all the cases. In my opinion it may very well be that, where the claimant has to do no work beyond making the first introduction of the customer to a trading firm, he can claim commission on repeat orders but where, as in the language of Cairns, L. C., and the Court of Appeal in *Boyd v. Mathers* (5), he is paid commission in respect of the services and services are expected to be rendered in respect of the renewals, when he has ceased to be in a position to render the services he cannot claim to receive the commission. I prefer, therefore, to follow the reported case of the Court of Appeal and the earlier decision of this Court and hold that, in the absence of a definite agreement to that effect, the right to receive the commission lapses on dismissal.

In the result, the appeal must be allowed and the suit dismissed with costs of the defendant throughout.

SADASIVA AIYAR, J.—In arriving at the terms of the contract between the parties, I am inclined to hold that we ought to be guided by Exhibit F. than Exhibit S. There is, however, no inconsistency between the two. But whether we look to Exhibit F. or Exhibit S. or to both, I agree entirely with my learned brother that the 'Instructions to Agents', Exhibit T., which the plaintiff dishonestly denied having received or looked into, ought also to be considered

for the ascertainment of all the terms of the contract between the parties. Considering, then, Exhibits F. S. and T. together I am clear that Article 29 of Exhibit T. governs the right to claim commission. It follows that when the plaintiff ceased to represent the company he lost his right to claim commission on renewals of premia made after he ceased to be the agent. I, therefore, agree that the appeal should be allowed and the suit dismissed with costs in all Courts. Whether if Article 29 of Exhibit T. was not to be incorporated into the contract, the plaintiff's suit should even then fail is a very interesting question. Apart from the English authorities, I am inclined to agree with my learned brother that, where the duty of the agent does not cease with the first introduction of the customer to the principal, commissions could not be claimed on payments made by the customer after the agency ceases and I concur in his observations on the judgment in Civil Revision Petition No. 933 of 1916.

M. C. P.

*Appeal allowed ;*

*Suit dismissed.*

# ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 6 OF 1918.

June 17, 1920.

*Present* :—Sir Grimwood Meare, Kt., Chief Justice, and Mr. Justice Ryves.

RAM KARAN—PLAINTIFF—APPELLANT

*versus*

Sri Thakur RAM NARAINJI AND

OTHERS—DEFENDANTS—

RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Suit against defendant in representative capacity—Defendant asserting personal rights—Suit decreed—Subsequent suit by defendant in personal capacity for same rights—Suit, whether maintainable.*

It was sued as trustee and manager of an idol, in respect of the income of certain property of the endowment, he did not defend the suit in his fiduciary character but asserted his own personal rights to the property and was unsuccessful. He then

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brought the present suit and his claim was precisely the same as his defence in the previous suit :

*Held*, that the suit was not maintainable and was barred under section 11 of the Civil Procedure Code. [p. 76, col. 1.]

First appeal from the decision of the Subordinate Judge, Cawnpore, dated the 10th July 1917.

Mr. Purrasettam Das Tandon, for the Appellant.

The Hon'ble Dr. Tej Bahadur Sapru and Mr. Kamla Kant Verma, for the Respondents.

**JUDGMENT.**—This is an appeal from the Court of the learned Subordinate Judge of Cawnpore who felt himself unable to go into the merits of the claim of the plaintiff, holding that in the circumstances the claim was barred by the doctrine of *res judicata*. We have to see whether that decision was well-founded, and for that purpose it is necessary that we must go into the previous history and the previous litigation. It appears that on the 27th of May 1890 certain persons, Munna Lal, Kamta Prasad, Debi Din and Lalta Prasad, sons of Kashi Din, and Ram, Karan and Bahari Lal, sons of Dat Ram, executed a deed of endowment by which they made over certain property to an idol, Sri Thakur Ram Narainji, in certain villages. Under that deed of endowment the appellant in the present appeal, being the plaintiff in the Court below, was appointed the manager and the other executants and one outsider were appointed *Panches*. Mutation was duly effected as regards the properties in favour of the idol and there were provisions for the payment of salaries to the *Panches*. The plaintiff, after the death of Kamta Prasad, became president as well as manager, and in the year 1909 disputes arose and those disputes culminated in an action which was tried in the Court of the District Judge of Cawnpore in which Lalta Prasad and Madhukar Prasad were plaintiffs and the present plaintiff, Ram Karan, was defendant. That suit originated in this way. Lalta Prasad was one of the men entitled to receive an annual salary, the second plaintiff was one of the sons of Munna Lal, and they made an application under section 18 of Act No. XX of 1862 which was an application that they might be allowed to sue, and the question that comes before a Court for decision when an application of that kind is made is, whether

there are *prima facie* grounds for the institution of a suit and whether such suit is likely to enure for benefit of the trust. These two plaintiffs proved themselves to the satisfaction of the Court to be persons interested in the performance of the trust which had been created by the endowment and as such were authorised by the Court to commence the proceedings. The proceedings had for their object the dismissal of Ram Karan from his position as president and manager, and the plaintiffs alleged various acts which they said were improper and which constituted misfeasance and breach of the trust. The first three on which they relied were, first, that, instead of taking Rs. 150 only by way of salary, he had throughout all the years in fact taken Rs. 300 and claimed it as a claim of right; the second matter was that he had omitted to bring into the accounts of the trust the income of certain property which they contended was covered by the clauses in the deed of endowment. The third matter was that they asserted that certain grain pits were the property of the idol and that Ram Karan was setting up a proprietary adverse title to them himself. Now, undoubtedly, Ram Karan was sued in his capacity as a trustee and if he had defended that action throughout without departing from that fiduciary character, that is, taking no pleas other than those which were proper to a trustee, it is possible that might have made a substantial difference in the consideration of the case. But when he was challenged with having done all those three things he put up a defence which is familiarly known as that of confession and avoidance, that is to say, he admitted that he had taken Rs. 300, he admitted that he had excluded the profits of the small portions of property from the accounts of the deed of endowment and he admitted also that he had not brought into credit or schedule amongst the property of the trust the grain pits. That was the confession. The avoidance was an assertion by him that he was right and he stood up and said: 'All that I have done in this matter is correct. I have taken Rs. 300. I have taken the profits of the land and of the grain pits because they are my own. That is why I have done so.' And, there-

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fore, he was setting up in the clearest possible terms a right personal to himself, a right under the deed as regards Rs. 300, a right of private property as regards the small shares in the *pittis* and again a right of personal property in the grain pits. In the action of Lalta Prasad and Madhuker Prasad, the learned District Judge went into all these three matters and decided each one of them against Ram Karan, the present plaintiff. It was not a decision which Ram Karan allowed to go uncontested by any means, because it is clear, from an examination of the judgment in the case which will be found from R. 5 to R. 15, that he fought each item with persistence. Those were the main three matters which decided the Judge in removing him from his office. That action was decided on the 20th of March 1913. On the 16th of February 1915 Ram Karan commenced the suit in the Court of the Subordinate Judge of Cawnpore in which he claimed in precise terms exactly the very three things which the Judge in the judgment of 1913 had decided were not his property at all. Now the Court which decided the matter in 1913 was a competent Court to decide these three facts. They were decided, as we have said, after a contest and there were substantial issues in the matter. In the present case which is under appeal they are the three matters alone in issue, and the claim of Ram Karan was in the second action precisely the same as his defence to the first action which had proved unsuccessful, that is to say, in the second action Ram Karan hoped to establish his own personal right to Rs. 300 a year and to the landed property and to the grain pits by exactly the same allegation which he put forward in the defence in the previous suit. Therefore, in our opinion, he comes precisely within the prohibition of the first part of section 11 of the Code of Civil Procedure, which forbids a Court to try any issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit. Now, that is not the whole of section 11, and there arises the further consideration as to whether there is an identity of parties in the 1913 suit and the 1915 suit because the section says that the issues must be between the same parties or between

the parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent suit. There is no question that the Court was competent to try the issues which it did, and now we have to look at the record and to see whether it can fairly be said that the action was between the same parties or between the parties under whom they or any of them claim litigating under the same title. The first action, as we have said, was between Lalta Prasad and Madhuker Prasad, but a perusal of sections 18 and 14 of Act XX of 1833 shows that those two men were not bringing an action for any personal benefit or personal enrichment but were bringing it for and on behalf of the idol and for and on behalf of the protection of the property of the idol. Ram Karan, as we have said, was sued as trustee and manager, but during the course of the case he assumed a different character from that of trustee and manager and fought on the ground of his own personal rights. As regards the action of 1915, the one now under appeal, Ram Karan is asserting his own personal rights and he is asserting them against Sri Thakur Ram Narainji and the son of the Lalta Prasad and Madhuker Prasad and other persons. Deciding as we do, that in the first action the plaintiffs were merely representatives of the idol and that in that action Ram Karan fought on personal grounds as well as on those of a trustee we have come to the conclusion that the words of the section are satisfied and that all the necessary elements which constitute *res judicata* obtain in this case, and in that view we affirm the decision of the Subordinate Judge and dismiss the appeal with costs and fees on the higher scale.

*Appeal dismissed.*



SUBRAMANIA PATTAR v. KRISHNA EMBRANDRI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2020 OF 1918.

January 29, 1920.

Present:—Mr. Justice Sadasiva Aiyar  
and Mr. Justice Spencer.

SUBRAMANIA PATTAR—DEFENDANT

No. 2—APPELLANT

versus

KRISHNA EMBRANDRI AND OTHERS—

PLAINTIFFS AND DEFENDANTS Nos. 1 AND 3—

RESPONDENTS.

Malabar Law—Karnavan, powers of alienation of—Decree-debts, transfer of—Recital, false, in transfer deed, effect of Decree in name of Anandran, whether belongs to tarwad—Presumption—Transfer of Property Act (IV of 1882), ss. 6, 7, 8, 3c, scope of.

A decree-debt is moveable property and a *karnavan* of a Malabar *tarwad* has full power to alienate all moveable property belonging to the *tarwad* at his discretion and to realize debts due to the family in any manner he likes and to sell moveables and convert them into money [p. 79, cols. 4 & 5.]

*Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi*, 2 M. 328 at p. 331; 5 Ind. Jur. 243; 1 Ind. Dec. N. S. 498, followed.

A third person who makes purchases of moveables including decrees and other debts for consideration from the *karnavan* of a Malabar *tarwad* is not bound to see to the application of the purchase-money or to make enquiries whether there was necessity for the alienation [p. 79, col. 2.]

A purchaser of property for consideration from a person having power to convey full title to the property is entitled to rely on all the powers vested in his vendor, which could enable that vendor to convey the complete title professed to be conveyed notwithstanding that the vendor mentions in the sale-deed that he derives his right to convey title by reason of facts whose truth or strength can be successfully attacked. False recitals as to under what particular state of facts he obtained his power to convey will not affect the title of the transferee, provided that the transferor has got the power to give an absolute title and professes to convey such absolute title [p. 79, col. 2; p. 80, col. 1.]

Per *Sadasiva Aiyar, J.*—There is no presumption that a bond or a decree standing in the name of a junior member of a *tarwad* belongs to the *tarwad*. [p. 79, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge, South Canara, in Appeal Suit No. 200 of 1917, (Appeal Suit No. 145 of 1917, on the file of the District Court), preferred against the decree of the Court of the District Munsif, Kasargod, in Original Suit No. 80 of 1916.

FACTS appear from the judgment.

Mr. C. V. Anantha Krishna Aiyar, for the Appellant.—The Appellate Court erred in law in making a presumption that properties standing in the name of a junior member

of the *tarwad* belong to the *tarwad*. There is no such presumption of law. The position of the members of a Mitakshara family is different and the analogy cannot be extended to cases of Malabar *tarwads*. The onus of proof was wrongly thrown on first and second defendants and the finding is incorrect as it proceeds on such erroneous assumption. See *Dharnu Shetti v. Dejamma* (1) and *Govinda Panikher v. Nani* (2).

The *karnavan* acted within his powers in assigning the decree. It was more than five years old and the assignee paid full consideration for it. In the absence of fraud, the purchaser need not be put on any sort of enquiry and cannot be deprived of his acquisition merely because he had notice that the junior members impeached the alienation as being against the interests of the *tarwad*.

Granted that the *karnavan* had absolute powers of disposing of the decree, a false recital in his assignment-deed that it belonged to himself will not vitiate the transfer, what title he had, had been conveyed.

Mr. C. Madhavan Nair, for the Respondents.—On the analogy of the Mitakshara cases, where property stands in the name of an *Anandran*, it must be presumed that he holds it for the *tarwad*. In any case, there is a distinct finding on a question of fact that it was *tarwad* property. That finding was arrived at on an analysis of the evidence adduced by both sides and a mere error in wrongly throwing the onus of proof will not affect that finding.

Whatever may be the *karnavan's* powers over moveables, he made it appear in the deed of transfer to the second defendant and that the decree debt was his self-acquisition. That is found to be false. The transfer, therefore, conveyed no title to the second defendant. The second defendant purchased something which was not in existence. The *tarwad* was, therefore, entitled to execute the decree that was really in its favour.

## JUDGMENT.

SADASIVA AIYAR, J.—The second defendant is the appellant. The seven plaintiffs are the junior members of a Malabar Brahmin

(1) 38 Ind. Cas. 292; 5 L. W. 253; (1917) M. W. N. 535.

(2) 21 Ind. Cas. 211; 36 M. 301.

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*Illom* (*tarwad* of Brahmins is usually called *Illom*) of which the first defendant is the *karnavan*. The first defendant, when he was a junior member in 1906, obtained a simple bond in his name. While still a junior member, he obtained a decree thereon in his own name on 9th July 1910.

Three years afterwards (in 1913) he became the *karnavan* of the *tarwad* on the death of the prior *karnavan*. He treated the bond he obtained in 1906 and the decree thereon which he obtained in 1910 as his self-acquisition and transferred the decree to the second defendant on 8th December 1915, for a consideration of Rs. 650. The second defendant is a Pattar, while the plaintiff and the first defendant are Embrandris. The third defendant is the judgment debtor under the decree.

The plaintiff stated in paragraph 11 of the plaint that "the second defendant lives not far from the *Illom* of the plaintiff and knew very well that the decree amount really belongs to the plaintiff's *tarwad*. With this knowledge he fraudulently colluded with the first defendant and accepted the assignment above said subject to all risks." The plaintiff, therefore, prayed for a declaration that the amount under the decree in Original Suit No. 254 of 1910 is really due to the *tarwad* of the plaintiff and the first defendant and they prayed for other appurtenant reliefs.

The District Munsif found (a) that the amount of the bond of 1906 belonged to the *tarwad* and, therefore, the decree amount also belonged to the *tarwad* and not to the first defendant as his self-acquisition; (b) that, as the *tarwad* had allowed the first defendant to appear as the ostensible private owner of the decree and of the debt due under the bond for nearly ten years before this suit was brought and as the second defendant was a *bona fide* purchaser for value and a stranger to the *tarwad*, the *tarwad* is estopped from contending as against the second defendant that the decree amount belonged to it and from contending that the first defendant had no right to transfer it to the second defendant. He, therefore, dismissed the plaintiff's suit.

On appeal the Subordinate Judge concurred in the finding of the first Court that the money belonged to the plaintiff's *Illom* but he held that though the second defendant paid consideration for the assignment and the

assignment to him was a real transaction he did not make proper enquiry whether the money belonged to the *tarwad* or to the first defendant in his personal capacity and, therefore, the Sub-Judge decreed the plaintiff's suit.

In second appeal the appellant's contentions are stated in grounds Nos. 3, 4, 5, 6, 11 and 15 of the memorandum. These contentions might be shortly stated thus—(a) the lower Appellate Court was wrong in its view that the presumption of law is that the properties standing in the name of a junior member of a *tarwad* belongs to the *tarwad* unless the contrary is shown; it, therefore, threw the burden of proof wrongly on the first and second defendants and its finding that the bond and the decree belonged to the *tarwad* is, therefore, vitiated by this error of law. (b) The *karnavan* has, under the Malabar Law, full power of disposal over moveables and his having assigned a decree more than five years old for adequate consideration in order to realise the fruits of the decree was in the usual and proper course of management, and it was also within those powers of the *karnavan* which cannot be controlled by the junior members, and mere notice that the junior members are charging the *karnavan* with acting against the interests of the *tarwad* cannot prevent title to moveable (or a decree debt) property sold by the *karnavan* and within his powers of disposal as *karnavan*, from vesting in the third person who purchases for consideration, without himself being guilty of any fraud against the *tarwad*.

So far as the first question as to whether the finding of the lower Appellate Court that the decree amount belongs to the *tarwad* is concerned, I think it has to be admitted that the lower Appellate Court was wrong in its view that there was a presumption in favour of the *tarwad* that the bond standing in the name of a junior member belongs to the *tarwad*. The matter has been fully considered in *Govinda Panikker v. Nani* (2) and *Dharmu Shetti v. Dejamma* (1), and it has been held that there is no presumption either way. If there is no presumption either way, the plaintiffs coming into Court are to prove the facts which show that a bond in the name of the junior member is *tarwad* property. I am myself inclined to hold what-

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ever may be the presumption as regards the bond in the name of a junior member of a Mitakshara family [see as to this *Parbati Devi v. Baikuntha Nath Das* (3), though even in Mitakshara cases the presumption, in my opinion, in modern days is a very feeble one], that as regards the Malabar *tarwad*, the presumption should be against the *tarwad*. The Subordinate Judge had relied only or mainly on the presumption which he erroneously thought should be raised in favour of the *tarwad*. I should be inclined to set aside that finding and call for a fresh finding. But on the records I see that both the Munsif and the Subordinate Judge have also gone into the evidence on both sides and have arrived at a concurrent finding that the money belonged to the *tarwad* and the Subordinate Judge has relied on the presumption only as a further support to his finding on the evidence. I, therefore, accept that finding.

Then, we have got the next and more important contention on the appellant's side. The lower Appellate Court seems to have thought that if the decree amount belonged to the *tarwad*, the plaintiffs were at once entitled to a decree declaring that the alienation by the *karnavan* to the second defendant was invalid if the purchaser (second defendant) knew that it belonged to the *tarwad*, or even knew that it was claimed as belonging to the *tarwad* by the first defendant's *Anandravan*. I think that such a view is wholly erroneous. As stated in Moore's Malabar Law, page 162, quoting Mr. Justice T. L. Strange, "the *karnavan* can alienate all moveable property, ancestral or self-acquired, at his discretion." In fact, in the olden days, even a debt contracted by the *karnavan* was presumed to have been for the use of the family and chargeable on the estate, until the contrary was shown and it was only in *Kutti Mannadiyar v. Payanu Muthan* (4), that the contrary rule was laid down (in Travancore, if consideration is proved for a bond executed by the *karnavan* the rule still applies). So far as moveables and properties in the nature of moveables are concerned, I have never heard it disputed

that the *karnavan* has absolute powers over them including the power of realisation of debts due to the family in any manner he likes and of selling moveables and converting them into money. It follows, that a third person who makes purchases of such property for consideration is not bound to see to the application of the purchase money, or to make enquiries whether there was a necessity for the alienation. The rule applies with great force in this case whether the property transferred is a decree more than five years old, no portion of the amount due under which had been realised and where a *karnavan* sells it for consideration to a third person, the title completely vests in the latter.

It was, however, argued by Mr. Madhavan Nair for the respondent that, as in transferring the decree to the second defendant, the first defendant (transferor) recited in the transfer deed that the decree amount belonged to himself as his self-acquisition, and as that was found against his transfer conveyed no title to the second defendant. The argument is that the second defendant purchased a decree supposed to belong to the first defendant as his self-acquisition and which, therefore, did not exist and not the decree which really existed and which belonged to the *tarwad*. I think this ingenious contention cannot and ought not to be accepted. A purchaser of a property for consideration from a person having power to convey full title to the property is entitled to rely on all the powers vested in his vendor which could enable that vendor to convey the complete title professed to be conveyed notwithstanding that the vendor mentions in the sale-deed that he derives his right to convey title by reason of facts whose truth or strength can be successfully attacked. Section 7 of the Transfer of Property Act says: "Every person competent to contract and entitled to transferable property or authorised to dispose of transferable property, not his own, is competent to transfer such property either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force". Now, if the *karnavan*, according to the Malabar Law, is authorised to dispose of the *tarwad* decree-debt absolutely and without condition, I do not see how

(3) 22 Ind. Cas. 51; 26 M. L. J. 243; 15 M. L. T. 66; 1914, M. W. N. 42; 12 A. L. J. 79; 19 C. L. J. 129; 18 C. W. N. 428; 16 Bom. L. R. 101 (P. C.).

(4) 3 M. 288; 1 Ind. Dec. (N. S.) 756.



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false recitals as to under what particular state of facts he obtained his power to convey can affect the title of the transferee, provided the transferor has got the power to give an absolute title and professes to convey such absolute title. After section 7 follows another important, section *viz*, section 8, in the Transfer of Property Act. The latter section says: "Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee *all the interest which the transferor is then capable of passing in the property* and in the legal incident thereof." This section shows that the test is, what interest the transferor is capable of passing in the property and not under what title he professes to have derived the power which makes him capable of passing such interest in the property. This is not a case of a transfer by a person authorised only under circumstances in their nature variable to dispose of a property. Take the analogous case of an executor who has got full power of realising the testator's property. Because he sells a property of the testator professing to be both the legal and the equitable owner thereof and not merely as empowered in his executor's capacity to convey, it cannot be contended that the purchaser from him does not get a good and complete title. It is only in the case of immoveable property and in the case of a person *having only restricted right* to transfer such immoveable property that any considerations as to reasonable enquiries, etc., on the part of the purchaser are at all relevant and material under the Transfer of Property Act (see section 38). In the case of moveable property, provided the vendor has got the power to give a good title, and vendee pays consideration, the vendor has absolute power to give such title to the purchaser. The fact that the vendor professes to exercise that right and power, reciting false state of facts cannot affect the vendee.

I might also state that the granting of a declaratory decree is a matter of discretion with the Court. The plaintiffs have not even asked for an injunction in their plaint against the second defendants executing the decree of which he had obtained a transfer, but asked only for a declaration of their own rights. Even on this ground, the lower Appellate Court ought not to have granted the declara-

tory decree, without directing the plaint to be amended by the addition of proper consequential reliefs irregularly omitted to be asked for.

In the result, I would allow the appeal and restore the decree of the District Munsif. The plaintiffs will pay the costs of the second defendant here and in the lower Appellate Court.

SPENCER, J.—It is argued that there is no cause of action for this suit. The plaintiffs asked for a declaration that a decree-debt assigned by the first defendant, who was the *karnavan* of their *Illom*, to 2nd defendant represented money due to the *Illom* and for leave to execute it. It has been found by both the Courts below that the amount due under the decree belongs to the *Illom*, and we must accept as correct this finding of fact. But the Courts overlooked the fact that the decree debt is moveable property and that a *karnavan* of a Malabar *tarwad* has full power to alienate all moveable property at his discretion.

[See Moore's Malabar Law, 3rd Edition, para 162, and *Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi* (5)]. It is suggested that he was under the necessity of raising money to meet the expenses of litigation, but whether this was so has not been clearly found. The assignment may be considered to have cast a cloud on the title of the *Illom* on the finding that the amount belonged to it and, assuming that the first defendant was not acting in their interests, and if so, the plaintiffs might at the discretion of the Court be given a declaration of title which is part of the relief prayed for, in their plaint. Though the first defendant cannot be made accountable in respect of the income of the *tarwad*, yet he is liable for fraud [see *Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi* (5)]. The fraud is alleged in paragraph 11 of the plaint, but the facts alleged in that paragraph do not amount to fraud, if, as it appears, the first defendant was acting within his powers. There is no issue or finding on the question of fraud. It is, therefore, unnecessary to call for a finding from the Subordinate Judge on the question whether 1st defendant acted *mala fide*, in assign-

(5) 2 M. 323 at p. 331; 5 Ind. Jur. 213; 1 Ind. Dec. N. S. 498.

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ing the decree to second defendant, and unnecessary to give the plaintiffs a declaratory decree. I agree that the suit must fail and that the decree of the District Mansif should be restored with costs of second defendant here and in the lower Appellate Court.

*Appeal allowed.*

### ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 84 of 1919.

May 18, 1920.

Present:—Mr. Justice Piggott and

Mr. Justice Kanhaiya Lal.

SUNDAR AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

HABIB CHICK AND OTHERS—DEFENDANTS

—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 10 (2), O XLIII, r. 1 (w), O XLVII, rr 1, 4, 7—Appeal—Appellate Court, power of, to set aside order rejecting appeal for failure to furnish security for costs—Appeal, whether lies—Revision—High Court, interference by—Review, order granting—Appeal, grounds for.*

An order setting aside an order rejecting an appeal for failure of the appellant to furnish security for the costs of the respondent is not appealable and where such order is made in the interests of justice, the High Court will not interfere in revision. [p 82, col. 2; p. 83, col. 2.]

The right of appeal given by Order XLIII, rule 1 (w) of the Civil Procedure Code against an order granting an application for review under Order X VII, rule 4 of the Code is subject to the conditions laid by rule 7 of the latter Order. Therefore, an appeal which does not come within the four corners of that rule is not entertainable [p. 83, col. 1.]

Appeal from an order of the Subordinate Judge, Jaunpur, dated the 12th of April 1919.

Dr. K. N. Katju, for the Appellants.

Mr. Mukhtar Ahmad, for the Respondents.

### JUDGMENT.

Piggott, J.—The matter now before us arises out of the following facts. An appeal had been filed in the Court below by certain persons who are the respondents in First Appeal from Order No. 84 of 1919, now before us. The opposite party, who are the appellants now in this Court, made an application to the Court below asking that the appellants there should

be required to furnish security for the costs of the appeal and of the Court of first instance. This application came before the Court below on the 1st of February 1919. It is clear that the present respondents were there represented by a Counsel who was very imperfectly instructed. He made no attempt to contest the application for security, but stated that his clients would furnish security if suitable time were given. For some reason not now apparent, the Court only gave one week and ordered security to be filed by the 8th of February. By that time the Presiding Officer of the Court who had passed the order of the 1st of February had been transferred and the matter came before his successor. The appellants in that Court now entered an appearance by the same Pleader, but some of them at any rate also appeared in person, for we find an affidavit put in sworn to by one of them. In this affidavit, and in the petition which accompanied it, they sought to show cause against the order of February the 1st, 1919. Facts were stated in the affidavit which, if accepted, would certainly amount to sufficient cause against the order requiring security from those appellants. The Court seems to have heard arguments on February the 8th but it passed orders on February the 10th. The order is a very summary one. The learned Subordinate Judge held, in the first place, that he was bound by his predecessor's order of February the 1st, 1919. Even if this were not so, he said that, in his opinion, no sufficient cause was shown for his setting aside that order. He then went on to say that the appellants before him neither deposited the costs or security for the same, nor asked for an extension of time. He, therefore, at once rejected the appeal under the provisions of Order XLI, rule 10, clause (2) of the Code of Civil Procedure. On February the 13th the appellants whose appeal had been thus rejected presented an application to the same Court asking for a re-consideration of the order of February the 10th. They protested that they had never understood that the failure of their application for re-consideration of the order of February the 1st would involve the rejection of their appeal, and in this connection they invited the attention of the Court to the fact that the date fixed for hearing the appeal itself had not yet been reached. They now asked for reasonable extension of

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time within which to furnish the required security. The Court below reviewed its own order of February the 10th, 1919, and allowed the appellants a short extension of time within which to furnish security. Security was furnished within the prescribed period and the Court thereupon ordered the appeal to be re-admitted on to the pending file and to be set down for hearing on the merits. We have before us an appeal from this order re-admitting the appeal, and we also have a petition in revision against the same order presented by way of alternative, in case this Court should hold that no appeal lies. It has not been contested before us that, so far as the extension of time was concerned within which security was to be furnished in the Court below, the Court had jurisdiction under section 148 of the present Code of Civil Procedure to enlarge the time even after the period originally fixed had expired. The difficulty raised is as to the setting aside of the order of February the 10th, 1919. It is contended that the Court which passed that order had become *functus officio* so far as this matter was concerned, that no provision is to be found in Order XLI, rule 10, or any of the other rules connected therewith, in any way analogous to those of Order XXV, rule 2, clause (2) according to which a Court of first instance which has dismissed a suit for failure to furnish security for costs has authority to set aside that dismissal. Hence, the case for the appellants before us may fairly be stated thus: that the Court below has either misused its power under Order XLVII, rule 1 of the Code of Civil Procedure, in which case an appeal lies against its order, *vide* Order XLIII (1) (w) of the Code of Civil Procedure, or it has acted wholly without jurisdiction, in which case the interference of this Court is sought under section 115 of the Code of Civil Procedure. A number of matters have been touched upon in argument before us. The case most directly bearing on the point is that of *Balwant Singh v. Daulat Singh* (1) decided by their Lordships of the Privy Council. This decision has since been commented upon as having been passed upon a very peculiar state of facts and as not being adequate authority for the propositions of law set forth in the head-note to the report in question. It cannot be

denied, however, that in the case in question this Court had refused to entertain an application in substance similar to that made to the Court below by the appellants in that Court on February the 18th, 1919, and had refused to do so on the express ground that the order passed by this Court had been one under section 549 of the former Code of Civil Procedure corresponding with Order XLI, rule 10, and that no authority was given to the Court by that section to re-consider its own decision upon cause subsequently shown. Their Lordships made it a distinct matter for complaint that this Court should have taken up this attitude and should for this reason have refused to consider whether the appellant to this Court was not entitled, under the circumstances, to have his appeal restored to the pending file on his furnishing the security which he had in the first instance failed to furnish. They set aside the order of this Court and re-placed it by an order directing his appeal to be restored to the pending file of this Court, subject to reasonable conditions. I find it impossible to say that this is not authority for the proposition that this Court, at any rate, may re-consider, upon cause subsequently shown, an order rejecting an appeal under Order XLI, rule 10, clause (2) of the Code of Civil Procedure, and it does not seem to me that any good reason can be suggested for holding that a power of this nature is inherent in this Court but not in subordinate Courts of Appeal. This decision of the Privy Council was discussed by a Bench of this Court in the case of *Firozi Begam v. Abdul Latif Khan* (2). In that case the Court below which had rejected an appeal under section 549 of the former Code of Civil Procedure had also rejected an application to re-admit that appeal to its pending file. The one question for decision before this Court was whether an appeal lay against an order rejecting such an application. The learned Judges held, and beyond question they were right in holding, that no appeal lay against such an order. Everything else in the reported judgment is of the nature of *obiter dicta*. The learned Judges did, however, call attention to the fact that there were no provisions in section 549 of the Code of

(1) 8 A. 815; 13 I. A. 57; 4 Har. P. C. J. 707.

(2) 80 A. 143; 5 A. L. J. 109; A. W. N. (1908) 53; 3 M. L. T. 221.



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Civil Procedure for the re-admission of an appeal which had been rejected under that section corresponding with those to be found in section 381 of the former Code and Order XXV, rule 2 of the present Code, which governed the action of Courts of first instance. They suggested that the matter was one for the attention of the Legislature. We find, further, that in the case of *Sankaralinga Chetti v. Annamalai Chetti* (3), a Bench of the Madras High Court purporting to found their decision upon the views expressed by this Court in *Firozi Begam v. Abdul Latif Khan* (2), held that no application was entertainable for setting aside an order rejecting an appeal under section 549 of the Code of Civil Procedure (Act XIV of 1832).

I feel bound to say that the matter is not to my mind free from difficulty. So far as I am concerned, I am prepared to dispose of the appeal and the application in revision before us on the following very simple grounds. The right of appeal given by Order XLIII, rule 1 (w) against an order granting an application for review under rule 4 of Order XLVII is undoubtedly subject to the conditions laid down by Order XLVII, rule 7. In my opinion, the appeal before us cannot be read so as to come within the four corners of that rule. The only suggestion possible would be that the appellants desired to plead that the Court below had failed to reject the application, although there were not before it sufficient grounds for review (*vide* the words of Order XLVII, rule 4 (1) of the Code of Civil Procedure). I do not think that this suggestion, however ingenious, is at all entertainable. For one thing, the words of the rule are that, "the Court shall reject the application where it appears to it that there is no sufficient ground for a review;" for another thing, it was obviously not intended that the words of this clause should be used so as virtually to nullify the whole of Order XLVII, rule 7 by letting in an appeal upon the mere ground that the discretion conferred upon the Court by Order XLVII, rule 1 had been wrongly exercised. I am, therefore, clearly of opinion that the First Appeal from Order No. 84 of 1919 now before us is not entertainable as an appeal and should be dismissed on that ground

alone. There remains the petition of revision, and I am not prepared to say that I have not felt the force of the arguments by which the learned Counsel for the petitioners in revision, the respondents in the Court below, has sought to show that the order complained of was wholly without jurisdiction. My own impression is, that the Legislature has assumed that an Appellate Court, by reason of its jurisdiction to entertain an appeal even beyond the prescribed period of limitation, supposing that in its opinion sufficient cause were shown under section 5 of the Indian Limitation Act, could not be prevented by reason of a mere order rejecting a petition of appeal under Order XLI, rule 10 (2) of the Code of Civil Procedure from taking up another appeal on the same pleas and against the same decision, if upon full consideration it saw sufficient grounds for doing so. In any case, what we are asked to do is to hold that the learned Judge of the Court below was not entitled to assume a jurisdiction which, according to their Lordships of the Privy Council, was certainly exercisable by this Court which they directed this Court to exercise in their decision in the case of *Balwant Singh v. Daulat Singh* (1). It may be that the provisions of Order XLVII, rule 1, are wide enough to cover the order complained of, or, as I have suggested, that the Court below may be regarded as simply having re-admitted a petition of appeal by reason of the jurisdiction it would have had to entertain a fresh petition of appeal if presented on the date of its order of re-admission. In any case, I am not prepared to say, under the circumstances, that the order complained of was wholly without jurisdiction, or that this Court is bound to interfere with it in revision; more particularly when I am of opinion that it was a very proper and necessary order in the interests of justice. I think the appellants in the Court below had been treated, up to the 10th of February 1919, in the most summary fashion imaginable. They had been given a week within which to furnish certain security. When they appeared on the last possible date they submitted to the Court substantial reasons why they should not have been required to furnish security at all, and incidentally complained that they had had no such reasonable notice as

(3) 4 Ind. Cas. 165; 19 M. L. J. 304.

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would have enabled them to instruct Counsel properly on any previous date. The Court brushed aside all their objections, upon the assumption that the presiding Judge was bound to stand by his predecessor's order of February the 1st, 1919. It is quite clear also that the Court below did not, at the time, make any attempt to explain to the appellants before it what their position would be if it merely rejected their petition of February the 1st or to ascertain from them definitely whether, in the event of that application being rejected, they would not be prepared to furnish the required security within reasonable time. It is obvious now that those appellants were so prepared, and the learned Subordinate Judge himself was clearly impressed with the belief that he had acted hastily and without reasonable consideration in rejecting the appeal in the manner in which he did on February the 10th. For these reasons, I do not think that this Court is either obliged in law, or called upon in the interests of justice, to interfere in revision, and on this ground I would also reject the application for revision.

KANHAIYA LAL, J.—In this case an appeal was rejected for failure of the appellants to file security for the costs incurred by the respondents in the Trial Court and for the costs to be incurred by them in the appeal. Subsequently, an application was made to set aside that order. The Court below granted that application and allowed the appellants a week's further time to file the security required. It was open to the Court under Order XLVII, rule 1 of the Code of Civil Procedure to renew or set aside its previous order, if it considered that there was sufficient reason for doing so. Order XLI, rule 10 does not contain any specific provision laying down the method in which an order rejecting an appeal for default of filing the security can be set aside. But the absence of such a provision does not necessarily suggest that a Court is not competent to review its order or modify it, if it thinks that the ends of justice require it or that sufficient reasons exist for its doing so. If the appeal had not been rejected, the Court could have extended the time under section 148 of the Code of Civil Procedure. The appeal having been rejected, the Court could still

act, in the absence of a specific provision similar to that contained in Order XXV, rule 2 of the Code, in review and I do not think that the Court exceeded its jurisdiction by discharging its previous order and granting an extension of time. In *Balwant Singh v. Daulat Singh* (1) an order rejecting an appeal for default was set aside by their Lordships of the Privy Council in somewhat similar circumstances and an extension of time was granted. In *Firozi Begam v. Abdul Latif Khan* (2) it was held that no appeal would lie from an order refusing to re-admit an appeal which had been rejected for failure to furnish the required security for costs. Such an appeal would have been clearly inadmissible under Order XLVII, rule 7, even if the application rejected had been treated as an application for review. An order granting a review is, however, appealable. In *Sankaralinga v. Annamalai* (3) it was held that no application to set aside an order rejecting an appeal under section 547 of the old Code of Civil Procedure (Act XIV of 1884) was entertainable but the question of the applicability of the provisions relating to review does not appear to have been there considered. Here the time originally granted to the appellants was clearly insufficient and the order of the Court below setting aside its previous order is not, in the circumstances, unjustifiable. I see no reason, therefore, to interfere with it and agree in dismissing the appeal and the application for revision with costs.

By THE COURT.—We dismiss the First Appeal from Order No. 84 of 1919 and also the application in Revision No. 81 of 1919 therewith connected, in each case with costs.

*Appeal dismissed.*

RADHAKRISHNA AYYAR v. SWAMINATHA AYYAR.

## PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

December 3, 1920.

Present :—Lord Buckmaster, Lord Phillimore,  
Sir John Edge, Mr. Ameer Ali and  
Sir Lawrence Jenkins.

RADHAKRISHNA AYYAR AND ANOTHER—  
APPELLANTS

v.

SWAMINATHA AYYAR—

RESPONDENT.

*Civil Procedure Code (Act V of 1908), ss. 109, 110,  
O. XLV, r. 3—Appeal to Privy Council—Leave to  
appeal—Certificate must show clearly upon what ground  
it is based.*

When a certificate is issued under Order XLV of the Civil Procedure Code it is of the utmost importance that it should shew clearly on its face upon which of the two grounds mentioned in rule 3 of the Order it is based, viz., whether it fulfils the requirements of section 110 of the Code as regards amount or value and nature, or is otherwise a fit one for appeal to His Majesty in Council under section 109 (c) of the Code. [p. 86, col 1.]

Where a certificate is granted under section 109 (c) of the Code of Civil Procedure, it should appear on its face that the discretion conferred by that section has in fact been exercised [p. 86, col. 1.]

Appeal from a decree of the Madras High Court, (Oldfield and Phillips, JJ.), dated November 14th, 1916, reported as 40 Ind. Cas. 587, modifying a decree of the District Judge, Tanjore, which in turn modified a decree of the Revenue Divisional Officer, Kumbakonam.

FACTS.—The High Court in this case restored the decree of the Trial Judge who had awarded the plaintiff-respondent Rs. 4,560 as rent for three years, which amount had been reduced by the District Judge to Rs. 3,953. There was a further question whether a *pattah* decreed against the defendants under Madras Act VIII of 1865, which was repeated by Madras Act I of 1908, was still binding upon them.

On this appeal

Mr. DeGruyter, K. C., (with him Mr. Parikh), for the Respondent took a preliminary objection that the appeal was incompetent inasmuch as no proper certificate of appeal had been granted. The only matter in dispute is a sum of Rs. 140 per annum and no substantial question of law is involved. The certificate in this case does not show that the High Court considered the case fell under section 109 (c). Unless the certificate is in proper

form the appeal cannot be entertained.

*Banarsi Parshad v. Kashi Krishen Narain* (1),  
*Radha Krishen Das v. Rai Krishn Chand* (2).

Mr. P. Kenworthy Brown, for the Appellant, submitted that the case fell under section 109 (c).

[SIR LAWRENCE JENKINS.—You have not got a certificate under that head.]

There is a general question of law of considerable importance involved, viz., whether "decreed" in section 52 (31) of the Madras Estates Land Act, 1908, covers decrees under the Act which preceded, or, as we contend, is limited to decrees under the Act of 1908 itself. In deciding against us the Madras High Court dissented from two former decisions of their own.

[LORD BUCKMASTER.—The point is you want special leave].

Yes : the Board can give it me now.

*Radha Krishen Das v. Rai Krishn Chand* (2).

## JUDGMENT.

LORD BUCKMASTER.—In this case a preliminary objection is taken to the appeal on behalf of the respondent based upon the ground that no proper certificate of appeal has been granted, and that the appeal is consequently incompetent.

The conditions that regulate the granting of certificates for leave to appeal have been clearly stated in the cases referred to by Counsel for the respondent, reported as *Banarsi Parshad v. Kashi Krishen Narain* (1) and *Radha Krishen Das v. Rai Krishn Chand* (2). It is not necessary to examine them again for the principle which they establish is plain and cannot be questioned. That principle is this; that as an initial condition to appeal to His Majesty in Council, it is essential that the petitioners should satisfy the Court that the subject-matter of the suit is Rs. 10,000, and in addition that in certain cases there should be added some substantial question of law. This does not cover the whole grounds of appeal, because it is plain that there may be certain cases in which it is impossible to define in money value the exact character of the dispute; there are questions, as, for example, those relating to religious rights

(1) 28 L. A. 11; 5 C. W. N. 193; 23 A. 227 (P. C.)  
11 M. L. J. 56; 3 Bom. L. R. 154; 7 Sar. P. C. J.  
825.

(2) 28 L. A. 182; 23 A. 415; 5 C. W. N. 689 (P. C.).



GOLAK BEHARI BHOWMIK v. MANINDRA CHANDRA NANDI.

and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money. Sub-section (c) of section 109 of the Civil Procedure Code contemplates that such a state of things exists, and rule 3 of Order XLV regulates the procedure. It is there provided that the petition for appeal should state the grounds of appeal, and pray for a certificate that either as regards amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise, i.e., under section 109, sub-section (c), a fit case for appeal to His Majesty in Council. When any certificate is granted under that Order, it is in their Lordships' opinion of the utmost importance that the certificate should show clearly upon which ground it is based, and they regret to find that the certificate in this case is at least ambiguous. It runs in these terms: "It is hereby certified that, as regards the value of the subject-matter and the nature of the question involved, the case fulfils the requirements of sections 109 and 110 of the Code of Civil Procedure, and that the case is a fit one for appeal to His Majesty in Council."

There is no indication in the certificate of what the nature of the question is that it is thought was involved in the hearing of this appeal, nor is there anything to show that the discretion conferred by section 109 (c) was invoked or was exercised. Their Lordships think it should be brought to the attention of the Indian Courts that these certificates are of great consequence, that they seriously affect the rights of litigant parties, and that they ought to be given in such a form that it is impossible to mistake their meaning upon their face.

Counsel for the appellants has asked that, even though the amount in value in this suit is beneath the proper appealable amount, as it undoubtedly is, his clients should be granted special leave to appeal upon the ground that an important question of law affecting the whole community is raised under the Madras Estates Land Act, 1908, a question which has not hitherto been the subject of judicial interpretation. That question was this: section 52, sub-section (3), provides that "*pattahs* and *muchalkas*

accepted, exchanged or decreed for any revenue year shall remain in force until the commencement of the revenue year for which fresh *pattahs* or *muchalkas* are accepted, exchanged or decreed: provided that where a *pattah* or *muchalka* has continued in force for more revenue years than one, no fresh *pattah* or *muchalka* for the same holding shall take effect until the commencement of the revenue year next succeeding that in which it is tendered, accepted, exchanged or decreed." He desires to contend on behalf of the appellants that "decreed" in that section means decreed under that Act, and that no former decree could have any operation. Their Lordships have considered this contention, but they do not think it of sufficient weight to justify granting special leave to appeal.

They will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs as incompetent, and that special leave to appeal should not be granted.

*Appeal dismissed.*

Solicitor for the Appellants:—Mr. Douglas Grant.

Solicitors for the Respondent:—Messrs. Chapman-Walker and Shephard.

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES Nos. 2553  
AND 249 TO 251 OF 1918.

May 17, 1920.

Present:—Justice Sir N. R. Chatterjee, Kt.,  
and Mr. Justice Panton.

GOLAK BEHARI BHOWMIK, MINOR,

BY HIS FATHER AND NEXT FRIEND,

BENODE BEHARI BHOWMIK

—DEFENDANT—APPELLANT

*versus*

HON'BLE Maharaja MANINDRA  
CHANDRA NANDI BAHADUR

—PLAINTIFF—RESPONDENT.

*Landlord and tenant—Acceptance by landlord of reduced rent for long time, whether conclusive to show that stipulation for payment of full rent was not intended to be acted upon.*

The fact that the landlord has received rent for a long time at a rate lower than that stipulated for in a *kabuliyat*, is not conclusive to show that the stipulation in the *kabuliyat* as to the payment of the full rent by the tenant was never intended

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to be acted upon, or that there was a waiver of that stipulation. [p. 88, col. 1.]

Appeals against the decrees of the District Judge, Rangpur, dated the 30th of August 1917, affirming that of the Munsif, First Court at Kurigram, dated the 5th of July 1912.

FACTS appear from the judgment.

Babu Mohendranath Ray (with him Babu Atul Chandra Gupta), for the Appellant.—These appeals are on behalf of the defendant and arise out of suits for rent at the *kabuliyat* rates. The *kabuliyats* were only for short terms and it was agreed that a large portion of the rent assessed was to be kept in *hajat* (suspense) and the balance payable as the rent for the term. It was stipulated further that the tenant was to take no objection to the payment of the full rent after the expiry of the term of the lease, when the amount of the *hajat* would be added to the *jama*. The plaintiff, however, continued to receive rent at the reduced rate for a long time after the expiry of the terms of the *kabuliyats*. These present suits of the plaintiff are for realising rent at the full rate on the ground that it was so stipulated for in the *kabuliyats*. These cases were remanded to the lower Appellate Court for a finding as to whether the stipulations in the *kabuliyats* to pay the full rent after the expiry of the lease was intended to be acted upon, or whether there was a waiver of the stipulations after the expiry of the lease. See *Manindra Chandra Nandi Bahadur v. Durga Sundari Dasya* (1). I am bound by the remand order and cannot go behind it. Their Lordships on remand directed the lower Appellate Court to determine whether the *kabuliyat* was intended to be acted upon. The lower Appellate Court after remand was clearly wrong in thinking that the fact that the *kabuliyat* was not acted upon for a very long time could be no independent evidence of the intention of the parties. The lower Appellate Court has clearly committed an error of law in thinking that the fact of receipt of rent at the reduced rate for a long time can only be corroborative of other independent evidence. The evidence that since the execution of the *kabuliyats* the tenants paid rent at a lower rate than that stipulated for in the *kabuliyat*, is clearly admissible to show that the intention of the

parties was that the *kabuliyat* from the very first was not intended to be acted upon as that there was a waiver by the parties. See *Beni Madhub Gorani v. Lalmoti Dassi* (2). Then, again, your Lordships will be pleased to see that the lower Appellate Court acted irregularly in not giving me an opportunity of referring to certain documents filed by the plaintiff. These documents were taken away by the plaintiff and were produced in the Appellate Court only when my Pleader had nearly finished his argument.

Sir Rash Behari Ghose (with him Babus D. N. Chackerbutty, Hemendra Nath Sen, Sarat Kumar Mitra and Sarat Chandra De), for the Respondent.—These appeals are concluded by findings of fact. The lower Appellate Court has definitely found that the stipulation in the *kabuliyat* was intended to be acted upon. The only fault of the plaintiff was that he was too indulgent towards his tenants. Where there is no reliable evidence to prove that the plaintiff ever bound himself to accept a reduced rent, the fact that he did, for some years, accept a reduced rent, is consistent with the reduction having been a mere voluntary and temporary abatement. See *Durga Prasad Singh v. Rajendra Narayan Bagchi* (3). Refers also to *Durga Prasad Singh v. Rajendra Narain Bagchi* (4). As regards the second contention of my learned friend, your Lordships will be pleased to refer to the remarks of the lower Appellate Court wherein it remarked that the documents had been filed long before the arguments were finished.

Babu Mohendra Nath Ray replied.

JUDGMENT.—These cases were remanded to the lower Appellate Court and that Court was directed to decide the question whether the stipulation in the *kabuliyat* to pay the full rent after the expiry of the lease was intended to be acted upon, or whether there was a waiver of the stipulation after the expiry of the lease.

That question has been gone into by the lower Appellate Court and it has come to the finding that it was intended to be acted upon.

(2) 6 O. W. N. 242 at p. 245.

(3) 21 Ind. Cas. 75; 4 O. 433; 18 O. W. N. 66; (1914) M. W. N. 1; 41 I. A. 223; 15 M. L. T. 68; 19 O. L. J. 95; 26 M. L. J. 25; 16 Bom. L. R. 42 (P. O.).

(4) 4 Ind. Cas. 713; 37 O. 233; 10 C. L. J. 570.

(1) 32 Ind. Cas. 165; 20 C. W. N. 680 at p. 681.

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It is contended before us on behalf of the defendant-appellant that the learned District Judge in arriving at that finding has proceeded upon the view that the realisation of rents at the reduced rate for a long period of time cannot by itself show that the landlord at the time he accepted the *kabuliyats* never intended to enforce his right to receive rent at the full rate after the expiration of the term of the lease. This, the learned Pleader for the appellant says, indicates that, in the opinion of the learned Judge, it was not independent evidence on the question of intention. But just in the previous passage, the learned Judge says: "The fact that there had been no realisation or attempt at realisation of the full rent was undoubtedly a piece of evidence having considerable bearing upon the question whether or not the stipulations in the *kabuliyat* were from the first intended to be acted upon."

It appears, therefore, that what he meant to say was that the fact of receipt of rent at the reduced rate for such a long time was not conclusive. He has referred to certain facts and circumstances, and came to the conclusion that these facts and circumstances, either individually or collectively, do not establish the proposition that the plaintiff when he accepted the *kabuliyats* never intended to enforce his rights to realise the full rents as reserved in these documents after the expiry of their term." The learned Judge, further, goes on to find as follows:—"On the other hand, there are in these cases more than one circumstance to indicate that the plaintiff, when he accepted the *kabuliyats* had the full intention to enforce his rights to realise full rents when the term of the *kabuliyat* would be over." He concludes thus: "On a careful consideration of the facts and circumstances of the case as I have detailed them above, I have no hesitation in holding that the defendant failed to show that the stipulations in the *kabuliyats* had not been meant to be acted upon, and my finding is that the stipulations were intended to be acted upon at the time the *kabuliyats* were executed by the defendant's predecessors and accepted by the predecessors of the plaintiff."

These findings are conclusive in second appeal and we are unable to interfere with them.

The next contention raised is that the

learned District Judge was wrong in not allowing the appellant's Pleader in the lower Appellate Court any opportunity to refer to certain *jama wasil baki* papers. It is said that these papers were taken away by the plaintiff and were produced in the Appellate Court only when the appellant's Pleader had nearly finished his argument and that, at the time of argument on his behalf, he had not the opportunity to refer to the papers.

The learned District Judge, however, points out that the *jama wasil baki* papers in question had been filed long before the arguments were finished, and that the Pleader for the appellant made no mention of those papers although he had been allowed to advance some additional arguments in the midst of the address of the Vakil for the respondent. We think that, in the first place, the appellant's Pleader ought to have asked the respondent to produce these papers before the hearing commenced, if anything really turned on those papers, and, secondly, from what the learned Judge says, these papers were on the record before the arguments were concluded. In these circumstances, we do not think that there was any irregularity in the procedure of the Court which would vitiate the judgment.

The appeals fail and are dismissed with one set of costs.

*Appeals dismissed.*

LAHORE HIGH COURT.  
SECOND CIVIL APPEAL No 1229 OF 1918.  
July 15, 1920.

Present:—Mr. Justice Broadway and  
Mr. Justice Abdal Raouf.  
Musammât FATIMA BIBI AND OTHERS—  
DEFENDANTS—APPELLANTS

versus  
NUR MUHAMMAD—PLAINTIFF—

RESPONDENT.

Muhammadan Law—Marriage—Agreement by husband to reside with wife in her parents' house, legality of—Waiver of right

An agreement by a Muhammadan husband to live with his wife in her parents' house is invalid and



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cannot be utilised by the wife to defeat the husband's claim for restitution of conjugal rights. [p. 89, col. 2.]

Where in such a case it is shown that the wife did leave her parents' house and went to live with her husband in his house, she must be taken to have waived her right, if any, under the agreement. [p. 89, col. 2.]

Second appeal from the decrees of the Additional District Judge, Gujranwala, dated the 23rd January 1918, modifying that of the Subordinate Judge, Second Class, Gujranwala, dated the 7th August 1917.

Mr. Gullu Ram, for the Appellant.

Mr. Taj-ul-Din, for the Respondent.

**JUDGMENT.**—The plaintiff, Nur Muhammad Khan, brought a suit for the restitution of conjugal rights, which has been decreed by the Courts below. Hence the second appeal. Musammat Fatima Bibi, the wife, her father Fazal Din, and her mother, Musammat Bego, were impleaded as defendants to the suit. As against the father and the mother, the relief claimed was that an order should be made prohibiting them from interfering with the plaintiff's right to take his wife to his own house. Various defenses were put forward to resist the claim, two of which were,—

(1) That the plaintiff when contracting the marriage had executed an *iqarnamah* in favour of the parents of the girl agreeing to reside for his whole life with his wife in the house of the parents of the girl.

(2) That the dower fixed being a prompt one the plaintiff was not entitled to the decree claimed without paying up the whole amount of the dower as well as arrears of maintenance allowance.

The Court of first instance decreed the claim in terms of the prayer in the plaint and issued a permanent injunction against the defendants Nos. 2 and 3 prohibiting them from restraining defendant No. 1 from living with the plaintiff as his wife. The lower Appellate Court in appeal maintained the decree, but made a slight modification by ordering the plaintiff to pay one fifth of the dower before executing the decree for restitution of conjugal rights. The defendants have come up in second appeal to this Court challenging the decree for restitution of conjugal rights and injunction and praying that, in any case, the decree should be made conditional on the payment of the whole amount of dower and maintenance.

The plea that the *iqarnamah* executed by the plaintiff is legally binding upon him and that he is not entitled to take away his wife from the house of her parents is repeated in this Court and Ameer Ali's Muhammadan Law, Volume II, 1917 Edition, is relied upon in support of this contention. The subject is discussed at pages 369, 478 80. At page 478, dealing with the subject of conjugal domicile and restitution of conjugal rights, the learned author states the law in these words:—

"The Muhammadan Law lays down distinctly—

(1) that a wife is bound to live with her husband, and to follow him wherever he desires to go ;

(2) that on her refusing to do so without sufficient or valid reason the Court of Justice, on a suit for restitution of conjugal rights by the husband, may order her to live with her husband."

At page 479, however, the learned author says :—

"At the same time, the law recognises the validity of express stipulations entered into at the time of marriage respecting conjugal domicile if it be agreed that the husband shall allow the wife to live always with her parents, he cannot afterwards force her to leave her father's house for his own."

On this later passage great reliance is placed on behalf of the appellants, but we find the following passage immediately after the passage mentioned above:—

"If the wife, however, were once to consent to leave the place of residence agreed upon at the time of marriage, she will be presumed to have waived the right acquired under the express stipulation and to have adopted domicile chosen by the husband."

If there was any force in the contention it has been altogether taken away by the last statement of the law in the book relied upon, because it is admitted before us by Fazal Din that the defendant No. 1, Musammat Fatima Bibi, did leave his house and went to live with the plaintiff at Karkan, the place of his residence, where she gave birth to a second child. Fatima Bibi, therefore, must be taken to have waived the right, if any, acquired under the *iqarnamah* executed by the plaintiff. It is not, however, clear whether the

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stipulation as to the permanent residence of the couple in the house of the wife's parents is based on any rule of Muhammadan Law to be found in the text-books on the subject, as the learned author has not quoted any such authority while we find quite a contrary rule stated in Macnaghten's Precedents of Muhammadan Law, Chapter VI, case 8, according to which a condition like the present is illegal and invalid. The question was raised in the Calcutta High Court in the case of *Hamid-unnessa Bibi v. Zohiruddin Sheik* (1) but was not decided. The learned Judges who decided the case quoted certain passages from Grady's *Hidaya*, Book 2, Chapter II, page 49, and Ameer Ali's *Muhammadan Law*, but left the question undecided. The question again came up before the Calcutta Court in the case of *Imam Ali Patwari v. Arfatunnessa* (2) and was decided by Justices Stephen and Mullick. Their judgment on the point runs thus, —

"There is some good authority for the statement that the condition that the wife shall be at liberty to live with her parents is void. We may for this refer to Wilson's Digest of Anglo-Muhammadan Law, section 50, Abdur Rahman's Institutes of Musalman Law, Article 207, paragraph 3 and to the decision in the case of *Abdul Piroj Khan v. Husseinbi* (3). We hold, therefore, that the condition is illegal .....

The subject is also discussed by Tyabji in his *Muhammadan Law*, Second Edition (1909), at page 109. He has discussed all the authorities mentioned above and has expressed a pious wish in these significant words:—

"The law is quite sufficiently partial to the husband, and it is submitted that the Court should not be astute to enhance the burden on wives."

The opinion expressed by the learned author is quite inconclusive and is opposed to the authorities already quoted.

In this state of authorities, we are not prepared to hold that the stipulation relied upon is legal and can be utilised to defeat the claim of the plaintiff for restitution of conjugal rights. This plea, therefore, fails.

(1) 17 C. 670; 8 Ind. Dec. (N. S.) 986.

(2) 21 Ind. Cas. 87; 18 C. W. N. 693

(3) 6 Bom. L. R. 728.

The next contention put forward on behalf of the appellant is that the decree of the Court below ought to have provided for the payment of the entire amount of dower and arrears of maintenance, and we are asked to modify the decree of the lower Appellate Court by making the decree for conjugal rights conditional upon the payment of the amounts claimed. It is, however, admitted that the matter entirely depended upon the discretion of the Court. The lower Appellate Court in exercise of its discretion has held that the plaintiff should be ordered to pay only one-fifth part of the dower under the circumstances of this case. We are not prepared to hold that the lower Appellate Court has not properly exercised its discretion. This plea also must fail. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.  
CIVIL REVISION PETITIONS NOS. 164 TO 196  
OF 1918

AND

CIVIL REVISION PETITION NO. 1252  
OF 1918.

February 24, 1920.

Present:—Mr. Justice Sadasiva Aiyar  
and Mr. Justice Soenker.

B. RAJA RAJESWARA SETHUPATHI  
alias MUTHURAMALINGA SETHU-  
PATHI AVERGAL, RAJA OF RAMNAD  
—PLAINTIFF—PETITIONER IN C. R. P.  
Nos. 164 TO 196 OF 1918 AND RESPONDENT  
IN C. R. P. No. 1252 OF 1918

versus

KAMITH RAVUTHAN, MINOR, BY  
HIS MOTHER AND GUARDIAN SAMUSAMMAL  
AND OTHERS—DEFENDANTS—PETITIONER  
IN C. R. P. No. 1252 OF 1918 AND  
RESPONDENTS IN C. R. P. Nos. 164 TO 196  
OF 1918.

*Madras Estates Land Act (I of 1908), s. 12—Occu-  
pancy tenant, right of, to trees on holding—"Cut down",  
"use", meanings of.*

An occupancy tenant, under section 12 of the  
Madras Estates Land Act, has the right to use,  
enjoy and cut down trees in his holding, and the

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fact that the rent payable for the land on which the trees stand varies with the number of trees standing thereon makes no difference. [p. 95, col. 1.]

The terms "cut down" and "use" in section 12 of the Act, include the right to appropriate the trees cut down. [p. 95, col. 1.]

Petitions, under section 25 of Act IX of 1887, praying the High Court to revise the decrees of the Court of the District Munsif, Manamadurai, in Small Cause Suits Nos. 180 to 191, 196 to 204, 211 to 217 and 219, 220, 225, 226 and 235 of 1917.

These petitions coming on for hearing on the 1st October 1919 and having stood over for consideration till the 8th of October 1919, the Court (Moore, J.) delivered the following

**JUDGMENT.**—These civil revision petitions arise out of a number of Small Cause Suits, which were brought by the petitioner, the Rajah of Ramnad, to recover from his tenants the value of Palmyra trees on their holdings which had been wrongfully cut and appropriated by the tenants. The value of the trees was claimed at the rate of Rs. 3 per tree in one village and Rs. 6 per tree in the other two villages.

In Civil Revision Petition No. 1252 of 1918, the petitioner is the defendant in one of the Small Cause Suits. It was alleged in the plaint that the defendants, who were bound, according to the custom of the village and Zamin and according to law, to pay compensation to the plaintiff for the trees cut, had not done so. The defendants denied having cut the trees and the custom alleged in the plaint and claimed the ownership of the trees. They further contended that the value claimed was excessive. The District Munsif found that the alleged cutting was true and that the value claimed was proper for the trees, viz., Rs. 3.00 and Rs. 6.00 and that the holding consisted of trees which were assessed to Tirwah. On the 3rd point, viz., "whether the alleged usage was true, and what relief was plaintiff entitled to?" the District Munsif held that the proper amount of compensation would "ordinarily" be the capitalised value of the annual Tirwah or twenty-five times the annual Tirwah. The findings on the first two points being in plaintiff's favour, the only question for decision in these petitions is, whether the method of calculating compensation adopted

by the lower Court is correct. Mr. Srinivasa Iyengar for the petitioner contended that the method of compensation, viz., the capitalised value of the annual Tirwah, adopted by the District Munsif is erroneous, as the evidence showed that 25 times the Tirwah was charged only when the landholder's permission to cut the trees has been obtained; that *prima facie* the trees belong to the Zemindar; that the defendants had no right to cut and appropriate the trees, and that if trees are cut without permission the Zemindar is entitled to claim the full value of the trees.

In support of his contention the learned Vakil relied on the decision in *Nafar Ohandra Pal Chowdhury v. Ram Lal Pal* (1), *Mohamed Hamidar Rahman Chowdhury v. Ali Fakir* (2) and *Bodda Goddeppa v. Maharaja of Vizianagaram* (3). On the other hand, the respondent's Vakil argued that the lower Court had overlooked the provisions of section 12 of the Estates Land Act which gives the occupant *ryot* the right to use, enjoy and cut trees, and that the custom to pay damages if trees were cut without permission had not been made out.

In their written statements the defendants stated that they were only liable to pay Tirwah according to the terms of the *pattas* for Ayacut trees, so long as they were alive, and that beyond that the plaintiff was not entitled to any other right in respect of the trees. The defendants further denied that there was any custom to pay compensation for trees cut. The principal matter in controversy between the parties at the trial was, whether the custom to pay compensation for trees cut was proved and the evidence was confined to this question. It is urged on behalf of the petitioner that the District Munsif has adopted an arbitrary method of estimating the compensation payable and has given no reasons for it; that having found against the defendants' contention that they had a right to cut and remove the trees and that the prices claimed in the plaint were proper, the suits should have been decreed in full, and that the District

(1) 22 C. 742; 11 Ind. Dec. (N. S.) 493.

(2) 2 Ind. Cas 955, 10 O. L. J. 25.

(3) 30 M. 155; 2 M. L. T. 25; 17 M. L. J. 64.



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Munsif misunderstood the evidence which shows that 25 years Tirwah is charged only when permission to cut trees was obtained.

These contentions are, I think, well-founded. The lower Court's judgment is far from satisfactory and it is difficult to follow the Munsif's reasoning in paragraphs 7 and 8 of the judgment. The District Munsif begins by saying: "The usage alleged is that damage should be paid for trees cut and there is no express allegation as to the basis on which damage was payable according to usage, though from the fact of the value being claimed as damages it may be inferred that the value of the trees is payable as damage for the trees cut." After some general observations, the District Munsif finds "that the proper method of compensation would ordinarily be the capitalised value of the annual Tirwah, or twenty-five times the Tirwah, which is said to be thirteen annas ten pies per tree." The District Munsif observes, with reference to the documentary evidence, that, although in order to prevent the wasteful cutting of trees the Zamindar may in some instances have levied the value of the tree or a fine, "the records produced do not support an ancient right to that effect." Finally, after referring to the oral evidence, the District Munsif states his conclusion thus:

"The oral evidence of usage shows a great want of uniformity in the usage in the scale of levy and in the principles of the levy of damage..... There is, however, uniformity to a limited extent, namely, that damage of some kind is leviable for cutting without permission and that trees should not be cut without permission. This would go to support no more than the principle of liability for damage as discussed in paragraph 7 above." In the result, the Munsif gave a decree in all the suits for twenty five times the Tirwah as damage. This cannot be accepted as a proper finding based on evidence. It is not clear whether the District Munsif intended to find that a valid custom to levy the full value when trees were cut without permission had not been made out, and that the right which the defendants claimed to cut trees at will without the permission of the landholder was not established. Moreover, the District Munsif has given

no reasons for holding that the proper method of compensation is the capitalised value of the Tirwah and there is nothing to show on what grounds he arrived at this conclusion. The monetary value of the claims is small. The question involved in these cases is of considerable importance but it is certainly unfortunate that the plaintiff should have selected a Small Cause Court as the forum for carrying on litigation of this kind. I must accordingly call for findings from the lower Court on the evidence on record, in the light of the above observations, on the following points:—

(1) Whether there is valid custom entitling the landholder to claim compensation for Palmyra trees cut by the defendants without the permission of the landholder?

(2) If so, what is the compensation payable by the defendants?

Findings will be submitted within 6 (six) weeks and 7 (seven) days are allowed for filing objections.

In compliance with the order contained in the above judgment the Principal District Munsif of Manamadurai submitted the following

FINDINGS—I have to give findings on the following two issues:—

I. Whether there is a valid custom entitling the landholder to claim compensation for Palmyra trees cut by the defendants without the permission of the landholder? and

II. If so, what is the compensation payable to the defendants?

2. Issue No. I:—

I have heard Mr. T. C. Srinivasa Ayyangar, Pleader for plaintiff, the Rajah, at great length. I have approached the question in the light of the observations contained in the judgment of High Court. I would find the issue in the negative.

3. The Ramnad Zamindari is an extensive one with innumerable Palmyra trees on the holdings of tenants. There must have been many cases of illicit cutting of Palmyra trees by the tenants. No instance where the Rajah sued the tenants in the Civil Court pleading a custom of the kind now relied on was brought to my notice by Mr. T. C. Srinivasa Ayyangar. No judgment

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of any Court where such a custom was affirmed, was referred to by the Pleader.

4. Again, none of the documents filed by plaintiffs as showing that tenants either asked for permission to cut the trees or paid the price of the trees after cutting them, refer to the suit villages. It was admitted that none of these documents refer even to the Sayalkudi Division which contains 70 or 80 villages including the suit villages. It was admitted that they related to villages in the Masitta Kurichi Division. That, however, is in the Kamuthi Taluk wherein, however, the Sayalkudi Division also is situate. In the plaint, paragraph No. 6, the custom was said to obtain in the suit village and Zamin; and yet no document pertaining to the suit villages or the Sayalkudi Division has been filed to support the alleged custom.

5. Mr. T. C. Srinivasa Ayyangar said that the earliest document bearing on this part of the case was Exhibit F 8. That takes me only to May 1906 when the Madras Estates Land Bill of 1905 had been introduced with its clause No. 11, corresponding to section 12 of the Act, and it refers only to a Margosa tree. The same remark applies to Exhibits F 9, F 10, F 11, and F 12, and F 13, F 17 and F 26. I do not exclude these documents from consideration on these grounds: all that I say is that these facts affect to some extent their probative value on the issue which I have to determine. Exhibit F no doubt refers to Palmyras, but it dates only from 1914, very near the date of dispute between the parties.

6. As regards the oral evidence for plaintiff on this point, it is interested; that for the defence contradicts it, and, in all the circumstances, I would decline to accept it.

7. Taking all the facts and circumstances into consideration, I find the issue in the negative. Mr. T. C. Srinivasa Aiyangar said that as these were only Small Cause Suits, the evidence was rather meagre, and that if the plaintiff had filed original suits much more evidence would have been forthcoming. That no doubt may or may not be a fact. But that is absolutely no reason for finding a custom of the kind pleaded has been made out on the evidence on record.

8. Issue No. II requires no finding in view of my finding on Issue No. 1. However, I may add that if I had found Issue No. 1 for plaintiff, I would have found the compensation payable by the defendants was the value of the trees cut and such value was the amount claimed by the plaintiff in each suit. I would accept the evidence of the plaintiff's witnesses on the point of value substantially. It is not the case of the defendants that by custom they need pay only 25 year's Tirwah when they cut trees without permission: in the written statement it was said only the value claimed by plaintiff is excessive. It is manifest, therefore, that if Issue No 1 should be found for plaintiff, he should have the market-value of the trees cut.

These petitions, under orders of this Court (Oldfield, J.), dated 7th of February 1920, came on for final hearing on the 20th day of February 1920, after the return of the finding of the lower Court upon the issues referred by this Court for trial.

The Hon'ble Mr. K. Srinivasa Aiyangar (Advocate General), for the Petitioners in O. R. Nos. 164 to 196 of 1918 and for Respondent in C. R. P. No. 1252 of 1918.—The landlord is *prima facie* entitled to the trees and the tenants appropriating them without the landlord's permission are liable to pay their full value. See *Nafar Ohandra Pal Chowdhury v. Ram Lal Pal* (1), *Mohamed Hamidar Rahman Chowdhury v. Ali Fakir* (2) and *Bodda Goddeppa v. Maharaja of Vizianagaram* (3).

Section 12 of the Madras Estates Land Act gives the tenant only the right to cut down the trees and not to appropriate them. This position was laid down by the Calcutta High Court under the corresponding section 23 of the Bengal Tenancy Act. See *Nafar Ohandra Pal Chowdhury v. Ram Lal Pal* (1), *Mohamed Hamidar Rahman Chowdhury v. Ali Fakir* (2), and *Meyoa Lall Ghose v. Gobinda Sunder Sinha Chowdhury* (4). In those cases a distinction is drawn between the right to cut and the right to appropriate.

The *pattahs* are only trees *pattahs* and not for land held for agricultural purposes. The remuneration paid to the landlord is not rent and section 12 of the

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Act has no application. The rent also is not fixed. It varies with the number of trees. His position is only that of a licensee. The so-called *muchilikas* are only agreements for payment of tax for the trees. See *Murugappa Chettiar v. Ramanathan Chettiar* (5).

Mr. K. P. Padmanaba Pillay, for the Respondents in C. R. P. Nos. 164 to 196 of 1918 and Petitioners in C. R. P. No. 1252 of 1918.—The case is governed by section 12 of the Estates Land Act. The sections should not be narrowly construed. The right to "cut, use and enjoy" trees includes the right to appropriate. The decisions under the Bengal Tenancy Act do not apply to the present cases, assuming that they are sound. Under the old Madras Rent Act tenants were not allowed to cut down trees. The new Act has given them the right to cut and the inference cannot be drawn that the right was restricted to the mere cutting.

The *muchilikas*, Exhibit E series, are not merely for the trees. They are not in the nature of mere licenses. They are executed for the land with the trees thereon. The fact that the rent varies with the number of trees does not alter the situation. The occupany tenant pays rent for the land with the trees thereon.

#### JUDGMENT.

IN C. R. P. Nos. 164 to 196 OF 1918.

SADASIVA AIYAR, J.—These are 33 connected petitions filed in revision, the petitioner in all the cases being the Raja of Ramnad. The counter-petitioners are tenants of lands on which trees were and are standing. The suits were brought on the Small Cause Side for compensation for value of trees cut from their respective holdings by the tenants. The tenants denied the cutting of the trees; denied that they were legally liable to give compensation for cutting trees on their holdings, and also disputed the correctness of the amounts claimed as damages. So far as the fact of their having cut down trees and the correct values of the trees so felled are concerned, we, as usual, do not interfere with the findings.

The remaining questions for considerations are, (1) whether the District Munsif was right in allowing as damages not the value

of the trees cut but only 25 times the Tirwah payable, and (2) whether plaintiff (petitioner) is legally entitled to claim damages at all; in other words, whether the tenants have got absolute right to deal with the trees in any manner without being liable for any damages for so dealing. So far as the first question is concerned, I might at once say that if the tenants are legally liable for damages, they ought to have been made to pay the market-value of the trees and not twenty five times the Tirwah. But on the second point, I am of opinion that the defendants are not liable for any damages at all. Section 12 of the Madras Estates Land Act says: (I shall quote only the portion which is necessary) "subject to any rights which by custom or by contract in writing executed by the *ryot* before the passing of this Act are reserved to the land-holders every occupany *ryot*, shall have the right to use, enjoy and cut down all trees now in his holding." I might at once state here that, in pursuance of an order made by a learned Judge of this Court remanding these suits for a finding on the question whether there was any custom entitling the landholder to claim compensation for Palmyra trees cut by the tenants without the permission of the landholder, the District Munsif has submitted a finding that no such custom has been made out. Mr. K. Srinivasa Aiyangar (Advocate-General), however, argued that section 12 gives the tenant the right only to cut down the trees in his holding and not to appropriate them. He relies on certain decisions based on the words of section 23 of the Bengal Tenancy Act, which (he argues) is to the same effect as our section 12. That section (23) says: "When a *ryot* has the right of occupany in respect of any land, he may use the land in any manner, etc, but shall not be entitled to cut down trees in contravention of any local custom." Construing this section, the Calcutta High Court, in the decisions reported in *Nagar Chandra Pal Chowdhury v. Ram Lal Pal* (1), *Mohamed Hamidar Rahman Chowdhury v. Ali Fakir* (2) and *Meyoa Lall Ghose v. Gobinda Sunder Sinha Chowdhury* (4), had made a distinction between the right to cut down the trees and the right to appropriate the trees after they are cut down. In their commentary on the Bengal Tenancy

(5) 26 Ind. Cas. 60; 1 L. W. 881.



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Act the authors (Finucane and Ameer Ali) state at page 156: "The correctness of the view involved in this extremely technical differentiation" (that is, the differentiation made in the above cases) "is very much open to question. It is probably quite against the intentions of the framers of this Act who deliberately altered the old law on this point as, under it, a *ryot* had no right to cut down trees." Under the Madras Rent Recovery Act also I remember to have held that, in the absence of a custom, a tenant had no right to cut down trees or to appropriate them to his own use, and that the trees cut down or which had fallen down in his holding by natural causes belonged to the landholder. But I am clear that the Estates Land Act intended to change the ordinary rule of law which governs the relations between an ordinary landlord and his tenant and intended to give the tenants under the Estates Land Act the right to use, enjoy and cut trees in their holdings and by using the expressions "cut down" and "use" intended to include the right to appropriate the trees so cut down.

Lastly, it was argued that the defendants are not *ryots* holding lands for agricultural purposes, but that they are merely persons who have been allowed to enjoy the produce of the trees on payment of some remuneration to the landholder which remuneration does not fall within the definition of "rent" in the Estates Land Act and that, therefore, section 12 has no application at all. The *muchilikas*, Exhibit E series, executed by the tenants do not, in my opinion, support this contention. They are all ordinary *muchilikas* of the kind usually executed by *ryots* holding land under the Zemindar. The only special feature of these *muchilikas* is that the fixed rent payable by the *ryot* who holds the land calculated on the area of the land (which is described as *Rekai Panja*) is increased by an amount varying with the number and size of the trees standing on the holding. Under the definition in clause (1) of section 3 of the Act, agriculture includes horticulture, and the fact that the rent for the land varies with the number of trees standing thereon does not make the *ryot* a mere licensee enjoying the produce of the trees under the landlord. He

is the occupancy *ryot* of the land itself with the trees thereon, though paying varying rents according to the number of trees existing on the land. (We were told in the course of the argument that the assessment, was varied once in six years, according to the number of trees at the time of the periodical settlement). Reliance was, however, placed on the decision in *Murugappa Chettiar v. Ramanathan Chettiar* (5) for the contention that these were not *muchilikas* for the land held by an occupancy *ryot* but that these are agreements for payment of *rari* or tax payable in respect of the trees held on tree *pattahs*. We have not before us the *muchilika* executed in that case and if, on a consideration of the terms of that *muchilika*, it was held that it was an agreement by a licensee to pay *Tirwah* for enjoying the produce of trees without any *Kudiwaram* right in him in the land on which the trees stood, I accept, (if I may say so with respect) the correctness of that decision. But, as I said, I am satisfied in this case that the land itself on which the trees stand is held on *pattah* though the rent payable for that land varied with the number of trees standing on it, owing to a certain amount (varying according to the number of trees) being added to the invariable rent based on the extent of the land. Therefore, the Estates Land Act does apply to the relationship of landlord and tenant in this case. In this view, the petitioner, Zemindar, ought to have been thankful for the amounts awarded to him by the lower Court as he had no right to even those amounts and all these petitions seeking to obtain even more than was awarded to him must be dismissed; and I would accordingly dismiss them with costs. There will be no order as to costs in Civil Revision Petition No. 180, in which the guardian of the respondent has already been supplied with funds to defend the petition. In the remaining 32 cases, Pleader's fee of Rs. 8 in each case will be allowed.

SPENCER, J.—I agree. Section 12 of the Madras Estates Land Act gives every occupancy *ryot* a right to use, enjoy and cut down all trees existing in his holding at the time of the passing of the Act subject to such rights as were reserved to

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the land-holder at the time of the passing of the Act.

As regards trees planted after the Act, the section gives the *ryot* an absolute right to use, enjoy and cut down the trees notwithstanding any contract or custom to the contrary. The word 'enjoy' in this section is appropriate to the taking by *ryots* of the produce of fruit bearing trees. The word 'use', in my opinion, implies something more than 'enjoy'. There is nothing in the section to suggest any limit to the use to which the trees may be put and, therefore, it seems to include the use of the timber of timber trees.

As regards trees planted before the passing of the Act, whether the trees in suit are of that description or not, the finding of the lower Court is against the Zemindar on the point of custom; and as regards trees planted after the Act, no question of custom or contract arises. Arguments based on the analogy of the Bengal Tenancy Act are not of much help to us in deciding questions as to the respective rights of landlords and tenants in the Madras Presidency, as the Bengal Tenancy Act is differently worded, and contains a sentence in section 23 in these words: "But (the *ryot*) shall not be entitled to cut down trees in contravention of any local custom", thus placing the burden on the *ryot* to prove his right to cut. The section does not speak of the enjoyment or use of the trees but only restricts the use of the land in any manner which would materially impair the value of the land. That clause corresponds to section 11 of the Madras Estates Land Act. The cases quoted from Calcutta also are of little help in deciding the question before us. *Meyoa Lall Ghose v. Gobinda Sunder Sinha Chowdhury* (4) is a decision based purely on the words of section 23 of the Bengal Tenancy Act. *Mohamed Hamidur Rahaman Chowdhury v. Ali Fakir* (2) is a case which ended in a finding being called for on the point to whom the trees cut belonged. *Nafar Chandra Pal Chowdhury v. Ram Lal Pal* (1) is a decision the soundness of which has been doubted. The suggestion that section 12 of the Madras Estates Land Act does not apply to this case was put forward on the assumption that the *pattis* in the suits were purely tree *pattis* and

not *pattis* for land. But a reference to the *muchlikas* on the record shows that this is not the case. I agree with my learned brother both on the general question as to the effect of section 12 of the Madras Estates Land Act and as to the order to be passed in particular cases.

In C. R. P. No. 1252 of 1918.

This petition is in a manner connected with the petitions just now disposed of by us. In this case petitioner is the tenant while the Raja is the respondent. For the reasons given in our judgment in the connected petitions, we set aside the District Munsif's decree and dismiss the plaintiff's suit. There will be no order as to costs in the lower Court, but the respondent will pay petitioner's costs in this Court. Vakil's fee Rs. 10.

M.C.P.

*Petitions dismissed.*

## ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 158 OF 1919.

May 19, 1920.

Present:—Mr. Justice Piggott and  
Mr. Justice Kanhaiya Lal.

LOKMAN DAS—DEFENDANT—  
APPELLANT

versus

GANGA SAHAI—PLAINTIFF—  
RESPONDENT.

*Evidence Act (I of 1872), ss 97, 167—Document more than thirty years old—Presumption as to signature of executant, when to be made—Finding as to admissibility of document arrived at without proof, value of—Appeal, second—Finding, whether binding.*

In a suit for a declaration that the plaintiff was the exclusive owner of a plot of land and for ejectment of the defendant therefrom, the plaintiff relied upon a deed of gift which was unregistered and did not bear any signature purporting to be that of the executant, but in the place reserved for the signature there existed a line which, it was alleged, was his mark, though it was not described as such in the deed, and the question was whether a presumption could be raised as to the genuineness of the deed as to render it admissible in evidence:

*Held*, that in a deed of this nature a presumption as to its genuineness ought to be made cautiously, and the most a court could do was to presume that the signature was in the handwriting of the scribe,

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the land-holder at the time of the passing of the Act.

As regards trees planted after the Act, the section gives the *ryot* an absolute right to use, enjoy and cut down the trees notwithstanding any contract or custom to the contrary. The word 'enjoy' in this section is appropriate to the taking by *ryots* of the produce of fruit bearing trees. The word 'use', in my opinion, implies something more than 'enjoy'. There is nothing in the section to suggest any limit to the use to which the trees may be put and, therefore, it seems to include the use of the timber of timber trees.

As regards trees planted before the passing of the Act, whether the trees in suit are of that description or not, the finding of the lower Court is against the Zemindar on the point of custom; and as regards trees planted after the Act, no question of custom or contract arises. Arguments based on the analogy of the Bengal Tenancy Act are not of much help to us in deciding questions as to the respective rights of landlords and tenants in the Madras Presidency, as the Bengal Tenancy Act is differently worded, and contains a sentence in section 23 in these words: "But (the *ryot*) shall not be entitled to cut down trees in contravention of any local custom", thus placing the burden on the *ryot* to prove his right to cut. The section does not speak of the enjoyment or use of the trees but only restricts the use of the land in any manner which would materially impair the value of the land. That clause corresponds to section 11 of the Madras Estates Land Act. The cases quoted from Calcutta also are of little help in deciding the question before us. *Meyoa Lall Ghose v. Gobinda Sunder Sinha Chowdhury* (4) is a decision based purely on the words of section 23 of the Bengal Tenancy Act. *Mohamed Hamidur Rahaman Chowdhury v. Ali Fakir* (2) is a case which ended in a finding being called for on the point to whom the trees cut belonged. *Nafar Chandra Pal Chowdhury v. Ram Lal Pal* (1) is a decision the soundness of which has been doubted. The suggestion that section 12 of the Madras Estates Land Act does not apply to this case was put forward on the assumption that the *pattahs* in the suits were purely tree *pattahs* and

not *pattahs* for land. But a reference to the *muchalikas* on the record shows that this is not the case. I agree with my learned brother both on the general question as to the effect of section 12 of the Madras Estates Land Act and as to the order to be passed in particular cases.

In C. R. P. No. 1252 of 1918.

This petition is in a manner connected with the petitions just now disposed of by us. In this case petitioner is the tenant while the Raja is the respondent. For the reasons given in our judgment in the connected petitions, we set aside the District Munsif's decree and dismiss the plaintiff's suit. There will be no order as to costs in the lower Court, but the respondent will pay petitioner's costs in this Court. Vakil's fee Rs. 10.

M. C. P.

*Petitions dismissed.*

## ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 158 OF 1919.

May 19, 1920.

Present:—Mr Justice Piggott and  
Mr. Justice Kanhaiya Lal.

LOKMAN DAS—DEFENDANT—  
APPELLANT

versus

GANGA SAHAI—PLAINTIFF—  
RESPONDENT.

*Evidence Act (I of 1872), ss. 90, 167—Document more than thirty years old—Presumption as to signature of executant, when to be made—Finding as to admissibility of document arrived at without proof, value of—Appeal, second—Finding, whether binding.*

In a suit for a declaration that the plaintiff was the exclusive owner of a plot of land and for ejectment of the defendant therefrom, the plaintiff relied upon a deed of gift which was unregistered and did not bear any signature purporting to be that of the executant, but in the place reserved for the signature there existed a line which, it was alleged, was his mark, though it was not described as such in the deed, and the question was whether a presumption could be raised as to the genuineness of the deed as to render it admissible in evidence:

*Held*, that in a deed of this nature a presumption as to its genuineness ought to be made cautiously, and the most a court could do was to presume that the signature was in the handwriting of the scribe,



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but it could not be presumed that the scribe had authority from the executant to sign his name on the document, and that, in these circumstances, the deed was inadmissible, and the fact that the deed was referred to in another deed, equally inadmissible, was of no avail. [p. 97, col. 4; p. 98, col. 1.]

A finding of fact that a deed is admissible in evidence arrived at by an Appellate Court without adequate proof being offered to show its genuineness is not final or conclusive, and the High Court will, in second appeal, interfere if such finding has prejudiced the trial of the appeal. [p. 98, col. 1.]

Appeal from an order of the Additional Subordinate Judge, Badaun, dated the 15th September 1919.

Mr Panna Lal, for the Appellant.

Messrs. S. P. Ghosh and Lakshmi Narain, for the Respondent.

**JUDGMENT.**—The dispute in this appeal relates to *muafi* plot No 1268 situate in Qasba Bisauli. The allegation of the plaintiff was that he was the exclusive owner of that plot and that the defendant wrongfully got himself recorded as the owner of a half share therein in June 1917. The plaintiff sued for a declaration that he was the exclusive owner of the said *muafi* plot and that the defendant had no right to it. He also sued for the ejectment of the defendant from the same. The defendant pleaded that the plot in question belonged to Kunj Behari from whom it devolved on his three sons, Hira Lal, Duli Chand and Umed Rai; that Umed Rai died childless, and that he, as the son and legal representative of Duli Chand, was entitled to a half share.

The plaintiff relied in support of his exclusive title on the deed of gift, purporting to have been executed by Pran Sukh in favour of Sri Kishen Das and Duli Chand on the 10th of August 1853. His statement was that Pran Sukh was the owner of a large plot, of which a portion was now in dispute and had planted a grove thereon and that he made a gift of the grove in favour of Sri Kishen Das and Duli Chand on the 10th of August 1853. The deed of gift was produced but it is unregistered. It does not bear any signature purporting to be that of the executant. In the place reserved for the signature of the executant a line exists, which is pointed out as the mark said to have been made by Pran Sukh. The Court of first instance examined the evidence adduced by the parties and the entries which existed from the time of the earliest Settlement in the revenue papers and came to the

conclusion that, in view of the said entries, the document could not be presumed to be genuine. It further said that no presumption could be raised in favour of the genuineness of that document because the document did not purport to bear the signature of Pran Sukh and did not even mention the name of the scribe. It did not, therefore, go into the other issues raised in the case and dismissed the claim. The lower Appellate Court, however, raised a presumption in favour of the genuineness of the said deed of gift, supporting its view on three grounds. The first was that the document was referred to in an agreement executed by Tirmal, Kunj Behari Lal and Duli Chand on the 18th of July 1853. That document is also unregistered and no direct evidence was produced to prove its genuineness. The Court of first instance had refused to presume that it was genuine. The lower Appellate Court presumed it to be genuine and treated it as corroborative evidence of the deed of gift under which the plaintiff based his title. The second piece of evidence on which the Court below relied in support of a presumption being raised in favour of the genuineness of the alleged deed of gift was the testimony of Sri Kishen Das himself who gave evidence corroborating the said deed of gift. Sri Kishen Das did not, however, identify the document as having been executed by Pran Sukh or prove the alleged signature or mark of the executant. The third piece of evidence on which the lower Appellate Court also relied was the entry made at the time of the last Settlement when Sri Kishen Das was recorded as the owner of a half share of the grove in question, which, he claimed, had been allotted to him by partition. The reasons given by the Court of first instance for refusing to raise a presumption in favour of the genuineness of the document do not appear to have been adequately considered by the lower Appellate Court. The presumption in favour of a document of this nature, which does not purport to bear the signature or mark of the executant or the name of the scribe, ought to be cautiously made. Section 90 of the Evidence Act permits the presumption to be raised in favour of the signature and every other part of such document which purports to be in the handwriting of any particular person being in that person's handwriting. But this

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document does not purport to bear the signature of Pran Sukh. The line drawn below the place left for the signature is not described as a mark made by Pran Sukh, and, as observed in *Shen Nandan Ahir v. Ram Lagan Singh* (1) and *Gokul Singh v. Sahab Singh* (2), the utmost the Court could do was to have presumed that the signature was in the handwriting of the scribe, but it could not have presumed that the scribe had an authority from the executant to sign his name on the document. The reference to the document in another deed, the admissibility of which is equally open to question, is of no avail, because the latter document, similarly, does not bear the name of the scribe or purport to bear the signature of the executant or his mark. The learned Counsel for the plaintiff respondent urges that the lower Appellate Court has arrived at a definite finding of fact based on the evidence adduced in the case in favour of the plaintiff's title, but if the deed of gift itself has been improperly admitted in evidence, no adequate proof having been offered to show its genuineness, the finding at which the lower Appellate Court has arrived cannot be considered as final or conclusive. Section 167 of the Evidence Act provides that the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received, it ought not to have varied the decision, but the mere fact that the learned Subordinate Judge refers to the evidence of Sri Kishen Das and the entry made at the time of the last Settlement and has relied on them as corroborative evidence in proof of the deed of gift, does not show that his conclusion is based on such corroborative evidence independently of the deed of gift. The admission of the alleged deed of gift and of the agreement said to have been executed by Tirumal, Kunj Behari Lal and Datt Chand which were not duly proved, has unquestionably prejudiced the trial of the appeal, and the proper course in the circumstances seems

to be that the case should go back to the lower Appellate Court for re-trial on the issues raised before it after the exclusion of the documents before mentioned. We accordingly direct that the appeal be re-stated under its original number and re-heard after the exclusion of the said documents. The costs of this appeal will abide the event.

*Case sent back.*

MADRAS HIGH COURT.  
CIVIL APPEAL No. 239 OF 1919.  
August 2, 1920.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Aiyar.  
POLEPEDDI VENKATASIVAYYA,  
BEING MINOR, BY NEXT FRIEND AND  
MATERNAL UNCLE, KONDURI  
VENKATA KR SHNAYYA  
—PLAINTIFF—APPELLANT

*versus*

POLEPEDDI ADENNA AND OTHERS—  
DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 118—Adoption, suit for declaration of invalidity of—Computation of time—Fraud or inaction of nearest reversioner, whether gives fresh starting point to next reversioner*

A suit for a declaration that an adoption is invalid is a representative suit, which the nearest reversioner is entitled to bring on behalf of the whole body of reversioners, born or unborn, within the period prescribed in Article 18 of Schedule I to the Limitation Act [p. 94, col. 1.]

*Chaitanyandla Varamma v. Madala Gopaladasayya*, 40 Ind. Cas. 202; 41 M. L. J. at p. 673; 55 M. L. J. 57; 24 M. L. T. 115; 8 L. W. 62; (1908) M. W. N. 461 (F. B.), followed.

Time begins to run against the whole body of reversioners from the time that the adoption comes to the knowledge of the next reversioner and fraud or inaction on his part would not give a fresh starting point to the other reversioners or stop time running which had begun to run against them all [p. 95, cols. 1 & 2.]

Appeal against the decree of the Court of the Additional Temporary Subordinate Judge, Guntur, in Original Suit No. 11 of 1910, (Original Suit No. 54 of 1917, on the file of the Temporary Subordinate Court, Guntur).

FACTS appear from the judgment.

Sr. C. Narayana Murthi, for the Appellant.—The present suit is not barred. The

(1) 30 Ind. Cas. 998; 13 A. L. J. 121.

(2) 38 Ind. Cas. 162; 15 A. L. J. 121.

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nearest reversioner did not bring the suit wantonly within six years of the adoption because he was bribed to consent to the adoption and not to contest it. Time, therefore, would not run against the general body of reversioners.

Messrs V. Ramesam and K. N. Kumarasami Aiyar, for the Respondents.—A suit to declare an adoption invalid is a representative suit. See *Ohallagundla Varamma v. Madala Gopaladasayya* (1). The limitation for it under Article 118 of the Limitation Act is only six years from the date when the next reversioner knew of the adoption. Time runs against all the reversioners. If the next reversioner's act in not suing was fraudulent, any other reversioner could have sued within time. The fraud does not stop time running or give a new cause of action to the next reversioner.

JUDGMENT.—We think that the Subordinate Judge was right in holding that this suit was barred under Article 118 of the Indian Limitation Act, IX of 1908. It is now settled by the Full Bench decision in *Ohallagundla Varamma v. Madala Gopaladasayya* (1) that a suit for a declaration that an adoption is invalid is a representative suit, which the nearest reversioner is entitled to bring on behalf of the whole body of reversioners, born and unborn, within the period prescribed in the Article.

Time begins to run from the time the adoption becomes known to the plaintiff, and here the adoption came to the knowledge of the next reversioners as soon as it took place in 1902. Therefore, time began to run against the whole body of reversioners from that date, and the present suit not having been brought within six years is barred. It is said that the nearest reversioner did not bring the suit because he had been bribed to give his consent to the adoption. That might have been a good reason for allowing another reversioner to sue within the prescribed period, if there had been one able and willing to do so. It did not prevent the next reversioner from suing himself if so minded, or prevent the whole body of reversioners being barred if no suit was brought within

the prescribed period. The fact that the plaintiff was born after the alleged adoption and before the suit had become barred under Article 118 did not give him any fresh cause of action or stop time running which had begun to run against the whole body of reversioners from the date of the adoption. To hold otherwise would be opposed to the express provisions of section 9. All that Coutts-Trotters, J., as we understand him, intended to lay down in the Full Bench case in *Ohallagundla Varamma v. Madala Gopaladasayya* (1) was, that a decree against the next reversioner obtained by fraud or collusion would not be binding on the other reversioners. These observations do not support Mr. Narayana-murthi's contention that time would not run under the Article against the general body of reversioners, if the nearest reversioner abstained from suing from interested motives. The appeal fails and is dismissed with costs.

M. C. P.

*Appeal dismissed.*

ALLAHABAD HIGH COURT.  
FIRST CIVIL APPEAL No. 348 OF 1917.  
May 20, 1920.

Present :—Mr. Justice Taddall and  
Mr. Justice Sulaiman.

Musammat SARASUTI TEWARIN

—DEFENDANT—APPELLANT

versus

Musammat NANDAN AND OTHERS—

PLAINTIFF AND DEFENDANTS—

RESPONDENTS.

*Hindu Law—Maintenance—Suit by widow—Decree, proper—Contest between defendants, whether should be decided.*

In a suit by a Hindu widow for maintenance against several persons in possession of the estate of her deceased husband, the proper decree to make is to direct payment of the amount of the maintenance by any one or more defendants in possession of the estate to the extent of the estate in his or her possession, on particular dates to be specified by the Court [p. 100, col. 2; p. 0, col. 1.]

In such a suit it is not necessary to decide a contest between the defendants *inter se* as to who is legally entitled to the estate. [p. 100, col. 2.]

(1) 43 Ind. Cas. 202; 41 M. 651 at p. 671; 35 M. L. J. 57; 24 M. L. T. 115; 8 L. W. 62, (1918) M. W. N. 481 (F. B.).



SARASUTI TEWARIN v. NANDAN.

First appeal against the decree of the Additional Subordinate Judge, Gorakhpur, dated the 10th of April 1917.

Dr. S. N. Sen and Mr. N. Upadhyaya, for the Appellant.

Mr. Haribans Sahai, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by one *Musammot Nandan*, the mother of a deceased Hindu, *Shishmal Prasad*, who died on the 9th of July 1912. She brought a suit originally against the two widows of her deceased son, namely, *Musammot Sarasuti* and *Musammot Ramjota*, and she claimed her maintenance as the mother of the deceased *Musammot Sarasuti* practically did not contest her claim except as to the amount which was demanded. *Musammot Ramjota*, on the other hand, pleaded that a son had been born to her after the death of her husband whose name was *Brij Kishore* and that, under the Hindu Law, *Brij Kishore*, was the owner of the entire estate and that she was not liable, and that if she were in possession it was on behalf of the infant son who was the real owner of the estate. It may be noted here that on the death of *Shishmal Prasad* the names of the two widows were entered each against half of the estate and, according to the judgment of the Court below, the elder widow, *Musammot Sarasuti*, is in possession of one half and the other widow is in possession of the other half. After *Musammot Ramjota*'s defence had been filed *Brij Kishore* was added as a party and the plaintiff amended her plaint by an addition to paragraph 6 in which she says: "If in the opinion of the Court *Brij Kishore* be declared to be the son and heir of *Shishmal Prasad* and the possession of *Musammot Ramjota* as the guardian of *Brij Kishore*, minor, be proved over the property of *Shishmal Prasad*, deceased, then the plaintiff is entitled to get maintenance and a house for her residence from defendant No. 3." The Court below went into the question of whether *Brij Kishore* was or was not the son of *Shishmal Prasad*. *Musammot Sarasuti* strongly denied the allegation. The issue was one really between the two defendants and the Court held in favour of *Brij Kishore*. It passed a decree for maintenance allowance at the rate of Rs. 144 a year against the defendants. The decree goes on to say: "that

the amount shall be payable by *Brij Kishore*, defendant, in two equal instalments, i. e., Rs. 72 on 1st January and Rs. 72 on the 1st July of every calendar year. In case of default of payment the amount shall be recoverable by the sale of the property left by *Shishmal Prasad* in possession of any of the defendants. None of the defendants shall be personally liable for the amount. The plaintiff shall also be entitled to reside as of right in the house situated in Mauza Bisbanpura." The rest of the plaintiff's claim in respect of her ornaments was dismissed. The only person who has appealed against this decree is *Musammot Sarasuti*. The only plea that she raises on appeal is, that the finding of the Court below that *Brij Kishore* who is the posthumous son of *Shishmal Prasad*, is wrong and it asks this Court on appeal to declare that he is not his son and grant such other relief as the Court may deem fit. It seems to us that the appeal must practically fail for the simple reason that, in our opinion, the decision of the issue between the defendants as to whether *Brij Kishore* was the son of *Shishmal Prasad* or not was quite unnecessary, and it is impossible for us on appeal to grant her the declaration that she seeks. It comes to this that the heirs of *Shishmal Prasad* and certain persons claiming to be the heirs of *Shishmal Prasad* are disputing among themselves; half the estate is in the possession of one widow and the other half is in the possession of the other widow either for herself or on behalf of *Brij Kishore*. The Court below has given the plaintiff her relief. It was quite unnecessary to go into the point about the parentage of *Brij Kishore*. It was simple and easy for the Court to say that the plaintiff was entitled to a decree for maintenance as against all the defendants among whom one at least must be a legal heir. The disputing parties being in possession each of one half of the estate the Court could easily have gone on to say that it would make the sum due payable by the parties in proportion to the share of estate in the possession of each party and in case of default the decree could easily have gone on to say that the amount due would be a charge upon the estate and be recoverable by the sale of the estate. We do not think it was necessary to declare that the amount was payable by *Brij Kishore*.

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We think that the proper decree which the Court below ought to have passed was, that the amount should be payable by any one or more of the defendants who is in possession of the estate in proportion to the extent of the estate in his or her possession, and on the dates fixed by the Court below. This, in our opinion, is the only modification of the decree which is necessary, because the decree of the Court below distinctly lays down that in default of payment the amount shall be recoverable by the sale of the property left by the deceased in possession of any defendant and none of the defendants is personally liable for the amount. We, therefore, modify the decree of the Court below to this extent. The words "Brij Kishore in two equal instalments, i. e., Rs. 72 on the 1st of January and Rs. 72 on the 1st of July on every calendar year" be struck out and in lieu thereof shall be entered the words "the amount shall be payable by any one or more of defendants on the 1st of January and 1st of July of each calendar year in proportion to the extent of the estate of Snishmal Prasad in his or her possession." The rest of the decree will stand good. The appeal practically fails. In the circumstances of the case, we follow the good example set by the Court below and make each party pay his own costs, as it is evident that this litigation has been brought with a view to testing an issue which does not arise in the case itself.

*Appeal dismissed.*

LAHORE HIGH COURT.  
SECOND CIVIL APPEAL No. 2925 OF 1916.  
July 14, 1920.

Present:—Mr. Justice Broadway and  
Mr. Justice Abdul Rasool.

TIRATH RAM—DEFENDANT  
—APPELLANT

versus

Musammāt KAHAN DEVI—PLAINTIFF  
—RESPONDENT.

*Hindu Law—Mitakshara—Succession—Adopted son, whether can succeed collaterally—Sister, whether heir—Paternal uncle's daughter's son, whether bandhu—Widow—Powers of alienation, restrictions on extent of—Possessory title—Burden of proof.*

Where the adoption of a person has not been in the Dattaka form, he cannot, under the Mitakshara, succeed collaterally in the family of his adoptive father [p. 102, col. 2.]

Under the Mitakshara, a sister has no right of succession to the estate of her deceased brother. [p. 101, col. 2.]

Under the Hindu Law, a paternal uncle's daughter's son is a *bandhu* [p. 105, col. 1.]

A Hindu widow's powers of alienation are inseparable from her estate and their existence does not depend on that of heirs capable of taking on her death. The mere fact that there are no such heirs, does not confer upon the widow unlimited powers of alienation [p. 103, col. 2.]

Where it is proved that on the death of a person there was a scramble for possession of his property among persons claiming to be entitled thereto, and that the plaintiff and defendant both put their looks on a house belonging to the deceased, neither of them can be said to have a possessory title as against the other. [p. 104, col. 2.]

Second appeal from the decree of the District Judge, Lahore, dated the 23rd of August 1916, varying that of the Sub Judge, 1st Class, Lahore, dated the 5th August 1916.

Bakhshi Tek Chand, for the Appellant.

Mr. Harbajan Das, for the Respondent.

JUDGMENT—This was a suit by a sister for the possession of the property of her childless brother on the death of the latter's widow. The facts of the case, which are either admitted or found, are as follows:—

One Nanak Chand had two sons, Jai Ram and Ram Chand. Jai Ram had a daughter, Musammāt Kahan Devi, plaintiff in the suit, and a son Harnam Das, deceased, whose property is in dispute. Harnam Das' widow was Musammāt Ind Kaur. Ram Chand had no son. He, therefore, appointed Tirath Ram, defendant, his daughter's son, as his heir. The parties belong to the caste of *Khatris*. The property in dispute was a house and certain moveables valued at Rs. 1,000. On the death of Harnam Das, Musammāt Ind Kaur admittedly got possession of the house and is said to have taken possession also of some moveable property valued as above-mentioned. In her lifetime Musammāt Ind Kaur executed a Will in favour of the defendant Tirath Ram. On the death of Musammāt Ind Kaur, the plaintiff, Musammāt Kahan Devi, according to the finding of the lower Appellate Court, took possession of the house from which she was subsequently dispossessed by Tirath Ram, defendant. This gave rise to the present suit. The defendant

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claimed title to succeed as collateral on the ground of his being the adopted son of Ram Chand, the uncle of Harnam Das, as well as under the Will of Musammot Ind Kaur, the widow. The plaintiff contested the validity of the adoption and the Will both on facts and in law, and claimed to succeed to the property of Harnam Das on the ground of her being his sister and lawful heir. She also claimed right to recover possession of the property in dispute from the defendant on the ground of her possessory title of which she had been recently deprived by Tirath Ram. The adoption of Tirath Ram is found to have been made out by evidence, and its validity has also been found to be established according to custom. The authorities quoted by the Courts below fully support the decision on the question of the validity of the adoption. It has, however, been held that, inasmuch as the adoption was not in the *Dattaka* form, Tirath Ram was not entitled to succeed collaterally. The rule on the subject is thus stated in Rattigan's Digest of Customary Law, 8th Edition, page 73, paragraph 49:—

"Nor, on the other hand, does the heir acquire a right to succeed to the collateral relatives of the person who appoints him, where no formal adoption has taken place, inasmuch as relationship established between him and the appointer is a purely personal one."

The Will by Ind Kaur has been found to confer no title on the defendant, as the widow had no power to make such a Will. As to the plaintiff's right to succeed as the sister of Harnam Das in the absence of any other heir the Court held that, according to law, it was not established. On this last finding the suit was bound to fail, but the lower Appellate Court held as follows:—

"But plaintiff's suit is based not merely on her claim to succeed as an heir but on the ground of possession. *Abdul Hamid v. Sarbuland Khan* (1) is cited as an authority to show that she is entitled to possession of the property as she was in possession of the property before she was dispossessed, unless defendant proves his better title. Defendant's own witnesses admit that plaintiff was in

possession before she was forcibly dispossessed, and she is, I think, therefore, entitled to possession of the house as decreed by the lower Court, defendant not having proved his better title."

Her allegation that Musammot Ind Kaur, widow of deceased Harnam Das, had left moveable property of the value of Rs. 1,000 was held not to have been established by evidence. She was, therefore, given a decree for possession of the house only. The defendant, Tirath Ram, has come up in second appeal to this Court, and the respondent, Kahan Devi, has filed cross-objections against the order of the lower Appellate Court as to costs.

Mr. Tek Chand, the learned Vakil for the appellant, has contested the decision of the lower Appellate Court both on the questions of law and fact. He has argued that his client was entitled to succeed collaterally as the parties belonged to the high caste of *Khatris*. He has also contended that Musammot Ind Kaur had full right according to law to make a valid Will in favour of the defendant appellant. In order to make the ground clear for the decision of various questions argued before us, it may be mentioned that, whatever might have been the position taken up in the Courts below, it has been frankly admitted in this Court by the learned Vakils who have argued the case before us that the parties are governed by their personal law of the Mitakshara School. According to that law it cannot be said that the adoption of the defendant not being in accordance with the *Dattaka* form he is entitled to succeed collaterally as the adopted son of Ram Chand. *Jivan Mal v. Jamna Das* (2) fully supports the decision of the lower Appellate Court on this point. The decision of the lower Appellate Court as to the power of Musammot Ind Kaur to execute the Will is also correct. An attempt was made to argue that, inasmuch as there was no reversionary heir, Musammot Ind Kaur had acquired an absolute right in the property of Harnam Das and as such was entitled to make the Will in favour of Tirath Ram, *Alla Dittah v. Gauhra* (3) is

(2) 10 Ind. Cas. 822; 67 P. L. R. 1911; 232 P. W. R. 1911.

(3) 23 Ind. Cas. 127; 3 P. R. 1914; 120 P. L. R. 1914; 200 P. W. R. 1918.

(1) 78 P. R. 1902; 137 P. L. R. 1902.



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relied upon in support of this contention. The head note of the case runs thus :—

"S., the last male proprietor of the land in suit, died childless, leaving a widow, who succeeded to his land. On her death her brother's son (defendant) obtained possession and claimed to hold it under a Will in his favour by the widow. Plaintiffs, the proprietors of the *patti*, sued for possession claiming to be entitled to the property in the absence of collaterals of S., and that the Will in favour of defendant was invalid: *Held*, that the onus of proving a right of succession by custom lay upon the plaintiffs and they had failed to discharge that onus, and that the entry in the village *waib-ul-az*, restricting a widow's power of alienation, was only inserted in the interests of collaterals and had no effect, where there were none."

At the end of the judgment the learned Judges who decided the case, made the following pertinent observation :—

"Mr. Pestonji urges that the widow's estate is always a limited one. Quite so, but it is only limited for the benefit of reversioners. Where there are none, she is to all intents and purposes an absolute owner. Counsel referred us also to *Wazira v. Mangal* (4), but we cannot find anything there which assists his contention. The fifth proposition laid down therein by the Financial Commissioner is against him. To sum up, we hold that the onus was upon the plaintiffs and they have not discharged it."

That was a case in which the parties relied upon custom and the plaintiffs failed to establish the custom relied upon by them. The decision in that case, therefore, cannot have any bearing upon the present case.

The rule of Hindu Law as to the powers of a Hindu widow are thus stated by their Lordships of the Privy Council in the case of *Collector of Masulipatam v. Cavalry Venkata Narrainapak* (5) :—

"It is not merely for the protection of the material interests of her husband's relations that the fetter on the widow's power is imposed. Numberless authorities, from Manu downwards, may be cited to

show that, according to the principles of Hindu Law, the proper state of every woman is one of tutelage; that they always require protection and are never fit for independence. Sir Thomas Strange (see Strange on Hindu Law, Volume I, page 242) cites the authority of Manu for the proposition that, if a woman has no other controller or protector, the King should control or protect her. Again, all the authorities concur in showing that, according to the principles of Hindu Law, the life of a widow is to be one of ascetic privation (2 Colebrooke's Digest, 459). Hence, probably, it gave her a power of disposition for religious, which it denied to her for other purposes. These principles do not seem to be consistent with the doctrine that, on the failure of heirs, a widow becomes completely emancipated; perfectly uncontrolled in the disposal of her property, and free to squander her inherited wealth for the purposes of selfish enjoyment... Their Lordships are of opinion that the restrictions on a Hindu widow's power of alienation are inseparable from her estate, and that their existence does not depend on that of heirs capable of taking on her death."

In the case of *Panlharinath Vishvanath v. Goind Shivram* (6) this passage from the judgment of their Lordships of the Privy Council is quoted at page 71 of the report and discussed with reference to the facts of that case. In our opinion, having regard to this rule of law, it must be held that the Will executed by *Musammatt Ind Kaur* conferred no title on Tirath Ram.

The decision of the lower Appellate Court on the question of the plaintiff's right to succeed as the sister of Harnam Das also, in our opinion, is correct. In Mayne's Hindu Law, 8th Edition, page 714, paragraph 534, the rule is thus stated :—

"As regards the provinces which follow the Mitakshara, both principle and authority seem also to exclude the sister."

The learned Vakil for respondent has, however, relied upon the head-note in the case of *Nanak Gir v. Musammatt Kishor Kaur* (7) and has argued that under Hindu Law

(4) 10 Ind. Cas. 294; 2 P. R. 1911 Rev.; 3 P. W. R. 1911 Rev.; 188 P. L. R. 191.

(5) 8 M. L. A. 529 at p 551; 2 W. R. (P. C.) 61; 1 Sath. P. O. J. 476; 1 Sar. P. C. J. 820; 19 E. R. 631.

(6) 32 B. 79 at p 71; 9 Bom. L. R. 1305.

(7) 53 Ind. Cas. 815; 191 P. R. 1919.

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sisters can succeed as *bandhus*. A reference to the judgment in the case shows that it was never intended to lay down the rule so broadly as it is stated in the head-note. In that case there was a competition between an alleged *chela* and the sister of the last holder of the property in dispute. It was found as a fact that the defendant Nanak Gir was a total stranger and had failed to prove that he was a *chela* and as such entitled to the possession of the property. Having regard to the special circumstances of that case, it was held that sisters had a right to succeed as against a total stranger.

The general rule of law is laid down in the case of *Shambhu Nath v. Musammatt Ralli* (8). It was never intended to depart from the general rule as stated by Mayne in the paragraph above referred to. In the decision of this Court in the case of *Shambhu Nath v. Musammatt Ralli* (8) the law on the subject is thus stated:—

"The whole subject is ably discussed in Mayne on Hindu Law and Usage, 8th Edition, pages 724-753, where it is pointed out that as regards the provinces which follow the Mitakshara School both principle and authority seem to exclude the daughter (*sic* sister)."

The head-note in *Nanak Gir v. Musammatt Kishan Kaur* (7) being inaccurate cannot, therefore, help the plaintiff. She is, therefore, not entitled to succeed against the defendant who cannot be said to be a total stranger being the daughter's son of Ram Chand, the uncle of Haroon Das.

The only question that now remains to be decided is, whether the decision of the lower Appellate Court granting a decree to the plaintiff on the ground of possession can be maintained. In this connection two questions have been argued on behalf of the defendant appellant, namely:—

(1) that the plaintiff had never obtained possession of the nature and kind which, according to rulings, would entitle her to a decree on the alleged possessory title,

(2) that the defendant has a better title as against the plaintiff, being a *bandhu* under the Mitakshara Law.

As regards the first question we have examined the record and the result of

our investigation is that we find that the plaintiff gave no evidence as regards her possession after the death of *Musammatt Ind Kaur*. It appears that on the widow's death there was a scramble for possession. The plaintiff tried to acquire possession by putting her lock, the defendant also put his lock on the door of the house. The learned District Judge has based his judgment upon the evidence of two of the defendant's witnesses, namely, Har Dayal and Sher Muhammad. We have scrutinized their evidence carefully and we find that it is not sufficient to establish plaintiff's peaceful and exclusive possession. Nothing beyond the putting of a lock by the plaintiff is proved by this evidence; on the other hand, the evidence of these witnesses goes to show that, in spite of the lock of the plaintiff, the defendant had succeeded in getting possession. The ruling in *Abdul Hamid v. Sarbuland Khan* (1) has been relied upon by the learned District Judge in support of his view that the plaintiff could be given a decree for possession on the basis of her possessory title. This was not a suit under section 9 of the Specific Relief Act. In a suit on possessory title a plaintiff ought to prove more than what is necessary for him to do in his suit under the Specific Relief Act. In the head note in the case above cited the rule of law on the subject is thus stated:—

"Possession in law being a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title, a person in possession of land without title has an interest in the property which is good against all the world except the true owner. Therefore, where a plaintiff has been forcibly dispossessed of immovable property by a person having no title, he can sue for possession simply on the strength of the possession which he had before he was dispossessed, provided he sues within the twelve years' period allowed by Article 142 of the Limitation Act. In such a suit, unless defendant proves a title, plaintiff should succeed without being asked to prove his own title to ownership, and even if the defendant proves that he has no such title."

On the facts disclosed in evidence on the record, in our opinion, the conclusion drawn

(8) 52 Ind. Cas. 591; 25 P. W. R. 1919.

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by the lower Appellate Court as to the possession of the plaintiff is not justified.

On the second question Mr. Tek Chand has argued that the defendant, independently of his alleged right as the adopted son of Ram Chand or as a legatee under the Will of Musammatt Ind Kaur, has a better title as against the plaintiff as the daughter's son of Ram Chand inasmuch as he is according to the authorities a *bandhu* of Harnam Das, deceased. In support of this contention he has relied upon Mulla's Hindu Law, 3rd Edition, pages 58 and 59, where in the order of succession among *bandhus* at No. 7 father's father's son's daughter's son is mentioned as a *bandhu*. Now the defendant comes within this description. Harnam Das' father was Jai Ram, Jai Ram's father was Nanak Chand. Ram Chand was the son of Nanak Chand. The defendant is the daughter's son of Ram Chand. Therefore, he comes within the description 'father's father's son's daughter's son.' Thus the defendant has a better title than the plaintiff. The ruling in *Abdul Hamid v. Sarbuland Khan* (1) instead of being against the defendant rather supports his claim, as he has succeeded in showing a better title than the plaintiff within the meaning of the rule laid down in that case.

In our opinion, therefore, the decision of the lower Appellate Court granting the plaintiff a decree for possession on the ground of her recent possession cannot be supported. We, therefore, allow the appeal, set aside the decree of the lower Appellate Court, and dismiss the suit of the plaintiff with costs in all Courts. The objection of the plaintiff necessarily fails and is dismissed with costs.

*Appeal accepted.*

CALCUTTA HIGH COURT.

CIVIL SUIT No 128 OF 1920.

June 4, 1920.

Present:—Mr. Justice Ghose.

E. H. DUCASSE—PLAINTIFF

versus

E. M. D. COHEN—DEFENDANT.

Calcutta High Court Original Side Rules, Ch. XIII,

r. 49—Originating summons—Indenture of lease, construction of—Procedure.

By an Indenture of Lease certain premises were demised to plaintiff for 5 years on certain terms and conditions, one of which was that plaintiff would not assign the premises without the consent of the defendant, but that such consent should not be unreasonably withheld provided plaintiff remained responsible under the lease. Plaintiff applied to defendant for his consent to assign his interest for the residue of the term mentioned to a Limited Company, but defendant refused. Plaintiff then applied to the High Court on an originating summons for the determination of the question whether, upon the true construction of the Indenture, he was entitled to assign the remainder of the term under the lease without the consent of the defendant. Defendant objected to the determination of the question on the ground that the plaintiff should proceed by means of a regular suit:

*Held*, that, under Chapter XIII, rule 9 of the Rules of the High Court, the procedure adopted by the plaintiff was correct, and that, on a proper construction of the Indenture, plaintiff was entitled to assign the remainder of the term of the lease without the consent of the defendant [p. 106, col. 2; p. 107, col. 2.]

Mr. B. L. Mitter, for the Plaintiff.

Mr. T. Ameer Ali, for the Defendant.

JUDGMENT.—This originating summons was taken out by the plaintiff E. H. Ducasse for the determination of the following questions, namely, whether, upon the true construction of the Indenture of lease mentioned in the plaint herein, relating to premises No. 4, Madge Lane, in the town of Calcutta, commonly known as the Grand Opera House, and in the circumstances mentioned in the plaint, the plaintiff is entitled to assign the remainder of the term under the said lease to the Bijou Limited without the consent of the defendant E. M. D. Cohen, and whether the defendant should not pay the costs of and incidental to these proceedings.

It appears that by an Indenture of Lease, dated 2nd March 1917, the premises known as the Grand Opera House were demised to the plaintiff for a period of five years, commencing from the 1st April 1917, on certain terms and conditions mentioned in the said lease.

Among other conditions it was provided by the said Indenture that the plaintiff would not assign, underlet or otherwise dispose of the said Grand Opera House and the said premises or part with the possession thereof or any part thereof, without the consent of the defendant, but that such consent should not be unreasonably withheld



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provided the plaintiff remained responsible in terms of the said Indenture.

The plaintiff complains that he applied to the defendant sometime in August 1918 for his consent to his assigning his interest in the said Indenture for the residue of the term mentioned therein to the Bijou Limited but the defendant, although repeatedly requested by the plaintiff to give his consent to the said assignment, has refused to do so. This refusal was finally given on the 5th of January 1920, and the plaintiff characterises this refusal as capricious and without any valid reason whatsoever on the part of the defendant.

The correspondence which passed between the parties shows that the plaintiff applied for the defendant's consent on the 2nd August 1918. On the 8th August 1918, the defendant replied saying that there was an outstanding dispute about a chandelier in the Grand Opera House, and, unless and until that dispute was settled, the question of the assignment of the lease could not be gone into. The dispute as regards the chandelier was settled on or about the 17th January 1920. On the 2nd January 1920 Messrs. Watkins and Co., acting on behalf of the Bijou Limited, wrote to the defendant saying that he had been repeatedly requested to give his consent to the assignment of the residue of the term of the lease to the Bijou Limited, but that the defendant had not formally granted his consent to the proposed assignment. In these circumstances, they notified to the defendant to the effect that they, on behalf of their client, namely, the Bijou Limited, proposed to take a formal assignment from the plaintiff on 6th January 1920 and asked the defendant to state definitely on or before that date, whether he consented to the assignment or not. On the 5th January 1920, Messrs. Leslie and Hinde, on behalf of the defendant, stated that their client refused to consent to the assignment referred to above. Messrs. Leslie and Hinde stated their client's objections in these terms:—"The objection of our client to the assignment to a Limited Company is a perfectly reasonable and valid one, and any attempt to carry out such assignment will be looked upon as a breach of covenant with a consequent right to our client to put an end to the lease. Our client has agreed with Mr. Galstaun to sell the property to

him subject to certain conditions being complied with, and subject to your client's lease. It is possible that the purchaser will not have the same objection to the assignment that our client has."

The plaintiff thereupon came to this Court on the 21st January 1920, with his present plaint against the defendant and applied on an originating summons for the determination of the questions hereinbefore referred. The application came on before me on the 6th February 1920. Learned Counsel who then appeared for the defendant objected to my determining the questions raised on an originating summons, and argued that the plaintiff should be directed to proceed by means of a regular suit. He further argued that, even if the Court should be of opinion that this matter could be proceeded with on an originating summons, the defendant ought to be given an opportunity to file a written statement herein. I was of opinion that this was a fit and proper case to be proceeded with on an originating summons. But inasmuch as the defendant wanted to file a written statement, I saw no objection to such a course and accordingly granted an adjournment. The defendant has now filed his written statement. In his written statement, the defendant states that the plaintiff has no cause of action as against him, and that, even if he had any, these proceedings by way of originating summons are wholly misconceived.

I think the procedure which has been adopted by the plaintiff in the present instance is entirely correct. Under the Rules of this Court (see Chapter XIII, rule 9) any person claiming to be interested under a deed or other written instrument may apply by originating summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the persons interested. The corresponding rule in England is Rules of Supreme Court, Order LIV<sup>a</sup>, rule 1. Among points dealt with from time to time under the last mentioned rule, have been questions as to whether an effective notice to determine a lease had been given [*Viola's Lease, In re, Humphrey v. Stenbury* (1)] whether a licensee to assign had been unreasonably

(1) (1909) 1 Ch. 244; 78 L. J. Ch. 128; 100 L. T. 33.

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withheld [*Young v. Ashley Gardens Properties Limited* (2), *Spark's Lease, In re, Berger v. Jenkinson* (3) and *Evans v. Levy* (4).] Whether upon the true construction of a covenant in a lease the costs of new drainage works were payable by the tenant [*Farlow v. Stevenson* (5)] and whether letters which had passed between parties amounted to an agreement for the renewal of a lease [*Bossert v. Jones* (6)] and the like. Of course, it is not the proper mode of procedure when the litigation involves anything beyond questions of construction, or where the questions of construction will not necessarily put an end to the litigation [see *Lewis v. Green* (7)]. The procedure adopted in this case was also, it may be noticed, adopted in the recent case of *Mills v. Cannon Brewery Company Limited* (8). I do not doubt, therefore, as I have said already, the correctness of the procedure in this case.

The only question that now arises is, whether, in the circumstances of the present case, the defendant was justified in withholding his consent to the assignment of the residue of the term under the said indenture of lease to the Bijou Limited. The onus of proof is on the plaintiff. I understand that the defendant's objection was that he did not like that the residue of the terms should be assigned to a Limited Company. In my opinion, the objection is not sustainable. It has been held that the word 'person' in a covenant against assignment includes a Corporation, and a Limited Company is capable of being "a respectable and responsible person" within the meaning of such a covenant. [See *Willmott v. London Road Car Company* (9)]. As to what is an "arbitrary" or "unreasonable" refusal, the cases of *Treloar v. Bigge* (10), *Governors of Bridewell*

*Hospital v. Fawcner* (11), *Barrow v. Isaacs* (12) and *Quinton v. Horne* (13) indicate that the expressions when used in a clause such as the one under consideration mean "without fair, solid and substantial cause."

On the evidence before me, I am of opinion that the defendant's refusal in the present case was unreasonable and capricious. I do not propose to again go through the correspondence, it is only necessary to point out that there was an express clause in the lease by which the liability of the plaintiff would remain undiminished in the event of an assignment. The only question now is the question of costs. In the view of the matter which I have taken, there is no escape from the conclusion that the defendant must pay the costs of this application. Therefore, the order is that, on a proper construction of the Indenture of Lease mentioned in the plaint, and in the circumstances mentioned therein, the plaintiff is entitled to assign the remainder of the term of the said lease to the Bijou Limited without the consent of the defendant, and that the defendant should pay the costs of and incidental to this application.

*Order accordingly.*

(11) (1892) 8 T. L. R. 657.

(12) (1891) 1 Q. B. 417; 60 L. J. Q. B. 179; 64 L. T. 686; 39 W. R. 338; 55 J. P. 517.

(13) (1906) 1 Ch. 596; 75 L. J. Ch. 293; 54 W. R. 344.

(2) (1903) 2 Ch. 112; 72 L. J. Ch. 520; 88 L. T. 541.

(3) (1905) 1 Ch. 456; 74 L. J. Ch. 318; 92 L. T. 537; 53 W. R. 878.

(4) (1910) 1 Ch. 452; 79 L. J. Ch. 383; 102 L. T. 128.

(5) (1900) 1 Ch. 128; 69 L. J. Ch. 106; 81 L. T. 589; 48 W. R. 213; 16 T. L. R. 57.

(6) (1904) 48 Sol. Jour. 836; 117 L. T. Jour. 285.

(7) (1905) 2 Ch. 340; 74 L. J. Ch. 682; 93 L. T. 303; 54 W. R. 93.

(8) (1920) 36 T. L. R. 513; 89 L. J. Ch. 351.

(9) (1910) 2 Ch. 525; 80 L. J. Ch. 1; 103 L. T. 447; 54 S. J. 873; 27 T. L. R. 4.

(10) (1874) 9 Ex. 151; 43 L. J. Ex. 95; 22 W. R. 843.

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2865 OF 1916.  
December 23, 1920.

Present:—Mr. Justice LeRoussignol and  
Mr. Justice Wilberforce.

GURDAS MAL SINGH—PLAINTIFF—  
APPELLANT

versus

ISHAR DAS AND ANOTHER—DEFENDANTS—  
RESPONDENTS.

Evidence Act (I of 1872), s. 91—Hundi, *sub on*—

GURDAS MAL SINGH v. ISHAR DAS.

*Hundi inadmissible in evidence—Plaintiff, whether can fall back on original cause of action.*

The language of section 91 of the Evidence Act is uncompromising, and whenever the terms of a contract are reduced to writing, and that writing is, for any reason, inadmissible in evidence, the promisee must lose his remedy [p. 100, col. 1.]

Where a *hundi* is executed in consideration of a loan and it is found that the *hundi* being insufficiently stamped is inadmissible in evidence, the debtor cannot fall back upon the original transaction and sue the debtor on the basis of the loan. [p. 108, col. 2; p. 100, col. 1.]

Second appeal from the decree of the District Judge, Rawalpindi, dated the 17th June 1916, varying that of the Senior Subordinate Judge, Rawalpindi, dated the 9th March 1916.

Mr. M. S. Bhagat, for the Appellant.

Lala Fakir Chand, for the Respondents.

JUDGMENT.—The plaintiff in this case sued to recover on three *hundis*, two for Rs. 500, each and the third for Rs. 1,000. He has been given a decree in respect of the *hundi* for Rs. 1,000 and the suit has been dismissed in respect of the claim on the other two *hundis*.

In this second appeal we are concerned with that portion of the suit which is based upon the *hundi* for Rs. 500, dated the 1st August 1913.

The plaintiff's plaint was to the effect that on the 1st August 1913 the defendants had borrowed Rs. 500 from him and had given him a *hundi* payable after two months, that on the 31st December 1913 a fresh *hundi* was executed and the old *hundi* returned to the defendants. The fresh *hundi* was, however, insufficiently stamped, and the plaintiff urged that, if the *hundi* were to be held inadmissible by reason of that defect, his suit should be considered to be brought on the original cause of action, viz., the oral loan of the 1st August 1913, upon which the first *hundi* of that date was based.

The Court below has held that, inasmuch as the oral contract of loan was embodied in the *hundi* dated the 1st August 1913, the plaintiff had no cause of action independent of that *hundi*. It has followed the view which has consistently been held by this Court, notably in *Bakhshi Ram Labhaya v. Kaka Ram* (1), that the plaintiff cannot base any claim on the original *hundi*.

Before us all the authorities on the

subject noted in the margin (see below\*) have been reviewed. They include the classic ruling *Sheikh Akbar v. Sheikh Khan* (2), which has been followed or distinguished or dissented from by the various High Courts. The principle laid down in that case is that, when a cause of action for money is once complete in itself, and the debtor gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration; and a distinction was drawn between a loan and a deposit, a distinction which is emphasized in *Pramatha Nath Sandal v. Dwarka Nath* (3). But with all deference we are unable to see any difference in principle between a deposit and a loan, for if a loan implies a promise of re-payment, equally also, in our opinion, does a deposit imply such a promise of re-payment.

For the appellant great reliance is placed upon the Allahabad ruling which is reported as *Bai Nath Das v. Salig Ram* (4), wherein it was held that when a promissory-note is handed to a creditor in payment of his claim and the promissory-note, by reason of its inadequate stamp, turns out to be waste paper, the creditor is at liberty to fall back upon an action for money had and received,

(2) 7 C. 256; 8 C. L. R. 523; 3 Ind. Dec. (N. S.) 713.

(3) 23 C. 851; 12 Ind. Dec. (N. S.) 565.

(4) 16 Ind. Cas. 33.

\**Sheikh Akbar v. Sheikh Khan*, 7 C. 256; 8 C. L. R. 523; 3 Ind. Dec. (N. S.) 713, *Pramatha Nath Sandal v. Dwarka Nath*, 23 C. 851; 12 Ind. Dec. (N. S.) 565, *Golap Chand Marwarce v. Thakurani Mohokoom*, 3 C. 314; 2 C. L. R. 112n. 2 Ind. Jur. 601; 1 Ind. Dec. (N. S.) 787, *Krishnasami Pillai v. Rangasami Chetti*, 7 M. 112; 7 Ind. Jur. 646; 2 Ind. Dec. (N. S.) 664, *Varlagalla Veera Ragarayya v. Gorantla Ramayya*, 29 M. 111; 15 M. L. J. 484, *Muthu Sastrigal v. Visvanatha Pandara Sannadhi*, 21 Ind. Cas. 561; 38 M. 80; 14 M. L. T. 520; (1914) M. W. N. 59; 26 M. L. J. 19, *Krishnaji Narayan v. Rajmal Manak Chand*, 24 B. 360; 2 Bom. L. R. 25, *Virbhadrappa v. Bhimaji*, 28 B. 442; 6 Bom. L. R. 436, *Parsotam Narain v. Talep Singh*, 26 A. 178; A. W. N. (1903) 217, *Bunarsi Prasad v. Fazal Ahmad*, 28 A. 29; 3 A. L. J. 25; A. W. N. (1906) 9, *Ram Sarup v. Jasoda Kunwar*, 13 Ind. Cas. 135; 31 A. 159; 9 A. L. J. 72, *Baij Nath Das v. Salig Ram*, 16 Ind. Cas. 33, *Samad Mir v. Brij Lal*, 73 P. R. 1886, *People's Bank of India Limited v. Abdul Kacim*, 14 Ind. Cas. 612; 18 P. R. 1912; 85 P. W. R. 1912; 76 P. L. R. 1912, *Musnomat Bhaq Bhari v. Gujar Mal*, 38 Ind. Cas. 623; 63 P. R. 1917; 40 P. W. R. 1917.

(1) 42 P. R. 1895.



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the basis of which action is not the contract reduced to the form of a promissory-note, but the doctrine of equity that the person who has received a sum of money from another for a consideration which wholly fails must return the money to the payer. If this view be correct, then it appears to us that section 91 of the Evidence Act is, to all intents and purposes, abrogated. Almost all written contracts must necessarily be preceded by oral contracts, and it is no argument against the applicability of section 91 of the Evidence Act to any particular transaction that, had the contract not been reduced to writing, a suit upon the oral contract would have been competent. The language of section 91 of the Evidence Act appears to us to be uncompromising, and we must hold that, if the terms of any contract have been reduced to writing and that writing is, for any reason, inadmissible, the promisee must lose his money. Similarly, (to take the case of a mortgage), if the mortgage is an oral transaction, the mortgagee may maintain a suit to recover his money, but if the mortgage has been reduced to writing and that writing is, for any reason, inadmissible, the mortgagee may not prove the debt *aliunde* and must bear his loss. It may seem unreasonable that by reason of the laches of the debtor the creditor should lose his money, but this arises from a duty imposed upon individuals by the Legislature to co-operate with Government in securing payment of Government's dues.

In all these cases, except that reported as *Baij Nath Das v. Salig Ram* (4), the question to be decided has been taken to be, "has the creditor a complete cause of action independently of the document which is inadmissible?" In this case the loan of Rs. 500, and the execution of the *hundi* were simultaneous transactions, and the contract for re-payment was obviously embodied in the *hundi*, but as that *hundi* is inadmissible in evidence, the contract cannot be proved *aliunde*. Consequently, the appeal must fail.

It has been urged that the District Judge was wrong in assuming that the *hundi* of the 1st August 1913 was under-stamped, and in view of the provisions of section 118 (f) of the Negotiable Instruments Act the presumption was in favour of the admissibility of the document, provided

that the plaintiff could prove that it had been lost. His allegation, however, was that the *hundi* had been returned to the defendants, and that allegation was denied by the defendants. The plaintiff did not lead evidence on the point, so that it was not proved that the document had been lost. Moreover, the point is negligible, because the claim for relief was clearly based upon the oral contract which preceded the execution of the *hundi*.

For the reasons given above, we hold that no evidence could be given, other than the *hundi*, of that transaction, and we dismiss this appeal with costs.

*Appeal dismissed.*

MADRAS HIGH COURT.  
SECOND CIVIL APPEAL No. 2043 OF 1915.  
August 12, 1920.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Aiyar.

THENNUTTI KALLINGAL  
UNNI MOIDIN—DEFENDANT No. 1  
—APPELLANT

*versus*

THENNUTTI KALLINGAL  
UNNI MOIDIN'S SON POCKER  
(DEAD) AND OTHERS—DEFENDANT—PLAINTIFF  
No. 2—RESPONDENTS.

Civil Procedure Code (Act V of 1909), O. XXI, r. 103  
—Suit under r. 103, scope of—Enquiry, nature of—  
Right to present possession—Title, adjudication of.

The suit referred to in O. XXI, r. 103, Civil Procedure Code, by whichever party instituted, is a suit to establish the right which he claims to the present possession of the property, and this right may be established without showing that the plaintiff was in actual possession at the date of the summary order against him [p. 111, col. 1.]

*Nabadwipendar Mookerjee v. Madhu Sudan Mandal*, 16 Ind. Cas. 741; 18 O. W. N. 473, relied on.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Palghat, at Calicut, in Appeal Suit No. 18 of 1915, preferred against the decree of the Court of the District Munsif, Parapanangadi, in Original Suit No. 226 of 1913.

THENNUTTI KALLINGAL v. POCKER.

FACTS appear from the judgment.

Mr. O. Madhavan Nair, for the Appellant:—The Subordinate Judge misunderstood the scope of rule 98 of Order XXI, Civil Procedure Code. The Court is not concerned only with the question of actual possession at date of the summary order. What plaintiff has to prove is the right to present possession. That is more than actual possession. If the opposite party proves a subsisting title, the plaintiffs' possession at date of order is of no avail. Where the decree-holder sues and does not prove title, the defendant with only a possessory title is entitled to succeed.

Mr. K. P. M. Menon, for the Respondents.—Compare the language of rule 103 with rule 63. In the former, the right to present possession has to be proved, but in the latter the right to the property itself has to be established. The rule 103 is only restricted to the question of actual possession at date of the summary order.

JUDGMENT.—The plaintiff resisted the execution of a decree for possession of the suit lands, and, having had an order made against him under Order XXI, rule 98, instituted the present suit under rule 103 "to establish the right which he claims to the present possession of the property", failing which the right would have been lost under the terms of the rule. The plaintiff, who based his case both on possession and on title, alleged that the conveyance, executed by him in 1899, in favour of the 1st defendant never took effect, and that, if it did, he had acquired a title by adverse possession before the date of the order against him under rule 98. The District Munsif dismissed the suit on the ground that the title passed to the 1st defendant by the conveyance of 1899. The Subordinate Judge allowed the appeal and decreed the suit, holding that the plaintiff, having, as he found, been in possession at the date of the order under rule 98, could not be ousted in execution of a decree to which he was not a party, and that, under the rule, the Court was concerned with possession only.

The view that, in a suit of this kind, the Court has merely to ascertain whether the plaintiff was in possession at the date of the order against him under rule 98 is based on a misconception of the scope of

the rule. If he was, then the Court ought not to have passed the summary order against him under rule 98 but ought to have dismissed the decree holder's application against him under rule 99. The effect of the order having been made under rule 98 was to oblige him to sue under rule 103 on pain of losing his rights, whereas if the application had been dismissed under rule 98, the decree-holder would have had to institute the suit under the like penalty. The suit referred to in the rule, by whichever party instituted, is a suit to establish the right which he claims to the present possession of the property. In a suit by the decree-holder if it were shown that the defendant was in possession at the date of the order under rule 99, the decree holder could only succeed by proving his title, because a person in the actual possession has a possessory title against the world and can only be dispossessed by the true owner, and those claiming under him. So, too, in the present suit, if it be found that the plaintiff was in possession at the date of the summary order against him under rule 98 he is entitled to succeed by virtue of that possession unless the defendant (decree-holder) proves a subsisting title carrying with it the right to present possession.

The object of these provisions is to secure the speedy settlement of questions of title raised in execution, as explained by the Privy Council in *Sardhari Lal v. Ambika Pershad* (1), with reference to the similar procedure prescribed with regard to claim petitions, and this is effected by requiring the unsuccessful party in the summary proceedings to file a suit within the year to establish his right on pain of losing it.

In support of the Subordinate Judge's view reliance has been placed on the fact that the suit referred to in rule 103 is a suit to establish the right which he claims to the present possession of the property, whereas the suit referred to in rule 63 is a suit to establish the right which he claims to the property in dispute. This does not show that a suit under rule 103 is concerned only with the question of

(1) 15 O. 521 (P. O.); 15 I. A. 123; 5 Sar. P. O. J. 172; 12 Ind. Jur. 210; 7 Ind. Dec. (N. S.) 981.

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actual possession at the date of the summary order. The suit is to establish the right which the plaintiff claims to the present possession of the property and this right may be established without showing that the plaintiff was in actual possession at the date of the summary order against him. Decree-holders and auction-purchasers against whom an order has been made under rule 99 are never in possession at the date of the summary order and yet they are allowed and even required to maintain the suit, and the scope of the suit must be the same whether the order against the unsuccessful party in the summary proceedings was made under rules 98, 99 or 101. *Nabodwipendra Mookerjee v. Madhu Sudan Mandal* (2), the only authority we have been referred to, is in accordance with this view. The Subordinate Judge has not recorded any clear finding as to whether the plaintiff has established the right which he claims to the present possession, and the decree must be reversed and the appeal remanded to the District Judge to enable him to do so in the light of the above observations. Costs to abide.

M. C. P.

*Appeal allowed.*

(2) 16 Ind. Cas. 741; 18 C. W. N. 473.

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1011 OF 1916.

July 9, 1920.

Present:—Mr. Justice Broadway and  
Mr. Justice Abdul Raoof.UDMI AND OTHERS—DEFENDANTS—  
APPELLANTS

versus

HIRA AND OTHERS—PLAINTIFFS—  
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 2 (2), O. I, r. 8, O XXII, r. 4—Representative suit—Some plaintiffs suing on behalf of all—Suit decreed—Appeal—Death of respondents, other than representatives—Failure to bring legal representatives on record—Appeal, whether abates—Order declaring abatement, whether decree—Appeal, whether lies.

Where a suit is brought by certain persons in a representative capacity under Order I, rule 8 of the Civil Procedure Code, the persons on whose behalf the suit is brought are not parties to it, and if, during the pendency of an appeal in such a suit, the suit having been decreed, some of these persons die, it is not necessary to bring their legal representatives on the record, and failure to do so does not involve the abatement of the appeal. [p. 113, col 2.]

An order declaring the abatement of an appeal on the ground that the legal representatives of certain deceased respondents have not been brought on the record is a decree and is appealable as such. [p. 113, col. 2.]

Second appeal from the order of the District Judge, Hissar, dated the 20th December 1915, affirming that of the Munsif, 1st Class, Hissar, dated the 1st April 1912.

Mr. Nanak Chand, Pandit, for the Appellants.

Bakshi Tek Chand, for the Respondents.

JUDGMENT.—This is an appeal from an order of Mr. Inam Ali, District Judge of Hissar, dated the 20th December 1915, declaring the appeal of *Udmi and others* (defendants-appellants), v. *Hira and others* (plaintiffs-respondents) to have abated under Order XXII, rule 4, of the Code of Civil Procedure. A preliminary objection is taken on behalf of the respondents to the hearing of this appeal on the ground that the order appealed against, not being a decree, is not open to an appeal. In order to decide this preliminary objection it is necessary to give the facts giving rise to the appeal before the learned District Judge in which the order appealed against was made:—

In the village Sisai Bhola the majority of the *biswadars* are *Jats*. There are some *Brahman biswadars* also, who own and possess some of the land. The suit out of which the appeal before the District Judge arose was instituted by the *Jat biswadars* on the allegations that they alone, as the real founders of the village, were entitled to the income of *shamilat* lands and that *Brahman biswadars* had no right in the said income. It was stated that this allegation was borne out by the entry made at the first Settlement of 1863, but that at the Settlement of 1891-1892 a vague entry was made to the effect that the profit and loss of the income was shared by the *biswadars* in proportion to *khewat* shares. This the plaintiffs alleged went to show that the *Brahmans* also had been sharing the income as *biswadars*.



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The relief claimed in the plaint, shortly put, was that it may be declared that they alone had the right to the income and that the *Brahman biswadars* had no concern with it. In the heading of the plaint the names of 393 persons are mentioned, who are described as "*akwam i-jatan saknai Mauza Sisai Bhola, Tahsil Hansi, muddian*". In the array of defendants the names of 53 persons are mentioned with the description "*Brahmanan saknai Mauza Sisai Bhola, Tahsil Hansi. muddaalahim*." The date of the presentation of the plaint is mentioned as the 15th of January 1912. It was signed by six of the persons described as plaintiffs—namely, Harasi, Dhari, plaintiff; Maman, son of Malke, plaintiff; Jagram, plaintiff; Ujagar and Sonda, plaintiff. The verification of the plaint is also signed by these six persons. Along with the plaint a petition was presented under Order I, rule 8, of the Code of Civil Procedure by the six persons, who had signed the plaint which contained the following statement and prayer:—

"In the suit mentioned in the heading there are 393 plaintiffs belonging to the *Jat* tribe, and there are 53 defendants belonging to the *Brahman* tribe. On behalf of the plaintiffs Hira, Maman, Mehri, Jagram, Ujagar and Sonda, *Lambardars* of the *deh*, institute the suit (*muddian ki tarofee, etc., etc., etc., numberdarni deh dawa karte hain*). It is, therefore, prayed that permission be granted to Hira, etc., *Lambardars*, applicants in accordance with Order I, rule 8, of the Code of Civil Procedure to institute the suit and prosecute it in the place of the entire body of the *Jat* proprietors of the village Sisai Bhola. The defendants are also numerous. It is accordingly prayed that UDMI, son of Sheo Ram, and Mutsaddi, son of Data Ram, defendants, be permitted to defend the suit on behalf of the entire body of the defendants and notice be given to the parties to the suit by proclamation."

This permission was granted by the Court on the 16th January 1912 in the terms of the petition presented by the six plaintiffs mentioned above. Accordingly, the suit was registered on this date, namely, the 16th January 1912. Notifications, as contemplated by the law, were issued. No objections were raised and apparently the entire body of the *Jats* accepted the six plaintiffs as the proper

persons to institute and prosecute the suit in the interest of all the *Jats*. On the 8th of February 1912 a written statement was filed on behalf of some of the defendants and while pleas impugning the claim on the merits were raised no objection appears to have been raised as to the right of the six plaintiffs to institute the suit on behalf of the entire body of *Jats*. Another written statement was filed by one of the defendants, Bansi Dhar, in which also no question as to the array of parties was raised. Thus though originally the names of 393 plaintiffs were entered in the heading of the plaint the suit was registered as a suit filed by six of the plaintiffs whose signatures are to be found at the foot of the plaint.

The Court of first instance passed a decree in favour of the plaintiffs in the following terms.—

"It is, therefore, ordered that a decree for declaration of rights to the effect that the *Jats* (the plaintiffs) alone are entitled to the income accruing from *malba*, other *samilat* and miscellaneous kind of *abadi* and *Gorah deh* land, and that they alone are co-sharers in this income and that the defendants, i.e., the *Brahman biswadars* have no concern with it, be passed in favour of the plaintiffs against the defendants".

The parties were ordered to bear their own costs.

Although the suit was treated as having been instituted by the six plaintiffs alone yet, curiously enough, the names of the 393 persons originally mentioned in the heading of the plaint were entered in the heading of the judgment of the first Court, and the same mistake was repeated in the heading of the decree. The defendants appealed to the lower Appellate Court and in the list of parties given in the heading of the memorandum of appeal the names of 52 defendants appellants were mentioned, and in the list of respondents the names of all the 393 persons were given. On the date of hearing it was discovered that three of the respondents, namely, Sisa, Ballu and Daya, had died. Their legal representatives were not brought on the record within the period of limitation, namely, six months from the dates of their deaths. Applications had been made beyond time for substitution of names and had been granted *ex parte*. The Court held.

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that out of the plaintiffs-respondents (*Jats*) all having common interest in this litigation, Sisa died on the 6th June 1912, Ballu died on the 18th July 1912 and Daya died on the 19th September 1912, and that applications for substitution of their legal representatives were made long after the period of six months fixed and made the following order:—

"Hence the appeal had abated (*vide Harlu v. Lala* (1). I cannot proceed with this appeal which had abated under the law (*vide* Order XXI, rule 4, of the Code of Civil Procedure)."

On the appeal being called for hearing in this Court the preliminary objection mentioned above was raised. The decision in the Full Bench ruling *Niranjan Nath v. Afzal Hussain* (2) was relied upon in support of this objection. In our opinion the decision instead of supporting the contention of the learned Vakil for the respondent goes to show clearly that, so far as the facts of this case are concerned, the order impugned is clearly a decree and is open to an appeal. The following passage, to be found at page 405\*, of the judgment deals with the precise question which arises on the facts of this case:—

"When there are two or more plaintiffs, and one of them dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone and no application to bring the legal representative on the record is made within six months Order XXI, rule 3 lays down that the suit shall abate so far as the deceased plaintiff is concerned. What is the effect of this partial abatement on the suit of the surviving plaintiff or plaintiffs? If the suit is of such a nature that it cannot proceed in the absence of the deceased's legal representative the partial abatement will result in the total abatement or dismissal of the suit. Whether the final decision is called an abatement or a dismissal, *qua* the surviving plaintiff or plaintiffs, it is manifest that it falls within the definition of term 'decree' and is appealable as such."

From the order of the lower Appellate Court it is manifest that the Court declared

(1) 21 Ind. Cas. 951; 41 P. R. 1915; 15 P. L. R. 1914; 16 P. W. R. 1914.

(2) 34 Ind. Cas. 822; 123 P. R. 1916 (F. B.); 111 & 176 P. W. R. 1916; 146 P. L. R. 1916.

\*Page of P. R. 1916—[Ed.]

the appeal to have abated on the ground that the plaintiffs in whose favour the decree stood had a common interest in the litigation. Apparently, the Court intended to adjudicate that, inasmuch as the interest of all the plaintiffs was common and the legal representatives of the deceased plaintiffs had not been brought on the record within time, the whole appeal had abated. Hence in terms of the ruling "whether the final decision is called an abatement or dismissal \* \* \* \* it falls within the definition of the term 'decree' and is appealable as such.

We accordingly hold that the preliminary objection has no force and must be overruled.

As regards the merits of the appeal we feel no difficulty in giving our decision. The three respondents who have been found by the lower Appellate Court to have died were not among the six plaintiffs who had instituted the suit in accordance with the order of the Court made under Order I, rule 3, of the Code of Civil Procedure. They were among the persons on behalf of whom these six plaintiffs had sued. Therefore, in fact and in law they were not parties to the suit and their names had unnecessarily been mentioned in the array of the respondents. It was, therefore, not necessary for the further progress of the appeal to bring on the record their legal representatives. If it was not necessary to bring their legal representatives on the record the appeal cannot be said to have abated. This view is clearly supported by the decision of a Division Bench in *Ram Dyal v. Mohammad Raju Shah* (3). It is not necessary for us, therefore, to give any further reasoning in support of the view we have taken, for the precise question which arises for decision before us arose before the Division Bench and was fully dealt with and decided by the learned Judges. Following the decision of the Division Bench, we hold that the order passed by the lower Appellate Court was erroneous. We, therefore, set it aside and remand the case under Order XL, rule 23, of the Code of Civil Procedure with the direction that the appeal be re-placed on its original number in the register of pending

(3) 51 Ind. Cas. 437; 46 P. R. 1919.

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appeals and be disposed of accordingly. We make no order as to the costs of this appeal. The other costs will follow the event.

*Appeal accepted.*

### MADRAS HIGH COURT.

APPEAL AGAINST ORDER NOS. 103 AND 102  
OF 1919.

August 9, 1920.

*Present:*—Justice Sir William Ayling, Kt.,  
and Mr. Justice Odgers.

SISTLA SITARAMASWAMY SASTRI,  
COUNTER PETITIONER—PETITIONER—APPELLANT  
*versus*

BONTHU BASAVAYYA alias BASIVI  
REDDI, PETITIONER—COUNTER-  
PETITIONER—RESPONDENT.

*Contract Act (IX of 1872), s. 133—Surety—Several  
defendants—Surety for decree against all—Suit con-  
tinued against one defendant only—Surety, whether  
exonerated.*

Where a person becomes surety for several defend-  
ants and contracts to be liable for any decree which  
may be passed against them, but the plaintiff with  
the leave of the Court, proceeds against one defend-  
ant alone, the exoneration of the remaining defend-  
ants has the effect of discharging the surety.

Appeal against the orders of the Court  
of the Subordinate Judge, Bezwada, in Exe-  
cution Petition Nos. 59 and 60 of 1917 and  
Civil Miscellaneous Petition Nos. 1495, 1494  
of 1917 and 335 of 1918, dated the 14th  
December 1918, in Original Suit Nos. 72 and  
76 of 1909, on the file of the District Court,  
Kistna.

FACTS appear from the judgment.

Mr. A. Krishnaswamy Aiyar, for the Ap-  
pellant:—The appellant undertook to be  
liable for any decree that may be passed  
against all the four defendants. The exonera-  
tion of some of them by the plaintiff pre-  
judices the surety as he is deprived of his  
own remedy against all the four defendant  
co-parceners. Section 139 of the Contract  
Act applies.

Mr. T. Ravachandra Eswar, for the Respond-  
ent.—The surety's obligation was to satisfy  
the decree on default by the defendants

The exoneration of some of them does not  
affect his liability. The plaintiff has not  
done any act inconsistent with any right of  
the surety.

### JUDGMENT.

C. M. A. No. 103 of 1919.

We think appellant in this case is entitled  
to discharge of his security in accordance  
with the provisions of section 139 of the  
Indian Contract Act. In his surety-bond, he  
contracts to be liable for any decree which  
the Court may pass against the defendants  
in the suit, who were four in number.  
Plaintiff, subsequently, with the leave of the  
Court, exonerated defendants Nos. 2 to 4 and  
proceeded with the suit against defendant  
No. 1 alone and obtained a decree against  
him.

This materially alters the position of  
affairs from the surety's point of view. At  
the time he became surety there were four  
persons (equal co-parceners in family pro-  
perty, as we are told) against all of whom  
he would have his own remedy, if he had  
to pay anything under the decree. The  
effect of the act of the Court and decree-  
holder, is to destroy his remedy against three  
of these.

We think the principle of section 139  
governs the case; and that the surety must  
be held to be discharged.

The order of the lower Court must,  
therefore, be set aside with costs in both  
Courts.

C. M. A. No. 102 of 1919.

This follows Civil Miscellaneous Appeal  
No. 103 of 1919. The order of the lower  
Court is set aside and the execution  
petition dismissed with costs in both  
Courts.

M. C. P.

*Appeals allowed.*



CHOKHEY LAL v. BEHARI LAL.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 156  
OF 1919.

May 19, 1920.

Present:—Mr. Justice Piggott and

Mr. Justice Kanhaiya Lal.

CHOKHEY LAL—DEFENDANT—APPELLANT

versus

BEHARI LAL AND OTHERS—

PLAINTIFFS—RESPONDENTS.

*Landlord and tenant—Grove—Portion of land denuded of trees—Land, character of, whether affected—Re-entry, right of, whether comes into existence—Wajib-ul-arz, construction of.*

The mere fact that a portion of a grove has become denuded of trees is not sufficient to deprive the land of its character of a grove, so as to give the Zemindar the right of re-entry in respect of the land as a whole, or in respect of any portion of it, or to a declaration that the land is no longer grove land. [p. 116, cols 1 & 2.]

The *wajib-ul-arz* of a village referred to a certain grove as standing on a different footing from other groves, and laid down that the grove-holder was to enjoy the full benefit of the grove, but that when the grove became denuded of trees the Zemindar should have the right to occupy and bring the land under his own cultivation, and this was followed by the words "and no tenant has any right without the consent of the Zemindar to plant a grove or scattered trees":

*Held*, that the meaning of the foregoing provision was not to prevent the grove-holder from keeping up the character of the grove by the planting of new trees. [p. 117, col. 1.]

First appeal from order of the Additional Judge, Shahjahanpur, dated the 12th September 1919.

Mr. Lakshmi Narayan, for the Appellant.

Dr K. N. Katju and Mr. Mukhtar Ahmad, for the Respondents.

**JUDGMENT.**—The plaintiffs in this suit are the Zemindars of a certain village. The defendant is a tenant of the village and is in possession of two plots of land constituting a grove or groves. It is not clearly stated anywhere whether the two plots of land are contiguous, but from the pleadings and the manner in which evidence was adduced it would seem that they must be; at any rate, it will be convenient to speak of the "defendant's grove." It is alleged in the plaint that, at the time of the Settlement in 1301 *Fask*, there were 323 trees standing in the grove and that now there are only 103 scattered trees. The plaintiffs, relying on their rights as proprietors of the land and on the provisions of the *wajib ul-arz* prepared

at Settlement, claimed that the defendant's grove, or at least some unspecified portion of the same, had become denuded of trees and had lost the character of a grove. They sought relief by way of a declaration and also by way of an injunction restraining the defendant from planting new trees in the grove, coupled with an order directing him to remove a number of trees alleged in the plaint to have been planted between a year and six months prior to the institution of the suit. The suit was resisted on a variety of grounds. The Court of first instance found that the land in suit, considered as a whole, had not lost its character of a grove, so that no right of re entry had come into existence in favour of the plaintiffs Zemindars, either in respect of the land as a whole or in respect of any portion of it. The learned Munsif went on to criticise the form of the reliefs claimed and held that, in any case, the plaintiffs were not entitled to relief by way of declaration, because if any right of re-entry had accrued to them they should have defined the area in respect of which that right had accrued and claimed possession over the same, and not a mere declaration. On the question of the injunction the Trial Court interpreted the provisions of the *wajib-ul-arz* in favour of the defendant and held that he had a right to continue planting new trees within the limits of the grove as defined in the Settlement papers. There were one or two other issues fixed which were not tried out, but the first Court dismissed the suit substantially upon these findings. In appeal the learned Additional Subordinate Judge has not discussed some of the points taken by the Court of first instance. He has not thought it necessary to consider whether the claim for relief by way of a declaration was in fact maintainable. He seems to have limited his consideration to the plaintiffs' claim for an injunction placing an interpretation upon the terms of the *wajib-ul-arz* different from that adopted by the first Court, he has held that the defendant has no right to plant new trees without the permission of the plaintiffs. Upon this finding he has remanded the suit for final disposal to the Court of first instance. In appeal before us there has been some argument on the questions discussed in the first Court's judgment which have not been touched upon in appeal.

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The learned Munsif was, in our opinion, clearly justified in his finding that, on the admission contained in the plaint itself, the land in suit still retains its character of a grove, so that no right of re-entry had come into existence in favour of the plaintiffs, either in respect of the land as a whole or in respect of any portion of it. There is also great force in the reasons given by the learned Munsif for his finding that, in no event, were the plaintiffs entitled to maintain a suit for a mere declaration, and those reasons have not been dissented from by the lower Appellate Court. There remains, however, the question whether the plaintiffs are or are not entitled to an injunction restraining the defendant from planting new trees. The point must be determined with reference to the provisions of the *wajib-ul-arz* and to the evidence on the record as to the previous conduct of the parties, that is to say, the rights hitherto exercised by the grove-holder. The Trial Court laid no small stress on the fact that in the period of 30 years or so between two Settlements, a very large number of new trees, 147 at least according to the learned Munsif, must have been planted by the grove-holder. It has also been shown to us that the re-planting of the grove on which the defendant has now embarked is on a considerable scale. According to the evidence, there are 2 or 3 hundred young trees at present standing in the grove over and above the 109 old trees referred to in the plaint. There was much controversy as to the age of these newly planted trees, but we do not think that anything substantially turns upon it. We are content to accept the finding of the lower Appellate Court that this re-planting of trees in the grove was at least started some four years prior to the institution of the suit. As to the terms of the *wajib-ul-arz* the essential points are the following: There is, first of all, a clear reference to these two groves as held by a "*raiya*", the predecessor-in-title of the present defendant, and as standing on a wholly different footing from the groves of proprietors of which a detail is also given. It is clearly laid down that the grove-holder is to enjoy the full benefit of the grove, including the fruit and the right to remove the timber. Then comes a provision that when the grove becomes denuded of trees the Zemindars shall have

a right to occupy and to bring it under their own cultivation. This is followed by the crucial words which we are asked to interpret. Rendered as literally as possible, the words are as follows, "and no tenant (*riaya*) has any right without the consent of Zemindars to plant a grove or scattered trees." The case for the plaintiffs-respondents is that these words refer to all *riayas* in the village, including the holder of the two particular groves which are mentioned just before this sentence, and that they amount to a prohibition of the planting of new trees within the grove in suit, either to re-place the old ones as those fall down or under any other circumstances, unless the consent of the Zemindars is obtained. The Trial Court regarded these words as wholly independent of the provisions immediately preceding about the two specified groves belonging to the defendant's ancestor. It treated them as merely containing a general statement that, in future, tenants of the village would not have any right either to plant a new grove or to plant individual trees, as, for instance, on the boundaries of their fields, or on the waste lands of the village, without previously obtaining the consent of the Zemindars. The lower Appellate Court seems to have thought it sufficient to hold that the words "*aur kisi riaya ko*" are perfectly general and are sufficient to include the predecessor-in-title of the defendant. This is a fair remark enough, if the attention of the Court is to be limited to these words alone; but it is certainly difficult to apply the words immediately following to the case of the existing grove-holder whose rights have just previously been defined. We had to put it to the learned Counsel for the respondents whether he wished us to apply this particular sentence to the facts of the present case on the ground that the defendant had been planting scattered trees, or on the ground that the defendant had been planting a grove. The former alternative he very properly abandoned. It seems, indeed, quite impossible to apply the words "*lagane darakht mutafarriqa*" to the facts disclosed by the evidence as to what the defendant has been doing within the boundaries of his own grove. The contention, therefore, is that the defendant has transgressed a provision of the *wajib ul arz* by virtually planting a grove. We think that this contention is almost as

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difficult to adopt as the other. The defendant has presumably waited until a considerable number of the trees in the grove had reached an age at which they were no longer valuable as fruit-bearing trees, but were likely to yield a profit either as timber or as firewood. He has then begun to plant a large number of trees to re-place those which have thus been lost. The expression "*lagane bagh*," as it appears in the *wajib-ul-arz* certainly seems to us to refer to the planting of a new grove. It is quite true that there is no word like "*jadid*" in the sentence in question, but when one comes to read the context the meaning does seem to be that, apart from the rights of the existing groveholder which have been just specified, no tenant in the village is recognised as having a right to plant a grove, that is to say, in effect to plant a new grove, without the consent of the proprietors.

Something has been said to us about the rights of the parties under the general law. So far as decided cases go, the tendency has been to limit the decision by the provisions of the *wajib ul arz* and to assume that the grove holder possesses all rights in respect of his grove which are not excluded by those provisions. At any rate, we think that, if it had been intended to prevent this groveholder from keeping up the character of the grove by the planting of new trees, something explicit would have been said on the subject in the *wajib ul arz*, and in this connection, the evidence relied upon by the first Court as to the practice of planting new trees which had apparently been going on without question for the entire interval between two Settlements becomes of considerable significance. The learned Additional Subordinate Judge has said that the terms of this *wajib ul arz* are very similar to those of another *wajib-ul-arz* which a learned Judge of this Court was called upon to interpret in another case. There is, no doubt, a certain similarity but, as a matter of fact, the judgment under appeal is an illustration of the danger of attempting to interpret a document in one case by the interpretation which may have been put upon a differently worded document in some other case. We think the wording of the *wajib-ul-arz* which has to be considered in the present case is distinguishable in the most crucial point from that of the *wajib-ul-arz* referred to in the

judgment of the lower Appellate Court. In our opinion, therefore, the decision of the Court of first instance was correct. The plaintiffs were entitled to no relief and the order of remand passed by the lower Appellate Court is unsustainable. We allow this appeal, set aside the order of the lower Appellate Court, and restore the decree of the Court of first instance, with costs throughout in favour of the defendant.

*Appeal allowed.*

### MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 79  
OF 1919.

August 11, 1920.

Present :—Justice Sir William Ayling, Kt.,  
and Mr. Justice Krishnan.

PUTHIA VEETIL MOHIDIN—PETITIONER—  
ASS.GNEE—DECREE-HOLDER—APPELLANT

*versus*

IRAKKAT KARNAVAN RAMAN  
NAYAR (DEAD) AND OTHERS—

CONTR-PETITIONERS AND PLAINTIFFS

Nos 1 AND 2—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—  
Execution of decree—Application for copy of decree,  
whether step-in-aid of execution.*

An application by a decree-holder for a copy of the decree is not an application to the Court "to take some step-in-aid of execution" within the meaning of Article 182 (5) of Schedule I to the Limitation Act.

Appeal against the order of the District Court, South Malabar, dated the 24th January 1919, in Appeal Suit No. 634 of 1918, preferred against the order of the Court of the District Munsif, Chowghat, dated the 24th September 1918, in Execution Petition No. 1302 of 1918, in Original Suit No. 828 of 1913.

FACTS appear from the judgment.

Mr. C. V. Ananthakrishna Aiyar, for the Appellant.—The first step to take proceedings in execution is to obtain copy of the decree. The application for copy of the decree is a 'step in-aid of execution' and is a fresh starting point for limitation,



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Mr. K. P. M. Menon, for the Respondent.—There is no connection between securing copy of a decree and its subsequent use for execution proceedings. In granting the copy there is no step taken in aid of execution. The copy may be applied for also for the party's satisfaction.

JUDGMENT.—The only question is, whether a decree-holder can plead his application for copy of decree as an application to the Court "to take some step-in-aid of execution." We agree with the District Judge that it cannot be so treated. There is no necessary connection between obtaining a copy and utilising it for the purpose of execution, and we do not think that it can be said that the Court in granting the copy takes any step-in-aid of execution. This appeal is dismissed.

M. C. P.

*Appeal dismissed.*

### MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1373 OF 1918.

August 10, 1920.

Present:—Justice Sir Abdur Rahim, Kt.,  
and Mr. Justice Oldfield.

KATAPRATH KATAKKE PURAYIL  
THAYYIL MAMMAD KARNAVAN  
OF THE TARWAD AND OF HIS TAWAZHI  
AND OTHERS—PLAINTIFFS—

APPELLANTS

*versus*

VALUVAKKAT KISHAKKE PURAYIL  
MAMMAD AND OTHERS—DEFENDANTS

—RESPONDENTS.

*Malabar Law—Alienation by karnavan unquestioned by tawazhi members—Attaladakam heirs, right of, to sue for recovery of alienated properties.*

An attaladakam heir who succeeds to the properties of a tawazhi only when there are no members left and to properties which have not been disposed of by the last members cannot question an alienation made by the karnavan which was not impeached by the tawazhi members [p. 120, col. 2]

Second appeal against the decree of the District Court, North Malabar, in Appeal Suit No. 299 of 1915, preferred against the decree of the Court of the District Munsif, Talliparamba, in Original Suit No. 820 of 1913.

FACTS appear from the judgment.

Mr. O. V. Ananthakrishna Aiyar, for the Appellants:—The plaintiffs, the attaladakam heirs, could question the karnavan's alienation. Alienation by the karnavan without necessity is *ab initio* void and the alienee is only a trespasser who could be ousted by any proper heir to the estate. The other members of the tawazhi could recover the alienated property without first setting aside the alienation. Under the Limitation Law it is not necessary for junior members of a tarwad or Hindu reversioners to set aside alienations by the karnavan or the widow before suing to recover the property. In a case falling under section 144, the person in possession must be deemed to be a trespasser and the alienation must be deemed to be non-existent. As, under English law, the right to avoid transactions of this nature descends to the heirs.

Mr. K. P. M. Menon, for the Respondents.—Attaladakam heirs are a kind of residuary heirs. They only succeed in the absence of tawazhi members and to undisposed of properties. Where the tawazhi members did, by no act of theirs, object to the alienation, it is not open to the attaladakam heirs to question it. The karnavan represents the tarwad and has large disposing powers. The right of the other members is limited and it is only they that can question the karnavan's act where it was not for a necessary purpose.

The analogy of sections 91 and 144 of the Limitation Act does not fit in. It cannot be said that an improper alienation is no alienation at all. Nor can any deductions be made from the position and rights of Hindu reversioners.

JUDGMENT.

ABDUR RAHIM, J.—In this appeal the question of law is as to the right of attaladakam heirs to dispute certain alienations made by the karnavan of a tawazhi who owned the property in dispute when the other surviving member of the tawazhi living at the time did not revoke it by any unequivocal act of his during the lifetime of the karnavan or after his death. There is no express authority on the point, but it seems to me all the same that it does not admit of any substantial doubt. In this case there were two members of the tawazhi to which this property belonged.

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and the *karnavan* for the time being made gifts of some of the properties to his children. The other member of the *tawazhi* at the time was one Paikoya. He did not, during the lifetime of the *karnavan*, take any steps to question these gifts except as regards one item of property which is not in dispute and with respect to which, before his death, he had instituted a suit and obtained a decree declaring that the alienation of the item of the family property was invalid. But he did not take any steps to get the rest of the property from the donees.

It was contended by Mr. Anantakrishna Aiyar, the appellants' learned Vakil, that the *attaladakam* heirs, that is, the *tarwad* which would succeed to the property on the death of the last surviving member of the *tawazhi*, were entitled to recover the property from the alienees. The plaintiffs are called *attaladakam* heirs, although it appears that their right to succeed to the property on the death of its last surviving member is provided for by a *karar* which was executed when the *tarwad* became divided into several *tawazhis*. I don't think it makes any difference whether the right of the plaintiffs is based on the *karar* or on the general law which gives the *tarwad* the right of succession to the property of a *tawazhi* which has become extinct. The main argument of Mr. Anantakrishna Aiyar is that the alienation by a *karnavan* of a Malabar *tarwad* or *tawazhi* without such necessity as is recognised by the law is *ab initio* void and the alienee is in the position of a trespasser. The right of the remaining members of the *tarwad* to the property, according to this contention, is not in any way affected by alienation and they can recover the property without seeking to set aside the alienation. His argument is founded on the decisions on the question of limitation whether it is necessary for a junior member of a *tarwad* or of a reversioner under the ordinary Hindu Law to have a deed of alienation executed by the *karnavan* or a limited owner like a widow cancelled and set aside within the period of limitation provided by Article 91. There used to be a conflict of decisions on this subject, but it has been ultimately ruled by the Privy Council in *Bijoy Gopal Mukerji v. Krishna Mahishi*

*Debi* (1) that it is unnecessary to have the alienation cancelled and set aside in such cases. Their Lordships say that, by instituting a suit for possession, a reversionary heir sufficiently elects to avoid the transaction and it is not necessary for him to have the deed set aside by any act previous to the institution of the suit. And we have also been referred to several decisions of this Court in which similar language is used in respect of alienation by the *karnavan* of a Malabar *tarwad*; *Mandoth Veetil Ohappan v. Puthanpurayil Ranu* (2) and *Unni v. Kunchi Amma* (3). But these decisions on the question of limitation do not really conclude a point of this nature. The main basis of the argument is that, if a case falls under Article 144 of the Limitation Act, then we must take it that the person in possession is a mere trespasser and, although he may profess to claim possession under a deed executed by a person who, in proper circumstances, would be entitled to convey the property, yet he has no title to the property and we must treat the case as if the alienation had ever been made. It is difficult to see how any such proposition can be derived from the cases to which we have been referred. It would be an extreme proposition of the law to lay down that an improper alienation by a limited owner or by a person in the position of a *karnavan* of a *tarwad* must be treated for all purposes as if it had never taken place. It is quite clear that there may be persons in adverse possession of a property to whom Article 144 of the Limitation Act is applicable, but who cannot be properly treated as mere trespassers. However that may be, the question before us is, are persons like the plaintiffs in the present case entitled to question and avoid alienations made by the *karnavan* of a Malabar *tarwad*? There can be no doubt that only the remaining members of the *tarwad* whose property has been wrongfully alienated by the *karnavan* can question such an alienation. The *karnavan* of a *tarwad* under the Malabar Law is the only person who can deal with the properties of the *tarwad* in circumstances recognised by the law,

(1) 34 C. 329; 11 C. W. N. 424; 5 C. L. J. 834; 9 Bom. L. R. 602 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 I. A. 87 (P. C.).

(2) 15 Ind. Cas. 587; 37 M. 420; 13 M. L. J. 118.

(3) 14 M. 26; 5 Ind. Dec. (N. S.) 19.

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and the other members have no rights in the property in the sense of their being entitled to a share in the property or to be able to ask for partition. Their rights consist in being maintained by the *karnavan* out of the income of the family property and to see that the *karnavan*, does not injure the family property by dealing with it in an improper way. If the junior members did not chose to question the alienation made by the *karnavan*, it is impossible to conceive on what principle their right would descend to a person like an *attaladakam* heir. It cannot be disputed that the *karnavan* and the junior member all together might make a gift of the entire family property if they so chose and, if the *karnavan* makes such a gift and the other members of the family affirm it, the result would be the same. There is no provision of law which lays down that they must affirm it by some positive act of theirs and, so far as I can see, it would, be sufficient if they did not, by any unequivocal act, call in question the alienation. In this case we have been asked by Mr. Anantakrishna Aiyar to say that it was alleged in the plaint that the Pakoya in fact had elected in his lifetime to avoid the transaction in question, but we do not think that there is any such definite allegation. All that is stated in paragraph 3 of the plaint is, that "the deceased Pakoya also had taken objection to the said demises." That is not a statement that he had, by any clear, unambiguous act, made a declaration supposing that a mere declaration would be sufficient that he would not be bound by the alienation made by the *karnavan* Ali Kunbi. In the plaint in the suit in respect of the item of property not in question in this litigation, there occurs a statement to this effect, "other documents also appear to have been executed for the benefit of the wife and children and other reliefs will be sought in respect of them." There is nothing in this statement which would enable us to identify any of the properties involved in the suit and in other respects also the statement cannot be said to be at all clear or unambiguous.

A number of English authorities have been cited before us by Mr. Anantakrishna Aiyar in order to establish that the right to avoid

a transaction of this nature descends to the heirs and legal representatives. But these cases can be of no help to us. They are cases which relate to the right to recover damages on similar remedies with respect to torts and it will be totally unsafe to draw any analogy between those cases and a case like the present arising under of the peculiar institution of the Malabar Law. Even the cases relating to the rights of a reversioner to avoid transactions of this kind under the ordinary Hindu Law do not furnish an exact analogy, because the position of the junior members of the *tawad* is in some respects weaker than that of the reversioners under the ordinary Hindu Law. A Hindu widow has merely a limited estate and her powers of alienation and management of the property are more limited than those of a Malabar *karnavan*. An *attaladakam* heir succeeds to the properties of a *tawashi* only when there are no members of the *tawashi* left and, of course, only to properties which were not disposed of by the last members of the *tawashi*. I must hold in this case that the property in dispute was disposed of by the last members of the *tawashi* and there was nothing left for the plaintiffs to succeed to. This Second Appeal (Second Appeal No. 1373 of 1918) is dismissed with costs. The other Second Appeals Nos. 1374, 1375 and 1376 of 1918 follow.

OLDFIELD, J.—I agree with my learned brother, and concur in the order proposed by him.

M. C. P.

*Appeal dismissed,*

ALLAHABAD HIGH COURT.  
SECOND CIVIL APPEAL No. 84 of 1918.  
July 20, 1920.

Present:—Mr. Justice Tudball and  
Mr. Justice Sulaiman.

RAM CHARAN SAHU AND ANOTHER—  
PLAINTIFFS—APPELLANTS

versus

GOGA alias MATA PERSHAD  
AND OTHERS—DEFENDANTS—  
RESPONDENTS.

Execution of decree—Sale—Property of person  
connected with suit sold—Procedure,



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Where in execution of a decree the property of a person unconnected with the suit is brought to sale and he is ousted and possession given to the auction-purchaser, such person is entitled to be re-placed in the position in which he was when ousted. [p. 123, col. 2.]

The mere fact that the auction-purchaser's remedy has, in the meantime, become barred by time makes no difference. [p. 123, col. 2.]

Second appeal from the decision of the Additional Judge, Gorakhpur, dated the 4th May 1917.

Messrs. K. N. Katju and Badri Narain, for the Appellants.

Mr. Jang Bahadur Lal, for the Respondents.

**JUDGMENT.**—The present litigation has been before this Court once before in First Appeal No. 205 of 1913. The facts which have given rise to the present litigation are to be found set out in *Mata Prasad v. Ram Charan Sahu* (1). We will re-state the facts. Two brothers, Baij Nath and Jagarnath, were members of a joint Hindu family. Baij Nath obtained a simple money-decree against one Ram Jas on the 17th of June 1878. In 1881 under a deed of partition between the brothers Jagarnath also got a half share in the said decree. Both the brothers applied for execution of the said decree and in execution attached 16 annas of Mauza Karma on the 20th of September 1884. On the 29th of July 1887 Ram Jas executed a deed of simple mortgage in respect of an eight-anna share in Mauza Karma to the defendants first party. In the meantime, both Jagarnath and Baij Nath died. On the 10th of January 1898 Ram Jas executed a sale deed in respect of a nine annas six pies share in the village for the sum of Rs. 9,471 in favour of *Musammatt Sheolagna*, the widow of Jagarnath. Jagarnath also left three sons, Ram Charan, Tirbeni, and Ganri Shankar, who are the plaintiffs in the present suit.

Out of the consideration for the sale-deed Rs. 127 were paid in cash, the balance was left with the vendee to pay off the amount of the decree of the 29th of July 1887 held by the sons of Jagarnath and Baij Nath, and also the amount of another decree held by the sons of Baij Nath only. Mutation of names was effected in favour of *Musammatt Sheolagna*. Thereupon the defendants first party, i.e., the mortgagees

(1) 25 Ind. Cas. 381; 36 A. 446; 12 A. L. J. 701.

brought a suit on the basis of a mortgage of the 29th of July 1887 impleading Thakur Das, the heir of Ram Jas, the original mortgagor, and also *Musammatt Sheolagna*, the purchaser of the nine annas six pies share. *Musammatt Sheolagna* defended the suit. Among other pleas, she pleaded that she was not the owner of the sale-deed, dated the 10th of January 1898, that her sons, namely, Ram Charan, Tirbeni and Ganri Shankar, were the real owners, and, that they were necessary parties. The mortgagees would not admit that the sons were the real owners. They contended that *Musammatt Sheolagna* was the real owner of the property. An issue was framed on the point and the learned Subordinate Judge held that *Musammatt Sheolagna* was the real owner, and, finding on the other issues in favour of the plaintiffs mortgagees, passed a decree in their favour on the 2nd of June 1898. In execution of that decree a six annas share in Mauza Karma was sold and purchased by the decree-holders. That six-annas admittedly included four-annas out of the share purchased by *Musammatt Sheolagna*. Possession was formally delivered to the decree-holders auction-purchasers on the 14th of April 1900. On the 16th of December 1911 the three sons, Ram Charan, Tirbeni and Ganri Shankar, started the present litigation suing for possession of the four-annas share in Mauza Karma against defendant's first party on the ground that they were the real purchasers of the party under the sale deed of the 10th of January 1898, and that the decree obtained against *Musammatt Sheolagna* was collusive and not binding on them. The Subordinate Judge held that *Musammatt Sheolagna* was the real owner, that even if she was the *benamidar* the decree against her was binding upon the real owners, i.e., the present plaintiffs. On appeal the Additional District Judge reversed the findings on both the issues and remanded the case for trial on the merits. The mortgagee decree-holders auction-purchasers appealed to this Court and this Court upheld the decision of the Additional District Judge by its judgment which is to be found in *Mata Prasad v. Ram Charan Sahu* (1). By that decision it was finally decided between the parties to the present litigation that the present plaintiffs, the sons

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of Musammat Sheolagna, were the real owners, that Musammat Sheolagna was not a *benamidar* for her sons and that the decision in the former litigation did not operate as *res judicata*. The case went back to the Subordinate Judge for decision on its merits. The learned Subordinate Judge held on the facts as now established that the plaintiffs were entitled to possession but he held that as the defendants first party, if relegated to a fresh regular suit, would be unable to enforce their mortgage against the sons of Musammat Sheolagna on account of the rule of limitation, it would be hard lines on them if the plaintiffs were given possession without being forced to pay what is due to the defendants first party on their mortgage. It accordingly gave the plaintiffs a decree for possession conditional on payment of a certain sum of money within a certain time. In default their suit was to stand dismissed. On appeal the lower Appellate Court modified the decree only as to the amount of money that was to be paid. Both parties have come into this Court in second appeal. The plaintiffs urge that they are entitled to an unconditional decree for possession. The defendants first party plead that they are entitled to recover a greater sum from the plaintiffs than the Court below has allowed. They seek for a modification of the decree of the Court below but only as to the amount of money to be paid by the plaintiffs.

Briefly stated, the facts are as follows: The mortgagees brought a suit for sale against the original mortgagor and against one Musammat Sheolagna, the ostensible transferee of the property. Musammat Sheolagna when impleaded came forward and stated to the Court that she was not the real owner and that her sons were the real owners and that they ought to be impleaded. The mortgagees, for some reason best known to themselves, which we have not been able to fathom, resisted the attempt to bring the sons of Musammat Sheolagna into the case as defendants. One would have thought that they would have hailed the impleading of these persons with joy as it would finally have decided the matter completely as between them and everybody who had an interest or claimed to have an interest in the property, but they objected tooth and nail and succeeded in keeping

them out of the suit. They got a decision behind the backs of the sons that the mother was the owner. On the findings in the present case the mother was not the owner but the sons were. They put to sale the right, title and interest of Musammat Sheolagna which was nil and they purchased, that right, title and interest at an auction sale. They then applied for possession and it was formally granted to them on the 14th of April 1900 and they succeeded in ousting the real owners of the property who had not been made parties to the mortgage-suit at all. The real owners have come into Court and have asked to be reinstated in possession, the lawful possession which they had on the 14th of April 1900 and with which the mortgagees decree-holders auction purchasers, had no right to interfere. One would have thought *prima facie* on these facts that the plaintiffs were clearly entitled to be re-placed into lawful possession of the property to which they clearly were entitled on the 14th of April 1900. The only ground on which the Court below has given a conditional decree is that if the opposite party were relegated to their proper remedy by a regular suit that suit would be barred by time. In our opinion, this is quite an insufficient ground for granting a conditional decree, specially on the facts of the present case. It is no body's fault but that of the mortgagee decree holders that the present plaintiffs were not impleaded in the former litigation. They are in the position of persons who wrongfully ousted the plaintiffs and who, on the 14th of April 1900, were not legally entitled to possession at all as against these plaintiffs. The lower Court has placed reliance upon two decisions of this Court to be found reported as *Hajra Bibi v. Shiam Narain* (2) and *Ram Prasad v. Bhikari Das* (3). The facts of these two cases differ considerably from the facts of the case now before us. In *Ram Prasad v. Bhikari Das* (3) the mortgagee obtained his decree and purchased the property and when he came to apply for possession was resisted and failed to get possession. He then brought a suit in the alternative to recover either his money or possession of the property. This Court held that he was entitled to one of the

(2) 20 Ind. Cas. 184; 11 A. L. J. 862.

(3) 26 A. 434, A. W. N. (1904) 108.

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two. In the case reported as *Hajra Bibi v. Shiam Narain* (2) the purchaser was not the mortgagee decree-holder but a third party. In neither of these two cases was any question of limitation raised. In the case reported as *Ram Prasad v. Bhikari Das* (3) it could not have arisen at all. In the case reported as *Hajra Bibi v. Shiam Narain* (2) it is impossible to say from the report whether or not the point of limitation could have been raised, but it clearly was not raised. There is no mention of the word 'limitation' to be found either in the statement of facts or in the judgment. On behalf of the plaintiffs-appellants our attention has been called to the Full Bench decision of this Court reported as *Hargu Lal Singh v. Gobind Rai* (4) and *Madan Lal v. Bhagwan Lal* (5). In each of these cases the mortgagee auction-purchaser brought a suit simply for possession. This Court on both occasions held that his claim for possession could not lie and that the suit was to stand dismissed. To a considerable extent it seems to us that the two decisions in *Hajra Bibi v. Shiam Narain* (2) and *Ram Prasad v. Bhikari Das* (3) clash with the Full Bench rulings, because in each of these cases it has been held that the plaintiffs therein were entitled either to recover their money or to recover possession of the property, whereas in the Full Bench case decision it was distinctly held that the plaintiffs were not entitled to possession at all. Be that as it may, the facts of the present case do differ from the facts of those four cases. Here we have it that the mortgagee auction-purchaser has gone one step further and has ousted from possession persons who were lawfully entitled to possession on the day of the ouster. Further, we have it admitted before us very clearly and distinctly that his claim (when the present suit was brought) under his mortgage against the present plaintiffs was time-barred and that he could not have recovered on it. The lower Courts, therefore, have allowed the wrongful possession obtained by the defendants to operate in their favour so as to enable them to give the plaintiffs a decree conditional on

payment of what is now a time-barred debt so far as the present plaintiffs are concerned. There is no denying the fact that the ouster of the plaintiffs was an unlawful ouster. It had come about under the colour of a decree and an auction sale. That does not make it any the more legal specially when we see that these mortgagees auction purchasers fought tooth and nail to prevent the present plaintiffs being impleaded in the former litigation. Furthermore, the person whom they did implead and whose rights they purchased has been found to have no title whatsoever in the property. The act of the auction-purchasers, therefore, has been equivalent to that of a mortgagee actually ousting his mortgagor although his mortgage was only a simple one and then pleading in defence that the persons lawfully entitled to possession cannot get possession until his money is paid. In other words, he seeks to call in aid for his defence in the present suit his own wrongful act. The plaintiffs, in our opinion, are clearly on the facts entitled to be replaced in the position in which they were on the 14th of April 1900, leaving it to the opposite party to seek and pursue any remedy which they may have according to law. The mere fact that his remedy may now be time-barred is no good ground for giving the plaintiffs a conditional decree for possession on re payment of money. We, therefore, allow Appeal No. 84 of 1918 and we grant to the plaintiffs an unconditional decree for possession of the property. The plaintiffs will have their costs in all Courts including in this Court fees on the higher scale.

Appeal allowed.

## MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 353 OF 1919.

July 2<sup>nd</sup>, 1920.Present:—Justice Sir William Ayling, Kt.,  
and Mr. Justice Krishnan.DURAIYYA SOLAGAN—RESPONDENT  
No. 2—APPELLANT

versus

VENKATARAMA NAIKER AND OTHERS—  
PETITIONER AND RESPONDENTS NOS. 1  
AND 3—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 36—Limita-

(4) 19 A. 541 (F. B.); A. W. N. (1897) 154; 9 Ind. Dec. (N. S.) 850.

(5) 21 A. 275 (F. B.); A. W. N. (1903) 41; 9 Ind. Dec. (N. S.) 859.



## JANGAL CHAUDHRY v. LALJIT PASBAN.

tion Act (IX of 1908), Sch. I, Art. 181, applicability of—Official Receiver, application by, to avoid transfer—Limitation for making application.

The period of limitation prescribed by Article 181 of Schedule I to the Limitation Act, is confined to applications under the Civil Procedure Code, and does not apply to an application under section 36 of the Provincial Insolvency Act made by the Official Receiver. No period of limitation is prescribed for such an application which may be made at any time during the pendency of insolvency proceedings.

Appeal against the order of the District Court, Tanjore, dated the 3rd November 1919, in A. No. 15 of 1917, in I. No. 17 of 1915.

FACTS appear from the judgment.

Messrs V. Ramasam and K. P. Ramakrishna Aiyar, for the Appellant.—The application by the Official Receiver was barred under Article 181 of the Limitation Act. It should have been dismissed. To a similar proceeding in the case reported as *Sambasiva Mudaliar v. Panchanada Pillai* (1) this Court applied Article 178 of the old Limitation Act of 1877.

Mr. A. V. Visvanatha Sastri, for the Respondents.—Article 181 of the Limitation Act applies only to applications under the Civil Procedure Code, and not to one under a self-contained, special enactment like the Insolvency Act. See *Janaki v. Kesavalu* (2), *Gnanamuthu Upadesi v. Vana Koilpillai Nalan* (3), *Rahmat Karim v. Abdul Karim* (4), *Baimanekbai v. Manekji Kavasji* (5), *Ali Ahmad v. Naziran Bibi* (6) and *Oonnell v. Himalaya Bank Limited* (7).

In *Sambasiva Mudaliar v. Panchanada Pillai* (1) these decisions were not dissented from, but it was held that the application itself was under the Civil Procedure Code.

JUDGMENT.—It has been argued before us that the learned District Judge was wrong in holding that the application by the Official Receiver under section 36 of the Provincial Insolvency Act was not barred by limitation, and that, in reality, it was so barred under Article 181 of the Limitation Act. We think the District Judge's conclusion

is right though upon a ground different from what he has taken. We are of opinion that that Article does not apply to an application like the present one. It has been held more than once in this Court that Article 178 of the Limitation Act of 1877, which corresponds to Article 181 of the present Act, applied only to applications under the Civil Procedure Code. See *Janaki v. Kesavalu* (2) and *Gnanamuthu Upadesi v. Vana Koilpillai Nalan* (3). This view has also been accepted by the other High Court. See *Rahmat Karim v. Abdul Karim* (4), *Oonnell v. Himalaya Bank Limited* (7), *Ali Ahmad v. Naziran Bibi* (6) and *Baimanekbai v. Manekji Kavasji* (5).

Our attention was drawn to the ruling in *Sambasiva Mudaliar v. Panchanada Pillai* (1) but in that case the learned Judges did not dissent from the earlier decisions but came to the conclusion that the application there was in reality one under the Code of Civil Procedure, to which Article 178 applied. That case is thus not an authority against the view we are following.

The application we are dealing with is clearly one under the Insolvency Act and not one under the Code, though the procedure prescribed by the Code has to be adopted in its disposal. It is thus an application to which no limitation applies and one which may be made at any time during the pendency of the insolvency proceedings.

In this view, the appeal fails and is dismissed with costs.

M. C. P.

*Appeal dismissed.*

## PATNA HIGH COURT.

LETTERS PATENT APPEALS Nos. 78 AND 80 OF 1919.

November 15, 1920.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice ROSE.

JANGAL CHAUDHARY—DEFENDANT  
—APPELLANT

versus

LALJIT PASBAN AND ANOTHER—

PLAINTIFFS—RESPONDENTS.  
Civil Procedure Code (Act V of 1908), O. IX, r. 18—

(1) 31 M. 24; 17 M. L. J. 441; 3 M. L. T. 19.

(2) 8 M. 207; 3 Ind. Dec. (N. S.) 143.

(3) 17 M. 379; 6 Ind. Dec. (N. S.) 263.

(4) 34 C. 672; 6 C. L. J. 119; 11 C. W. N. 674.

(5) 7 B. 213; 4 Ind. Dec. (N.) 144.

(6) 24 A. 542; A. W. N. (1902) 160.

(7) 18 A. 12; A. W. N. (1895) 136; 8 Ind. Dec. (N. S.) 712.

JANGAL CHAUDHARY &amp; LALJIT PASBAN.

*Ex parte decree, application to set aside, dismissal of—Suit to set aside decree, maintainability of—Fraud.*

A. obtained an *ex parte* decree upon [a hand-note against R., and, in execution thereof, R.'s property was attached and sold. Before the sale, R. applied under Order IX, rule 13 of the Civil Procedure Code to set aside the decree on the ground that the summons had not been duly served upon him; the Court found that service of the summons had been satisfactorily proved, and dismissed the application. R. then brought the present suit to set aside the decree on the ground of fraud in connection with the service of summons, and that the decree was obtained by perjured evidence:

*Held*, that the suit was not maintainable as the question of the non-service of summons having been agitated between the same parties and decided by a Court of competent jurisdiction, the matter could not be re-opened between the same parties in a subsequent suit, and that as the hand-note had been produced and proved by A., and accepted as genuine by the Court, it was not competent to R. to re-open by a subsequent transaction the very question which was decided in the original suit. [p. 126, col. 2; p. 127, col. 1.]

Letters Patent Appeal against the judgment of Mr. Justice Das, dated the 14th July 1919, in Second Appeals Nos. 491, 492 of 1918, affirming the decisions of the First Sub-Judge, Monghyr, dated the 8th February 1918, confirming those of the Second Munsif, dated 15th June 1917.

Mr. Shiveshwar Dayal, for the Appellant.

Mr. S. O. Mitter, for the Respondent.

#### JUDGMENT.

MILLER, C. J.— These two appeals are brought under the Letters Patent from a decision of a single Judge of this Court. They arise out of two suits, which were tried together by consent of all the parties, the facts in each being similar and the defendant being the same in each. The suits were instituted by the respondents to set aside certain decrees obtained against them by the appellant on the ground that they were obtained by fraud. The material facts, shortly stated, are as follows: the appellant sued the respondents to recover certain sums due under two hand-notes executed in his favour by the respondents, respectively. In each case, he recovered by an *ex parte* decree the amount claimed. In execution of the decree so obtained, the *jotes* of the respondents were attached and eventually sold. After attachment and before sale, the respondents applied under Order IX, rule 13, to set aside the decree on the ground that the summons was not duly served. It was the

respondent's case at the hearing of that application and it is their case in the present suits, that no service of summons had taken place at all, and that the appellant, in collusion with the Court-peon, got a false report of service of summons filed. The question, therefore, for determination in the application under Order IX, rule 13 was whether the fraud then, as now alleged by the respondents, was, in fact, perpetrated, or whether, as the appellant contended, the summons was, in fact, served upon the respondents. At the hearing of the application, the respondents themselves gave evidence, four witnesses in all being called on their behalf. The appellant called three witnesses, including himself and the peon, whose honesty had been attacked. The learned Subordinate Judge after hearing the evidence found that the appellant had proved satisfactorily that the summons was duly served and dismissed the application with costs. If the summons was, in fact, served, as the learned Subordinate Judge found, it follows that the fraud alleged by the respondents resulting in the non-service of the summons was found not to have taken place. The decision of the learned Subordinate Judge was, in my opinion, the judgment of a Court of competent jurisdiction directly upon the point raised in the present suits and is, in the words of Sir William DeGray, in the *Duchess of Kingston's case* (1), "as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another Court."

It is true that a decree can be set aside on the ground of fraud but, if the question has already been agitated between the same parties and decided by a Court of competent jurisdiction, the matter is *res judicata* and cannot again be re-opened between the same parties in a subsequent suit. The learned Judge, from whose decision these appeals are brought, considered that the case was governed by the decision of their Lordships of the Privy Council in *Khagendra Nath Mahata v. Pran Nath Roy* (2) and that the allegations made in the plaint in these suits were within the words of Lord Robertson,

(1) (1776) 2 Sm. L. C., 11th Ed., 781; 34 H. L. Jo. 655; 20 How. St. Tr. 537; 1 Leach C. C. 146.

(2) 29 O. 395 (P. C.); 29 I. A. 99; 6 C. W. N. 473; 4 Bom. L. R. 363; 8 Sar. P. O. J. 266.

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who delivered their Lordships' judgment in that case, "plainly an attack not on the regularity or sufficiency of the service or proceedings but on the whole suit as a fraud from beginning to end."

With great respect to the learned Judge, I am unable to apply the principle upon which that judgment was based to the facts of the present case. In that case the defendants had obtained an *ex parte* decree against the plaintiff, which he sought to have set aside on the ground of fraud. It is true that the plaintiff alleged that service of summons had not been duly made, and that the defendants had caused false returns of service of process to be made. It is also true that he had applied under section 108 of the Civil Procedure Code, 1882, to have the decree set aside on the ground of non-service of summons and had failed, and had that been his only ground for impeaching the decree, I venture to think that their Lordships' decision would have borne a different complexion. It was proved, however, that in the suit, which resulted in the decree impeached, the defendants, in order to keep the plaintiff out of the way and prevent him from knowing what was going on, had induced his wife and other relations to institute proceedings to have the plaintiff declared a lunatic and by means of various threats had caused him to leave his home and stay elsewhere in secrecy, and in such circumstances the plaintiff was unable to take proper steps to defend the suit. It is clear that these allegations, as pointed out in their Lordships' judgment, were an attack not merely on the regularity or sufficiency of the service, but on the whole suit as a fraud from beginning to end. These were matters, which were not enquired into in the proceedings under section 108, and no decision had been come to on them. Even assuming the service of summons to have been regular, there still remained the other question to be determined, upon which the decree could be set aside as fraudulently obtained. In the present case, the only fraud alleged is that in connection with the service of summons and this question had been determined in the proceedings under Order IX, rule 13. It was further alleged in the plaint that the hand notes sued upon were not genuine and did not bear the signatures

or thumb impressions of the respondents. It is not competent to the respondents, having failed in the original suite, to re-open by a subsequent action the very questions which were decided. The hand notes were produced and proved by the appellant in the original suite and were accepted as genuine by the learned Judge. It is true that the suits were determined *ex parte*, but this is no reason why the respondents should be allowed again to re-open the matters there determined. See *South American and Mexican Company, In re, Bank of England, Ex parte* (3).

It was lastly contended that as the decrees were also attacked on the ground that they were obtained by perjured evidence, a fresh suit will lie. There has been some conflict of opinion in the decisions both in England and in this country upon this question, but the better view seems to be that an action is not maintainable upon that ground. So far as this Court is concerned, the question has been decided in more than one case against the contention of the respondents, I need only refer to the case of *Ram Narain Lall Shaw v. Tooki Sao* (4) in which the learned Judge, from whose decision this appeal is brought, took part. It was there decided that a suit to set aside an *ex parte* decree, not on the ground that the plaintiff was prevented by any fraud on the part of the defendant from placing his case before the Court, but on the ground that the defendant procured the decree by putting forward perjured evidence in his favour is not maintainable. To the same effect is the decision in *Kirpa-sindhu Panigrahi v. Nandu Ohiran Panigrahi* (5) where it was observed: "if notice had not been served or if the defendants were prevented by the plaintiff from appearances, there would be some extrinsic collateral act, but where the notice has been duly served and the plaintiff has owing to his own fault failed to appear and place his case before the Court, there is not such extrinsic collateral act. The whole case is before the Court, which has decided it on the pleadings and on the evidence, and whether the case was a false one or not,

(3) (1895) 1 Ch. D. 87; 64 L. J. Ch. 189; 12 R. 1; 71 L. T. 594; 43 W. R. 131.

(4) 58 Ind. Cas. 182; 1 P. L. T. 119; (1920) Pat. 98; 2 U. P. L. R. (Pat.) 51; 5 P. L. J. 259.

(5) 56 Ind. Cas. 606; 1 P. L. T. 206.



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and whether the evidence adduced is perjured evidence or not, the Court must be held to have adjudicated on both these points and once having adjudicated, it cannot be asked to adjudicate again".

In my opinion, these suits are not maintainable, and the appeals should be allowed with costs here and in the Courts below.

Ross, J.—I agree.

*Appeals allowed.*

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 790 OF 1919.

August 2, 1920.

Present :—Justice Sir Abdur Rahim, Kt.,  
and Mr. Justice Oldfield.

PL. PL. PALANIAPPA CHETTIAR

—PLAINTIFF—APPELLANT

*versus*

N. S. P. CHOCKALINGAM CHETTIAR

—DEFENDANT—RESPONDENT.

*Contract Act (IX of 1872), s. 23—Judgment-debtor taking assignment of decree in name of agent—Execution by agent against other judgment-debtors and realisation of moneys—Suit against agent for recovery of moneys realised, maintainability of—Civil Procedure Code (Act V of 1908), O. XXI, r. 16.*

Plaintiff, who was one of several judgment-debtors, got an assignment of the decree in the name of his agent, who was to be paid a certain commission for executing the decree against the other judgment-debtors. The agent realised moneys in execution but refused to pay them over to his principal. In a suit by the latter for recovery of the amounts :

*Held*, that the suit was maintainable and did not fall within the mischief of section 23 of the Contract Act.

*Sykes v. Beadon*, (1879) 11 Ch. D. 170; 48 L. J. Ch. 522; 40 L. T. 243; 27 W. R. 464, *Booth v. Hodgson*, (1795) 6 T. R. 405; 101 E. R. 619, *Battersby v. Smyth*, (1818) 2 Madd. 110; 56 E. R. 45, distinguished.

*Gowami Shri Purushotamji Maharaj v. Robb*, 8 B. 398; 9 Ind. Jur. 37; 4 Ind. Dec. (N. S.) 640, explained.

Second appeal against the decree of the District Court, Ramnad at Madura, in Appeal Suit No. 753 of 1919, preferred against the decree of the Court of the Temporary Subordinate Judge, Sivaganga, in Original Suit No. 4 of 1918.

FACTS appear from the judgment.

Mr. A. Krishnaswami Aiyar, for the Appellant :—The contract here is one of agency and the defendant is certainly accountable to the plaintiff. The defendant having realized moneys, though under an illegal contract, there is no reason why he should retain it. *Tenant v. Elliott* (1), see also *Bhola Nath v. Mul Chand* (2).

The purchase of a decree by a judgment-debtor is not illegal. Order XXI, rule 16 only prohibits execution. The right of the judgment-debtor who has obtained the transfer to sue his co-debtors in contribution is not lost. See *Anant Vinayak v. Nagappa Subraya* (3). Here the defendant had realized moneys in execution without objection. The Court did not refuse execution. The point is that the defendant having got the moneys cannot, under his contract withhold them from his principal, the plaintiff. The case would be different if the plaintiff should compel the defendant to execute the decree or sue him for damages for failure to execute.

Mr. B. Bashyam Iyengar, for the Respondent :—Under Order XXI, rule 16, Civil Procedure Code the decree was not executable. It contains a distinct prohibition. The moneys having been realized in contravention of a statutory provision, plaintiff, who was a party to this illegal business, cannot claim any benefit under an illegal contract. The Court would have refused to execute the decree if it was brought to its knowledge that the defendant was only a *benamindar*.

The contract is also in violation of the provisions of section 23 of the Contract Act. The agency in favour of the defendant was created by the plaintiff to deceive the Court. Both the agency and the contract are unenforceable under the section. See *Sykes v. Beadon* (4), *Booth v. Hodgson* (5) and *Battersby v. Smyth* (6). See also *Gowami Shri Purushotamji Maharaj v. Robb* (7).

(1) (1797) 1 B. & P. 3 at p. 4; 4 B. R. 755; 123 E. R. 744.

(2) 25 A 639; A. W. N. (1903) 161.

(3) 32 B. 195; 10 Bom. L. R. 89.

(4) (1879) 11 Ch. D. 170; 48 L. J. Ch. 522; 40 L. T. 243; 27 W. R. 464.

(5) (1795) 6 T. R. 405; 101 E. R. 619.

(6) (1818) 2 Madd. 110; 56 E. R. 451.

(7) 8 B. 398; 9 Ind. Jur. 37; 4 Ind. Cas. (N. S.) 640.

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## JUDGMENT.

ABDUR RAHIM, J.—The plaintiff's suit has been dismissed on the ground that, according to section 23 of the Contract Act, the agreement on which the suit is based as contained in Exhibit A is illegal and that, therefore, the plaintiff cannot recover the money which the defendant had collected under certain decrees. The plaintiff himself is the judgment debtor under those decrees and he apparently asked the defendant to take an assignment of the decree on his behalf and to execute the decree against the other judgment-debtors and the defendant realised in execution certain assets. By Exhibit A, it is provided that the defendant will submit accounts to the plaintiff of the amount spent in collecting the money and of the amount realised and, after deducting a commission of 20 per cent, to pay over the balance to the plaintiff.

Order XXI, rule 16 says that "where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others." It is not contended that on such transfer, the liability under the decree becomes altogether discharged but that the decree shall not be enforced in execution. It is open to the judgment-debtor who has obtained a transfer of the decree to sue his co-debtor upon it for contribution as held in *Anant Vinayak v. Nagappa Subraya* (3). In this case the judgment debtors did not raise any objection to execution on the strength of Order XXI rule 16. The defendant must be taken to be an agent of the plaintiff for the actual realisation of the money. But it is argued on behalf of the respondent that it was the duty of the Court to refuse execution and the Court would have done so if it was brought to its notice that the defendant was merely an agent or *benamindar* of the plaintiff who was one of the judgment debtors. Having regard to the language of Order XXI, rule 16, we may proceed on the assumption that if the facts were known to the executing Court, it would have been bound to reject the application for execution.

Then, it is contended that if the Court were now to help the plaintiffs in recovering the moneys realised by the defendant by means of the execution of the decree

in spite of the prohibition of the law, that would be a violation of the rule laid down in section 23 of the Contract Act. Mr. Bashyam Iyengar, in support of the judgment of the lower Court has referred us to a number of rulings of the English Courts. The English authority on which much emphasis was laid down was the case of *Sykes v. Beadon* (4). There Jessel, M. R., upheld the proposition that a Court of Law or Equity will not lend its assistance in any way towards carrying out an illegal contract, therefore, such a contract cannot be enforced by one party to it against the other, either directly by asking the Court to carry it into effect, or indirectly by claiming damages or compensation for breach of it. The case before us does not fall within the proposition laid down in *Sykes v. Beadon* (4). In the first place, the purchase of a decree by one of the judgment-debtors is not illegal and, next, this case comes within the class of cases mentioned in the judgment of the Master of the Rolls: "but in cases where the contract is actually at an end or is put an end to, the Court will interfere to prevent those, who have, under the illegal contract, obtained money belonging to other persons on the representation that the contract was legal, from keeping that money." If the plaintiff in the present suit were suing the defendant to enforce the contract and to compel him to execute the decree against the co-judgment-debtors or to recover damages for having failed to do so, in that case, it would be asking the Court to carry out an illegal contract. But that is not the case here. The same answer is to be given to the cases in *Booth v. Hodgson* (5) and *Battersby v. Smyth* (6). On the other hand, this case, in my opinion, is governed by the class of cases of which *Bridger v. Savage* (8) is a leading example. There the plaintiff had employed the defendant for a commission to make bets for him on horses. The defendant accordingly made such bets, and he received the winnings from the persons with whom he had so betted. In an action by the plaintiff for the amount which the defendant had so received, it was held that 8 and 9 Vic. C. 109, section 18, which makes null and void all

(8) (1885) 15 Q. B. D. 363; 54 L. J. Q. B. 464; 53 L. T. 129; 33 W. R. 891; 49 J. P. 725.

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contracts by way of wagering, did not apply to the contract between plaintiff and defendant and that, therefore, notwithstanding that Statute, the plaintiff was entitled to recover in respect of the bets which had been so paid to the defendant. The learned Judges, of the Court of Appeal point out that the principle is that, "a person who has received money from another under an illegal contract cannot be allowed to retain it," to quote the language of Eyre, C.J., in *Terent v. Elliott* (1) Bowen, L.J., observed as follows: "If the person who has betted pays his bet he does nothing wrong, he only waives a benefit which the Statute has given to him, and confers a good title to the money on the person to whom he pays it. Therefore, when the bet is paid the transaction is completed and when it is paid to an agent, it cannot be contended that it is not a good payment for his principal. If not, how monstrous it would be that the agent who has received the money which belonged to his principal and which he received for his principal, and only on that account should be allowed to say that the payment was bad and void. The truth is that the contract under which he received the money for his principal is not affected by the collateral contract under which the money was paid to him." It seems to me that these observations apply to the present case. I may also point out that in *Bridger v. Savage* (8) which was argued by eminent Counsel on both sides, *Sykes v. Beadon* (4) was not cited at all as establishing a contrary proposition nor the cases in Terms Reports cited by the respondent. So far as the Indian Courts are concerned, there are two decisions directly against the contention of the plaintiff *Bhola Nath v. Mul Ohand* (2), *Nagendrabala Dass v. Guru Doyal Mukerji* (9). In the former decision Chief Justice Stanley takes the law as quite settled on the authority of the English decisions. On the other hand, we have been referred to a decision of the Bombay High Court in *Gowami Shri Purushotamji Maharaj v. Robb* (7). But as I read the case, it does not lay down anything different from the law enunciated in *Bridger v. Savage* (5). All that it lays down is that a suit could not

be sustained for levying a cess prohibited by law.

I am, therefore, of opinion that the judgments of the lower Courts are wrong. I must reverse them and remand the case to the Court of first instance for disposal on the other issues. Costs will abide the result. The Court-fees paid on the Second Appeal memorandum and in the appeal in the lower Appellate Court, will be refunded to the appellant.

OLDFIELD, J.—If it were necessary to consider whether section 23 of the Contract Act was applicable to the contract between the plaintiff and the defendant, I should have no difficulty in holding that the plaintiff's object, which he has unlawfully accomplished, was to defeat the provisions of Order XXI, rule 16. It is not disputed that the defendant entered into the contract with full knowledge of the circumstances and of the character of the plaintiff's intention in making it. That, however, is not enough to justify the defendant in repudiating the liability for what he realised on plaintiff's behalf. His agency to execute the decrees was, it should be remembered, in itself innocent. His knowledge that the execution of the decrees on plaintiff's behalf might defeat Order XXI, rule 16 will no more make his agency guilty than did the similar knowledge of the brokers referred to in *Bhola Nath v. Mul Ohand* (2) that they were encouraged in wagering transactions. See also *Nagendrabala Dass v. Guru Doyal Mukerji* (9). Mr. Bashyam Aiyangar, for the respondent, has put the case in this way. The creation of an agency by the plaintiff was part of the machinery, by which he intended to deceive the Court and thus to secure the successful execution of his unlawful design. That, he contends, is enough to bring the agency and the contract by which it was created, within the principle of section 23 and to make the latter unenforceable. He cited, to support this, *Bent v. Holgson* (5), *Battersby v. Smyth* (6) and *Sykes v. Beadon* (4) besides Indian cases of less importance. It does not seem to me that these authorities go to the length which he requires. In them the relation between the parties was not merely the means employed to carry out the unlawful transaction, but it was the transaction



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itself. In the three English cases, the material fact was that something was done by a number of persons which, according to law, either could not be done by that number of persons without some formality being complied with, or could not be done by that number of persons at all. It was the association which was in fact the unlawful element and which made the transaction unlawful. Here there is nothing of that sort, because the contract by which the parties were associated, here one of agency, was not in itself unlawful and was not what made the whole transaction unlawful since the unlawfulness would have been the same, had plaintiff succeeded in carrying through his execution himself without ever employing the defendant at all.

For these reasons, I agree with my learned brother and concur in the order proposed by him.

M. C. P.

*Appeal allowed;  
Case remanded.*

## [MADRAS HIGH COURT.]

SECOND CIVIL APPEAL No. 494 OF 1919.

September 19, 1920.

*Present*:—Justice Sir Abdur Rahim, Kt.,  
and Mr. Justice Olcfield.

ALAGAPPA CHETTY—PLAINTIFF—  
APPELLANT

*versus*

ALAGAPPA CHETTIAR AND ANOTHER—  
DEFENDANTS—RESPONDENTS.

*Hundi, invalid—Endorser, whether estopped from denying validity—Paper Currency Act (11 of 1910), s. 26.*

Inasmuch as by virtue of section 26 of the Paper Currency Act, a *hundi* made payable to bearer on demand is invalid, the endorser of such a *hundi* is not estopped from denying its validity on this ground as against his endorsee.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Sivagunga, in Appeal Suit No. 74 of 1918, preferred against the decree of the Court of the Principal District Munsif, Sivagunga, in Original Suit No. 123 of 1916.

FACTS appear from the judgment.

Mr. O. V. Ananthakrishna Aiyar, for the Appellant—The second defendant was the person who made an endorsement of an invalid document. It does not lie in his mouth to plead its invalidity. He is estopped. See *Arunachalam Chettiar v. Narayanan Chettiar* (1).

Mr. K. Bhashyam Aiyangar (with him Mr. Malim Sahib), for the Respondents.—The document is expressly declared invalid by Statute and there can be no estoppel against a statutory injunction. The observations in *Arunachalam Chettiar v. Narayanan Chettiar* (1) are *obiter*. To favour the theory of estoppel would be to nullify the provisions of the Paper Currency Act.

JUDGMENT.—The suit in which this second appeal has arisen was instituted by the endorsee of a *hundi* in order to enforce the payment of the *hundi*. The case is pressed only against the second defendant who is the endorser. The *hundi* itself is not forthcoming but the defendant in his written statement admitted that such a *hundi* had been issued, but that it was made payable to bearer on demand and as such it was an invalid document by virtue of section 26 of the Paper Currency Act. That section is absolutely clear and there can be no doubt that it applies to a *hundi* of this character. The point is settled by a ruling of this Court in *Chioambaram Chettiar v. Ayyasami Thevan* (2). But it was argued by Mr. Ananthakrishna Aiyar, that the endorser is estopped from denying the validity of his instrument. The authority for the proposition is an observation of one of the learned Judges in *Arunachalam Chettiar v. Narayanan Chettiar* (1). That observation is purely by way of *obiter* and no authority is cited in support of the proposition. It is well established that there can be no estoppel against a clear injunction of a statute. If we were to accept the contention of the appellant, we should be virtually abrogating section 26 of the Paper Currency Act which prohibits altogether the issue of any document like this except in the case set out in the proviso.

Mr. Ananthakrishna Aiyar also argued

(1) 51 Ind Cas 300; 42 M. 470; 86 M. L. J. 801; (1919) M. W. N. 188; 9 L. W. 488.

(2) 3 Ind Cas. 741; 40 M. 646; 81 M. L. J. 401; (1916) 2 M. W. N. 210; 4 L. W. 281; 20 M. L. T. 350.

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that the endorser second defendant ought to be treated as a banker, apparently on the ground that the *hundi* was drawn on him and he endorsed it to somebody else. There is no basis for this suggestion.

The second appeal is dismissed with costs of the first respondent.

M. C. P.

*Appeal dismissed.*

ALLAHABAD HIGH COURT  
FIRST APPEAL FROM ORDER NO. 12 OF 1920.  
July 30, 1920.

Present:—Mr. Justice Walsh and  
Mr. Justice Gokul Prasad.

Lala PARSHOTTAM SARAN  
—JUDGMENT-DEBTOR—OBJECTOR—  
APPELLANT

*versus*

Lala HARGOOLAL—DECREE HOLDER,  
AND ANOTHER—DECREE-HOLDER  
AND AUCTION-PURCHASER—  
RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 5—  
Stay of execution—Appellate Court, power of—Court  
which can stay execution—Order, cancellation of—Pro-  
cedure—Duty of Judge.*

Under rule 5 of Order XLI of the Civil Procedure Code an Appellate Court has no jurisdiction to grant a stay of execution of a decree of a subordinate Court unless it has seisin of an appeal against such decree. Where no appeal has been preferred, the Court which passed the decree alone has power to grant a stay, on sufficient cause being shown, during the time provided by law for presenting an appeal. [p. 133, cols. 1 & 2.]

The practice of scratching out or attempting to obliterate a previous order already passed by him in his judicial capacity, is conduct which no Judge ought, under any circumstance whatever, to permit himself to adopt. If he makes up his mind to cancel an order, the proper way to do so is by writing or dictating a fresh order stating that the previous order is cancelled and giving the reasons for such cancellation [p. 132, cols. 1 & 2.]

First appeal from the order of the Subordinate Judge, Moradabad, dated the 17th January 1920.

Mr. P. L. Banerji (with him Mr. B. E. O'Connor), for the Appellant.

The Hon'ble T. B. Sapru, Messrs. Kamla Kant Varma and Saila Nath Mukerji, for the Respondents.

**JUDGMENT.**—This appeal, which arises out of two applications made to the execution Court, raises several questions. We propose to deal only, so far as the decision of the case goes, with one point of law, which in our view is fatal to the appeal. Two applications were made to the Court below on the 27th of October 1919 to set aside a sale, or, in other words, to declare that a sale which had been only held provisionally had become void in the events which had happened. There is a difficulty about the application under Order XXI, rule 90. It is clear that the reason why two applications were made was that a difficulty was felt by the applicant and it was desirable to have an alternative or second string to his bow. The application under Order XXI, rule 90, i.e., the application 112C, breaks down by reason of the fact that no irregularity in publishing or conducting the sale was alleged or proved and no attempt was made to prove any loss resulting therefrom and it is plain law and covered by authority, namely, *Shirin Begam v. Agha Ali Khan* (1), that it is necessary for the applicant to make that position good. The other application, which is the substantial one and which has formed the subject of argument before us, we have treated as an application under section 47 arising out of the execution of the decree, being in substance an application to declare the sale void and of no effect. For the purpose of the point of law to be decided, it is not necessary to set out the whole of the history of this matter. It is sufficient to say that the applicant, Lala Parshotam Saran, purchased the interest of the judgment-debtor in the property in question subject to a heavy liability under a mortgage-decree which had been obtained by Hargoolal, the decree holder, in 1917, and in January 1917 the decree-holder made an application for sale. After considerable delay objections were taken by the judgment-debtor or his successor and were heard and disposed of on or about the 12th of September and an application was made by Parshotam Saran *ex parte* to this High Court, which forms the subject of our decision. At that time there no appeal had been filed against

(1) 13 A. 141; A. W. N. (1896) 9; 8 Ind. Dec. (N. S.) 800.

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the order dismissing the objections. Indeed, there could be none, because the High Court was closed except for vacation business and it was, therefore, necessary that application should be made to the vacation Judge. The vacation Judge was informed by affidavit that no appeal had been filed and that it was proposed to file an appeal at the earliest possible moment, namely, at the commencement of the next sittings of the Court. In view of the fact that security had been filed by the applicant, the vacation Judge entertained the application and granted a stay of the sale. The sale had been fixed for the next day and it was not possible for the order of the High Court to reach the Court below in time to stop the sale. Arrangements were made by which the Court below was informed by telegram of the order which the High Court had made that day. The Court being in a obvious difficulty made, what turns out to have been, a very sensible order. Having no order of the High Court before it, it refused to stop the sale, but made an order that if it should turn out that the sale had been properly stayed by the High Court, it would have to be cancelled. In the face of an order like that, both parties, of course, would proceed with the sale at their own risk; that is to say, the decree-holder and the purchaser might say to themselves, this is not good enough, and consent to the sale being cancelled and a fresh date fixed. On the other hand, the judgment-debtor might, if the sale took place and he had reason to complain of its results, apply to the Court to make some order confirming that which it had provisionally made, namely, that the sale should be void. On the 27th of October an application was made *ex parte* to the Subordinate Judge asking for such an order to be passed, namely, the sale be declared void, and the learned Judge appears to have made an order to that effect, but at the instance of the other party, also *ex parte*, subsequently cancelled. It is not necessary to deal with the legal effect of this particular proceeding, but it is desirable to point out to the learned Judge that whether he was *functus officio* or not, and could cancel the order which he had made on the 27th of October, if he made up his mind to

do so, the proper way to do so would be by writing or dictating a fresh order stating that his previous order was cancelled and giving the reasons for such cancellation. The practice of scratching out or attempting to obliterate a previous order already passed by him in his judicial capacity, is conduct which no Judge ought, under any circumstance whatever, to permit himself to do. It is obviously in the highest degree inconvenient and might, under certain circumstances, be much worse than inconvenient, and we do not hesitate to direct the learned Judge to take notice of this observation and on no account to permit himself to do anything of that kind with an order of the Court again. Passing from that, the next important step was that an appeal, towards the end of October, was filed in the High Court, when the High Court was open for the purpose. The auction-purchaser was not made a party to that appeal and he was compelled to apply to the High Court to be made a party. An order to that effect was made. The hearing of the appeal was expedited and on the 19th of December 1919 the appeal was dismissed on the merits and the order of stay granted by the vacation Judge on the 19th of September was discharged. We may here, in passing, observe that the learned Judge of the Court below has taken an erroneous view of the effect of a discharge of this kind. Assuming the stay order to have been properly obtained and granted within the jurisdiction of the Court, it is good as far as it goes and as long as it lasts, until it is discharged; and a proper order duly made according to law, if it is subsequently discharged for good reasons, cannot be treated as of no effect. Great point was made by the respondents before us, and properly made, of the terms in which that appeal was dismissed. The Bench of two Judges who heard that appeal, formed the opinion that the appeal and, therefore, necessarily, the application made for a stay in connection with the appeal, was a mere attempt by Parshotam Saran to delay the sale and to obstruct the execution of the decree without good cause; and it has been urged before us that, that being so, the order obtained *ex parte* on the 19th of September from the vacation Judge, must be taken to have been obtained *malafide* and that the



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result of that is that the present applicant cannot set up that order in his own favour for the purpose of having the sale invalidated. We agree that if that is made out, the result contended for by the respondents would necessarily follow. An applicant to any Court for an order in his own favour *ex parte*, if he acts with want of *bona fides*, cannot subsequently set up an order so obtained in his own favour, and if we were in a position to decide that point finally to-day, it would be a complete answer to the application of Parshotam Saran. It is, however, true, as pointed out by the applicants' Counsel, that in making the application he filed security which was afterwards found sufficient. We, therefore, come to no conclusion upon this question of fact. We are left with the question whether the order staying the sale, of the 19th of September, was a good order or a bad one. If it was a good order there was no sale. If it was a bad order there was nothing to render the sale invalid. The question whether it was a good order or a bad one depends upon the question whether the vacation Judge had power to make such an order, no appeal being, at that time, before the Appellate Court. We agree that Chapter I, rule 3 of our own High Court Rules enables a vacation Judge to exercise the appellate jurisdiction vested in the Court in any matter connected with or arising out of the execution of a decree which he considers urgent, and that that would clearly authorise him to grant a stay of execution of a decree in respect of which an appeal was pending in the Appellate Court. Whether it would enable him to admit an appeal for the purpose of granting a stay is another question upon which we give no opinion and which will have to be decided when the matter arises. The vacation Judge on this occasion was not asked to admit any appeal. No appeal was preferred before him. No order was made accelerating the admission of the appeal. All that happened was an undertaking on affidavit that an appeal would be filed at the commencement of the next sittings of the High Court. In our view, the interpretation to be put upon Order XLI, rule 5, which is the material provision in the Code of Civil Procedure in this matter, is that an

Appellate Court has no jurisdiction to grant a stay of execution in a matter of which it is not already seized in appeal. The matter has been strongly argued on behalf of the appellant on the terms of clause (1) of rule 5, and if clause (1) stood alone, there would be a good deal to be said for the contention, but the provisions in clause (2) which empowers the Court which passed the decree to grant a stay on sufficient cause being shown during the time provided by law for presenting an appeal, make it quite clear that that Court and that Court alone has jurisdiction during the period before the appeal was presented, and we think that this is the proper interpretation of rule 5 as a whole. We are confirmed in this view by such authority as appears to exist upon the subject. In an unnamed ruling reported as *Weekly Reporter, Miscellaneous Rulings, Volume VI, page 15 [Bhugwan Ohunder Ghose, In re (2)]*, a Court of two Judges held that the High Court could not under a provision of the law corresponding to the present Order XLI, rule 6, direct a lower Court to take security in execution of a decree when no appeal had been preferred to the Appellate Court against such decree. In 1904 a two Judge Bench in Calcutta, reported in the case of *Bhagwat Raikoor v. Sheo Golam Sahu (3)*, took the view that it is the Court which has seisin of the appeal which is competent to stay the carrying out of the order appealed against pending the hearing of the appeal, and that it was not competent to an Appellate Court to stay proceedings in the execution of a decree of a Subordinate Court merely because an appeal had been preferred against an order of the lower Court refusing to set aside the decree. In that case there was no appeal pending to the Appellate Court against the decree itself. By implication a strong Bench of five Judges in Calcutta took the same view in the case of *Balvishen Sahu v. Khugnu (4)*. That Court held that the Court which has seisin of the appeal can make an order staying proceedings pending the hearing. It is plain from the referring order which caused that Bench to be

(2) 6 W. R. Mis. Rul. 15.

(3) 31 C. 1081; 9 C. W. N. 123.

(4) 31 C. 722 (F. B.); 8 C. W. N. 572.

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constituted that they took the view that such an order could not be made unless the Court had seisin of the appeal. We, therefore, come to the conclusion that the order in this case which Parshotam Saran obtained in his own favour, was made without jurisdiction and could have no legal effect in nullifying the sale which took place on the 20th of September. It is, perhaps, superfluous to point out that *ex parte* orders are always obtained at the risk of the party applying for them. By reason of the fact that it is impossible for the Court dealing with such applications to take a complete view of the whole matter, that there is nobody on the other side to point out difficulties or objections, and that the tribunal is bound more or less to follow the lead of the person making the application it necessarily follows that it is impossible for the applicant, if he makes a mistake, either of omission or commission, so that it afterwards turns out that the order which he has obtained, is an imperfect one, to correct such mistake and have it put right in the same way in which orders may be amended or corrected when they have been passed in the presence of the parties and the mistake is a common one to both sides. On this ground alone the appeal fails and the application was rightly dismissed, though, as appears by what we have said, not upon the grounds upon which the learned Judge dealt with the matter in his judgment. Both the respondents, the decree-holder and the auction-purchaser, must have their costs of this appeal on the higher scale.

*Appeal dismissed.*

#### MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 280 OF 1919.

April 29, 1920.

*Present* :—Justice Sir Abdur Rahim, Kt.,  
and Mr. Justice Napier.

[RAJAH OF VENKATAGIRI—PLAINTIFF—  
PETITIONER

*versus*

SURA KRISHNA REDDI AND ANOTHER—

DEFENDANTS—RESPONDENTS.

(Civil Procedure Code (Act V of 1908), s. 145,

O. XXI, r. 43—Execution of decree—Attachment—  
Property entrusted to stranger—Bond with sureties—  
Failure to produce property—Decree-holder, remedy of.

Where in execution of a decree attached property is made over to a person for safe custody and production in Court on his executing a bond with sureties, it is not open to the decree-holder, on failure of the production of the property, to enforce the bond against the sureties; his remedy is to get the bond assigned by the Judge to himself and sue upon it. [p. 135, col. 1.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Temporary District Munsif, Gudur, at Nellore, dated the 7th May 1919, in Execution Petition No. 506 of 1919, in Small Cause Suit No. 218 of 1917.

FACTS appear from the judgment.

Messrs. S. Ramachandra Aiyar, and K. S. Krishnaswami Aiyangar, for the Petitioner.—The appellant's proper remedy was to enforce the bond in execution against the sureties. Both clauses (b) and (c) of section 145, Civil Procedure Code, apply. Here the sureties have made themselves liable to produce the cattle and the clause prescribes the remedy by means of execution. As the sureties have failed to fulfil the conditions imposed on them, clause (c) of the section applies.

The respondents were not represented.

JUDGMENT.—Certain cattle were attached in execution of a decree in favour of the appellant and the *swin*, in accordance with the Civil Rules of Practice under the rule of the High Court and Order XXI, rule 43, Civil Procedure Code, made over the cattle to a villager for safe custody and production in Court for which he executed a bond with two sureties. The appellant applied in execution to enforce the bond against the respondent sureties on their failure to have the cattle produced in accordance with the bond. The question is whether the bond could be enforced in this way under section 145.

It is argued that clause (b) of section 145 applies. It says: "Where any person has become liable as surety for the restitution of any property taken in execution of a decree," then the decree may be executed against him to the same extent to which he has rendered himself personally liable in the manner provided in the Code for the execution of decrees. This clause is *prima facie* intended for cases in which restitution is

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sought against the person who has taken the property in execution of the decree and restitution is to be made by such a person. Here it would be stretching the language of the Code too far to say that the sureties took the property in execution of the decree. We agree, therefore, with the interpretation put on this clause by Mr Justice Sadasiva Aiyar in *Konimreddi Subbaredli v. Kollipara Veerayya Tata* (1).

It is also argued that clause (c) applies. That says: that the surety-bond can be executed against the person who has made himself liable for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon. Here there was no order of the Court under which any money was to be paid by any person or which required him to fulfil any condition imposed on him. Order XXI, rule 43 empowers the *Amin* of the Court entrusted with the warrant of attachment to make over cattle or moveable property of a like nature to the custody of a villager on his executing a bond. The act, therefore, is that of the *Amin* done under the authority conferred on him by law. The Court could not be said to have passed any order in this case under which the bond was taken. The Court had not the terms of the bond before it, the Court knew nothing about it, until the *Amin's* return was made. We must, therefore, hold that clause (c) also does not apply. The only remedy open to the appellant (decree holder) is to get the bond assigned by the Judge to himself and to sue upon it as pointed out in the case above mentioned. The petition is dismissed. No costs.

M. C. P.

*Petition dismissed.*

(1) 52 Ind. Cas. 410; 9 L. W. 476; 25 M. L. T. 220; (1919) M. W. N. 219.

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No 1562 of 1919.

July 27, 1920.

Present:—Mr Justice Sadasiva Aiyar  
and Mr Justice Napier.

MUTHIYALU CHENGAPPA—PLAINTIFF  
—APPELLANT

versus

'BURADA GUNTA alias AKULA  
VENKATASWAMI—DEFENDANT No. 1  
—RESPONDENT.

*Hindu Law—Surrender—Widow, surrender by, in favour of co-widow, whether accelerates succession—Limitation Act (IX of 1908), Sch. I, Art. 41, applicability of, to case where there are more female heirs than one—Limitation, commencement of*

Where a widow surrenders her interest in her husband's estate in favour of a co-widow, such surrender has not the effect of accelerating the succession of the male reversioners of the deceased. [p. 137, col. 1.]

Article 14 of Schedule I to the Limitation Act applies to a case where a reversioner is entitled to property on the deaths of more female heirs than one inheriting jointly, and limitation in such a case begins to run from the date of the death of the last surviving female heir. [p. 138, col. 2.]

Second appeal against the decree of the District Court, North Arcot, in Appeal Suit No. 799 of 1917, preferred against the decree of the Court of the District Munsif, Madanapalli, in Original Suit No. 366 of 1916.

FACTS appear from the judgment.

Messrs. P. Somasundram and B. Somaya, for the Appellant.—The suit is not barred. The lower Appellate Court was wrong in holding that there was any acceleration of succession of the reversioners. Any agreement between the co-widows by which one surrendered her rights to the other will not have that effect as the reversioner was no party to the agreement. The cause of action for the reversioner's claim arose on the death of the junior widow, the releasor. On the death of the senior widow who had a kind of *stridhanam* estate in her husband's property the junior widow became her heir. Her interest lasted only till her death in 1914 and it was only then that the reversioner's right of inheritance opened. See Second Appeal No 356 of 1914 (unreported).

Mr L. A. Govindaraghava Aiyar, for the Respondent.—The surrender by the junior widow accelerated the reversioner's rights. In *Bidnamma v Venkataramappa* (1) it was held that one widow might absolutely sur-

(1) 8 M. H. C. R. 263.



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render her right and interest to the co-widow so as to let in the husband's heirs immediately after that other's death.

#### JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is the appellant in this second appeal. He is the purchaser from the reversioner to the estate of one Gurappa. Gurappa died in 1883 leaving two widows as his heirs. The younger widow, on receipt of Rs. 30, gave up all her rights (about six months after her husband's death) in favour of the elder widow under the deed, Exhibit B. I agree with the lower Appellate Court on the construction of Exhibit B that she thereby gave up her whole life-interest in her husband's estate, whether the interest might have extended beyond the lifetime of the elder widow or whether it would have come to an end during the lifetime of the elder widow. The elder widow died in 1902 and the younger widow in 1914, and the present suit was brought by the purchaser from the male reversioner in 1916. The learned District Judge dismissed the suit on the preliminary ground of limitation. His argument was that by the junior widow giving up her right of survivorship (if she happened to survive the senior widow) the senior widow not only represented the whole widow's estate during her own lifetime but that, on her death, the fact that the junior widow was still living was no obstacle to present reversioners from coming in, the junior widow's relinquishment having accelerated the succession of the male reversioner and such acceleration took place in 1902 and the suit was brought in 1916 the plaintiff was barred under Article 144 of the Limitation Act.

It was argued before us, in the first place, by the appellant's learned Vakil that the senior widow, on her death, owned a sort of *stridhanam* estate in her husband's property which was inherited by her own heirs that the junior widow was the heir to that *stridhanam* estate (which, however lasted only till the junior widow died in 1914), and that the reversioner became entitled to inherit the whole of the husband's estate only afterwards and reliance was placed on the decision in Second Appeal No. 356 of 1918 *Pappammal v. Venkataswami Naicker* (unreported). As the question of the right of a widow who had parted with her rights to her co widow to inherit the rights again on the death of

the co-widow is said to be under consideration before another Bench of this Court, and as I feel doubts as to an estate surrendered by a widow to a co widow constituting in some sense or to any extent the property of the surrenderee held by her in a different capacity from that of the widow of her husband, I shall not deal with this question further in this case, it not being necessary for the purpose of deciding this second appeal to express a final opinion on that question.

The next point is, whether there was this acceleration of the right of the male reversioner on the death of the elder widow. Acceleration by surrender to the next male reversioner (which, I take it, means a surrender known to and accepted by him) is, no doubt, known to the law. Acceleration caused by the Statute law declaring that a widow contracting a second marriage shall be deemed to have died can also be understood, but acceleration of the right of a male reversioner by transactions between two or more joint female heirs cannot, in my opinion, be continued by them without the knowledge or consent of the reversioner. Article 141 of the Limitation Act, though it uses the word "female" in the singular, clearly covers a case where the Hindu reversioner is entitled to the property on the deaths of more than one female heir inheriting jointly. And when the last column speaks of "when the female dies" it clearly means in such a case "after the death of all the female co-heirs." That a male reversioner's right should be accelerated by agreements to which he is not a party is to me a very startling proposition, and even though there may be more startling propositions and anomalous rules in the modern Hindu Law, I do not see why I should extend such anomalies unless I am bound by clear authorities and precedents to do so. Mr. Govindaraghava Aiyar relied upon a passage in *Ridnamma v. Venkataramappu* (1). That was a case in which the appellant alone was heard, the respondent being absent. The appellants' Counsel had evidently argued that there might be an agreement between co-widows so as to let in the next heirs of the husband immediately upon the death of the widow who died first. The learned Judge of the Bench remarked upon this argument: "We are not prepared to say that they might not enter into such an agree-

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ment as would bind each to an absolute surrender of all interest in the other's share so as to let in the next heirs of the husband immediately upon the death of that other. *But there is no such agreement in this case.*" Thus the learned Judges finally stated that the argument had no relevancy to the facts of that case, though they began by saying that they were not prepared to say that there might not be something in the argument. This is a very weak foundation for the contention that an agreement by which the succession of the reversioner can be accelerated might be made behind his back. Further, the acceleration can effect, if at all, only the half share, which belonged to the elder widow who died first (and the right to enjoy which half share by survivorship was abandoned by the younger widow) and could not apply to the share of the younger widow who conveyed her rights to the widow who died first because that share was not surrendered to *any reversioner* and surrender which accelerates is surrender to the succeeding *reversioner* and not a surrender to a co-widow.

In the result, I would set aside the judgment of the District Judge who proceeded upon the sole ground of limitation and would remand the appeal to him for disposal, on the other questions arising in the case.

The memorandum of objections filed in that Court will also be considered along with the appeal. The Court fee paid on the memorandum of the second appeal will be refunded to the appellant. The respondent should pay the appellant the other costs of this second appeal.

NAPIER, J.—I entirely agree.

M. C. P.

*Appeal allowed;  
Case remanded.*

### ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 3) (F 1919.

April 23, 1920.

Present :—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

BHARAT SINGH AND OTHERS—PLAINTIFFS—  
APPELLANTS

*versus*

SARSUTI SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Property inherited

*by reversioner, nature of—Mortgage by father, when binding on sons—Pious obligation, nature of—Contingent obligation, whether can be repudiated.*

Under the Hindu Law property acquired by a reversioner by inheritance from a collateral is not joint family property, and in respect of such property the inheritor possesses an absolute power of disposal, and his sons and grandsons do not acquire any right in that property by birth so as to enable them to impeach a transfer thereof. [p. 138, col. 2.]

A mortgage by a Hindu father cannot validly affect the joint family estate unless it is made for family necessity or for the family benefit, or to pay an antecedent debt, either binding *per se* on the family by reason of its having been taken for family purposes, or binding in consequence of the pious obligation on the sons, where it exists, to pay the same if not tainted with immorality. [p. 139, col. 2; p. 140, col. 1.]

Although, during the lifetime of a father there is no pious obligation on his son to pay his debts, there is nevertheless a *contingent* obligation on him to pay which he cannot repudiate unless he shows that the debt was taken for immoral purposes: so that if the joint family property has passed out of the family to pay off such an antecedent debt either under a conveyance executed by the father or under a sale held in execution of a decree for the father's debt, the son cannot recover back the property unless he can show that the obligation arising out of the antecedent debt was of a character which he was not in *any* contingency liable to discharge. [p. 140, col. 2.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated 12th April 1919.

The Hon'ble Pandit Gokaran Nath Misra, for the Appellant.

Babus Lisheshwar Nath Srivastava and Eishambhar Nath Srivastava for Respondents, Nos. 3, 4, 5, 6, and, 8.

JUDGMENT.—This appeal arises out of a suit brought by the sons and grandsons of Sarsuti Singh to set aside a sale of certain property, effected by Sarsuti Singh in favour of Ram Sarup and Musimmat Hansa on the 18th April 1907. The property sold comprised a 2 annas 8 pies share in the village Tikra. The consideration specified in the sale deed was Rs. 11,952 9-0, out of which Rs. 971-5 6 were paid before the Sub-Registrar and the balance was credited towards certain prior debts stated to have been due to Ram Prasad, the father of Ram Sarup and the husband of Musimmat Hansa.

It is not disputed that the plaintiffs lived jointly with Sarsuti Singh. The allegation of the plaintiffs was that the property sold by Sarsuti Singh was the ancestral property of the family, that Sarsuti Singh

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was addicted to smoking *ganja* and *charas* and immoral habits and that he had sold the disputed property for a fictitious consideration of Rs. 11,952-90 without any family necessity to satisfy his own unlawful needs. The defence was that a 1 anna 4-pies share in the village Tikra had been inherited by Saranti Singh from his uncle, Daljit Singh, on the death of his widow, *Musammam* Ram Kuar, that Saranti Singh had a right to sell the same, and that the sale of the remaining property was also valid because it was effected to pay antecedent debts due by Saranti Singh which had been incurred for the benefit of the family and to meet the expenses of the marriage of Jang Bahadur Singh, one of the plaintiffs. The Court below dismissed the claim.

The first question for consideration is whether a 1-anna 4-pies share of the village Tikra is the joint family property of the plaintiffs and Saranti Singh. It appears that Daljit Singh, the uncle of Saranti Singh, was the owner of a 4-annas share in the village Tikra. He died leaving a widow, *Musammam* Ram Kuar. On the 16th June 1888 *Musammam* Ram Kuar sold that 4 annas share to Suphal Singh for Rs. 5,000. Saranti Singh and Bisban Singh, two of the reversionary heirs of Daljit Singh, filed a suit for a declaration that the sale was void as against them and did not bind their reversionary interest (Exhibit 16). The suit was decreed on the 28th October 1889 (Exhibit 17). On the 2nd August 1890 Saranti Singh and Bisban Singh sold the decree for costs awarded to them in the above suit to Tajuddin Ahmad, father of Sajjad Husain, (Exhibit 27). In lieu of the costs so due Suphal Singh sold the life-interest of *Musammam* Ram Kuar, which was still in his possession, to Sajjad Husain (Exhibit 25) and the latter in turn sold his rights to Saranti Singh and Bisban Singh (Exhibit 28).

On the death of *Musammam* Ram Kuar her life interest ceased and the reversionary interest became absolute. Saranti Singh thus became the owner of a 1-anna 4-pies share in the village Tikra by inheritance from Daljit Singh. He held another 1-anna 4-pies share in the same village by ancestral right.

The plaintiffs contend that the expenses incurred by Saranti Singh and Bisban Singh

in the suit brought by them to impeach the sale effected by *Musammam* Ram Kuar were paid from joint family funds, that the 1-anna 4-pies share obtained by Saranti Singh on the death of *Musammam* Ram Kuar must, therefore, be regarded as joint family property and that Saranti Singh had in his lifetime treated it as such. The plaintiffs' own witness, Bisban Singh, however, admits that Sajjad Husain, Pleader, paid the Court-fee stamp and all other expenses connected with that suit from his own pocket and reimbursed himself after that suit was decreed by getting the decree for costs awarded to Saranti Singh and Bisban Singh sold to his father, Tajuddin. There is no reliable evidence to show that any portion of the expenses of that litigation had been met from the income of the joint family property. There is similarly no reliable evidence to prove that Saranti Singh treated the 1-anna 4-pies share inherited by him from Daljit Singh on the death of his widow, *Musammam* Ram Kuar, as part of the joint family estate. It is suggested by some of the witnesses produced by the plaintiffs that the accounts of the income derived from the ancestral property and of that derived from the said 1-anna 4-pies share used to be kept together, but no account-books have been produced and Saranti Singh has not been examined to account for their non-production. In the sale-deed executed by Saranti Singh in favour of Ram Sarup and *Musammam* Hasea the 1-anna 4-pies in question was described by the vendor as the share which he had inherited from Daljit Singh as distinguished from the share which was his ancestral property. The Court below was, therefore, justified in refusing to treat the said 1-anna 4-pies share as joint family property. In regard to that share Saranti Singh possessed an absolute power of disposal; and, as observed in *Hardwar v. Ram Milan* (1), the sons and grandsons of Saranti Singh could not have acquired any rights therein by birth so as to enable them to impeach the transfer.

The next question is, whether the sale of the remaining 1-anna 4-pies share, which was the ancestral property of the family, was effected for family necessity or for illegal

(1) 42 Ind. Cas. 812; 20 O. C. 271; 4 O. L. J. 565,



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and immoral purposes. The learned Counsel for the plaintiffs-appellants concedes that he is unable to sustain the contention that the sale was effected for illegal or immoral purposes, or that the debts for the payment of which the sale was made had been so contracted. In *Sahu Ram Ohandra v. Bhup Singh* (2) their Lordships of the Privy Council discussed the general principles governing the transfer of property under the Mitakshara Law and the exceptions attached thereto. The first principle, they observed, was that as members of a joint family, a father and his sons and grandsons were co-parceners in the ownership of the family property and that such property could not be the subject of a gift, sale, or mortgage by one co-parcener except with the consent, express or implied, of all the other co-parceners. The other principle was that in his capacity as head and manager of the family the father had certain powers with reference to the joint family property to effect or dispose of it for purposes denominated necessary purposes, for the reason that where an estate or family necessity existed, the necessity existed on the co-parceners as a whole, and it was proper to imply a consent of all of them to that act of the one which such necessity demanded. To these two general principles an exception, they pointed out, had been made to cover the case of a mortgage or sale by the father in consideration of an antecedent debt, that exception being largely necessitated by the need of protecting the rights of third persons, say, the purchasers of the property who had taken their title for onerous consideration and in good faith. They proceed to explain how that exception affected the question of onus and said that where the mortgagee himself, with whom the transaction took place, was setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he might, to quote the language of Knight Bruce, L. J., in *Hunoomanpersaud Panday v. Musammat Babooes Munraj Koonweroo* (3), "be expected to allege and prove

facts presumably better known to him than to the infant heir, namely, those facts which embodied the representations made to him of the alleged needs of the estate and the motives influencing his immediate loan;" but where a joint family property had been sold out and out, or where a decree in execution of the mortgage had been obtained against the property and in enforcement thereof rights had sprung up with regard to the joint family estate, those rights could not be defeated by the members of the joint family simply questioning the transaction entered into by its head. They referred to the decision of *Suraj Bansi Koer v. Sheo Persad Singh* (4) where Sir James Colvile, adverting to the case of *Girdhar Lal v. Kantoo Lal* (5) observed: "That case is undoubtedly an authority for these propositions:—First, that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and, secondly, that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make enquiry beyond what appears on the face of the proceedings." The presumption of law, according to them, in such cases was *prima facie* to support the charge, and the onus of disproving it rested on the sons.

No such presumption arises where the mortgagee of a Hindu father seeks to enforce his mortgage against his sons. Such a mortgage cannot validly affect the joint family estate unless it is made for family necessity, or for the family benefit, or to pay an antecedent debt, either binding *per se* on the

(2) 39 Ind. Cas. 280; 44 I. A. 126 at p. 133; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 38 M. L. J. 14; (917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 217; 89 A. 477 (P. C.).

(3) 6 M. I. A. 393; 18 W. R. 87; Sevestre 2537; 2 Suth. P. O. J. 29; 1 Sar. P. O. J. 552; 19 E. R. 147.

(4) 6 I. A. 88 at p. 101; 5 C. 148; 4 C. L. R. 226; 4 Sar. P. C. J. 1; 3 Suth. P. O. J. 589; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705.

(5) 1 I. A. 221; 14 B. L. R. 187; (P. C.) 22 W. R. 56; 3 Sar. P. C. J. 380.

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family by reason of its having been taken for family purposes or binding in consequence of the pious obligation on the sons, where it exists, to pay the same, if not tainted with immorality. In order to exclude cases amounting to a plain and, what might be, a deliberate breach of trust, as, for instance, where a father makes a mortgage in one month without family necessity and makes a fresh mortgage in another month to re-pay the same, their Lordships examined the limits of the principle of the exception and observed that the obligation relied on must not only have been antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. In saying so, they could hardly have meant that if such antecedent debt had been incurred on the security of the family property, it was to be wiped out altogether and treated as non-existent, for, apart from any question of family necessity underlying such debt, they themselves, in an earlier part of their judgment, had pointed out that the responsibility to meet the father's debts was one thing and the validity of a mortgage over the joint estate was quite another thing (page 131\*). In a later part of the same judgment they said: "The importance of the case being free from complications is this, that except under the mortgage all other remedies have long ago disappeared; and the appellants rear it up and claim under it now, there being no right in them to invoke the doctrine of the pious obligation to discharge the debt incurred by Bhup Singh, because that debt as such cannot be successfully sued for. Accordingly, unless the mortgage validly affects the joint family estate, the appellants must fail (page 135\*)". It is obvious that where there is no family necessity, a mortgage as a mortgage might fail; but if it was made in lieu of an antecedent debt, that antecedent debt, though not shown to be enforceable as a mortgage, might still be evidence of a pious obligation, contingent or otherwise, on the son of the mortgagor to pay that debt unless it is shown to have been tainted with immorality. The decisions in *Ramman Lal v. Ram Gopal* (6), *Gur Sahai v. Girdhar*

(6) 47 Ind. Cas. 987; 21 O. C. 200; 5 O. L. J. 629.

\*Pages of 44 I. A.—[Ed.]

*Lal* (7) and the remarks of Sir Basil Scott in *Hanmant Kashinath Joshi v. Ganesh Annari Pujari* (8) are pertinent to that view.

The learned Counsel for the plaintiffs-appellants contends that where the father is alive the antecedency of the debt is of little value, because there is no pious obligation on his son to pay his debt in his lifetime. But there is a *contingent* pious obligation on him to pay all the same, which he cannot repudiate unless he shows that the debt was taken for immoral purposes: so that, if the property has passed out of the family to pay off such an antecedent debt either under a conveyance executed by the father or under a sale held in execution of a decree for the father's debt, the son cannot recover back the property unless he can show that the obligation arising out of the antecedent debt was of a character which he was not in any contingency liable to discharge.

The mortgage-deed in the present case, for the satisfaction of which the sale was made, contained a double obligation, namely, an obligation resting on the mortgaged property and an obligation resting on the person and other property of the mortgagor. The antecedent debts proved amount to over half the consideration secured by the sale. The sale of that portion of the property which was ancestral was, therefore, justified.

The appeal fails and is dismissed with costs.

*Appeal dismissed.*

(7) 52 Ind. Cas. 75; 22 O. C. 84 at p. 90; 11 U. P. L. R. (J. C.) 54; 6 O. L. J. 411.

(8) 51 Ind. Cas. 612; 43 B. 612 at p. 618; 21 Bom. L. R. 435.

BANDARU MARAYYA v. BANDARU RAMALAKSHMI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 16 OF 1920.

August 31, 1920.

Present :—Justice Sir William Ayling, Kt.,  
and Mr. Justice Odgers.

BANDARU MARAYYA—DEFENDANT

—APPELLANT

versus

BANDARU RAMALAKSHMI—PLAINTIFF

—RESPONDENT.

*Hindu Law—Adoption—Orphan given by elder brother—Factum valet, doctrine of, applicability of.*

The doctrine of *factum valet* is inapplicable to the case of an adoption of an orphan son when given by an elder brother, as such an adoption is invalid under the Hindu Law. [p. 142, cols. 1 & 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Kistna, at Ellore, in Appeal Suit No. 424 of 1917, preferred against the decree of the Court of the Additional District Munsif, Narasapur, in Original Suit No. 33 of 1916.

FACTS appear from the judgment.

Mr. V. Ramadoss for the Appellant,—Though the adoption of an orphan is not, strictly speaking, valid, it must be upheld in this case on the principle of *factum valet*. In an exactly similar case, *Bhagabat Pershad v. Murari Lal* (1) the Calcutta High Court applied the doctrine of *factum valet* to the adoption of an orphan. See also *Ohinna Goundan v. Kumara Goundan* (2) where the adoption of an only son was upheld on the ground of *factum valet*. To hold otherwise would result in great hardship to the adoptee whose status was long recognised by the family.

Members. P. Narayanamurthy and Satyanarayana, for the Respondents.—The adoption of an orphan is illegal even when the adopted boy was given by his elder brother *Subbaluvammal v. Ammakutti Ammal* (3), *Vaithilinga Mudali v. Munigan* (4). In *Bhagabat Pershad v. Murari Lal* (1) the adoption was 48 years before the suit and their Lordships were influenced by that circumstance in applying the *factum valet* doctrine. In the present case the adoption took place only six years

before the suit. In *Vaithilinga Mudali v. Munigan* (4) the Judges refused to apply the doctrine even though the adoption was recognised by the family for upwards of 30 years. The doctrine must be applied where there is no want of authority to give or accept or positive interdiction of adoption. See *Laksmappa v. Ramava* (5). See also *Bashetiappa v. Shivlingappa* (6) and *Wooma Daes v. Gokoolanund Daes* (7).

JUDGMENT.—The sole question for decision in this appeal is whether it is proper to apply the doctrine "*factum valet*" to the adoption of an orphan. The facts are admitted. Appellant Marayya was in fact adopted by Narasimhayya, respondent's husband in 1910. Marayya was at the time an orphan and was given in adoption by his elder brother. It is conceded on his behalf that the adoption was, strictly speaking, illegal [*vide Vaithilinga Mudali v. Munigan* (4)]. Can it be nevertheless upheld on the maxim "*factum valet quod non fieri debet*?"

In our opinion it cannot be so upheld. The doctrine is one which must always be applied with great caution and we do not think we should be justified in applying it here. A case is reported as *Subbaluvammal v. Ammakutti Ammal* (3) in which the learned Judges rejected the argument that the maxim of "*factum valet*" could be applied to the adoption of an orphan, and set aside the decision of the *Sadar Amin* based on that doctrine. They also rejected the contention that an orphan could be validly given in adoption by his elder brother. This is one of the cases quoted by the learned Judges in *Vaithilinga Mudali v. Munigan* (4) in support of their decision, and we observe that in the latter case no attempt was made to apply the doctrine of "*factum valet*" although the fact that the adoption was made more than 30 years before suit and had been treated as valid by the family was brought prominently to the notice of the Judges and is referred to in their judgment.

(1) 7 Ind. Cas. 427; 15 C. W. N. 524; 15 C. L. J. 97.

(2) 1 M. H. C. R. 54.

(3) 2 M. H. C. R. 129.

(4) 15 Ind. Cas. 299; 87 M. 529; 23 M. L. J. 169; (1912) M. W. N. 1127.

(5) 12 B. H. C. R. 364 at p. 398.

(6) 10 B. H. C. R. 268.

(7) 3 O. 587 (P. C.); 5 I. A. 40; 2 C. L. R. 51; 3 Suth. P. C. J. 499; 3 Sar. P. C. J. 786; 2 Ind. Jur. 262; 1 Ind. Dec. (N. S.) 958.



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*Bhagabat Pershad v. Murari Lal* (1) is no doubt an exactly similar case to the present, in which the doctrine of "*factum valet*" was applied to an adoption of an orphan given by his brother. The learned Judges say they apply it "not without considerable hesitation" and lay stress on the lapse of 48 years after the adoption and on the grave injustice which would be done to the adopted son by destroying his civil status after it had been so long accepted. These considerations have no application to the case before us, where the adoption took place only six years before suit. *Ohinna Goundan v. Kumara Goundan* (2) is quoted as a case in which the doctrine was applied to the case of adoption of an only son, and, indeed, it does seem to have largely induced the decision of the learned Judges, that the adoption of an only son, once made, was valid in law. But their Lordships of the Privy Council in *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma* (8), while endorsing the correctness of the decision in that case, certainly do not put in on the ground of "*factum valet*." On the contrary, they are at pains to point out at page 423 the inapplicability of such a doctrine and the conclusion they arrive at is, that the adoption is not contrary to Hindu Law.

The true limits of applicability of the doctrine of "*factum valet*" as regards adoption are laid down by Westropp, C. J., in *Laksmappa v. Ramava* (5) thus: "To us it appears that its application must be limited to cases in which there is neither want of authority to give, or to accept nor imperative interdiction of adoption." The views of Westropp, C. J., in this connection are expressly endorsed by the Privy Council in the last quoted case (page 423). See also Mahmood, J., in *Ganga Sahai v. Lekhraj Singh* (9). The capacity to give, the capacity to take and the capacity to be the subject of adoption seem to me to be matters essential to the validity of the transaction, and, as such, beyond the province of the doctrine of "*factum valet*."

As an instance of the proper application

of the doctrine, we may refer to *Worma Dass v. Gokoolanund Dass* (7). There the maxim of "*factum valet*" is relied on as supporting the view of their Lordships that the adoption which they were considering was legal and valid. But the only objection to the adoption there was that the rule of preference of a brother's son had been disregarded and it was held that this view was not so imperative as to have the force of law. If that case be compared with the case before us in the light of the tests suggested by Westropp, C. J., and Mahmood, J., it will be seen how inapplicable the doctrine is to the case we have to deal with.

The only other case to which we shall refer is *Bashetiappa v. Shivalingappa* (6). The learned Judges in that case (Westropp, C. J. and Nanabbai Haridas, J.) held that the adoption of an orphan, even when given by an elder brother with the authority of parents given before their death, was invalid and they add the pithy remark that, to allow such an adoption, would leave it in the power of an elder brother to thin the ranks of his fellow parsons by bestowing his younger brothers in adoption in a manner highly detrimental to the interests of the latter.

We must hold that the adoption of an orphan is not only contrary to Hindu Law but that the doctrine of "*factum valet*" cannot be invoked to support it.

The second appeal is, therefore, dismissed with costs.

M. C. P.

*Appeal dismissed.*

# COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND CIVIL APPEAL No. 80 OF 1919-20.

April 19, 1920.

Present:—Mr. Hopkins, S. M., and  
Mr. Porter, J. M.

KALLU MISIR—APPELLANT

versus

BHAGWATI SINGH AND ANOTHER—  
RESPONDERS.*Landlord and tenant—Ejectment—Notice, cancella-*

(8) 22 M. 398 (P. C.); 21 A. 460; 1 Bom. L. R. 226; 3 C. W. N. 427; 9 M. L. J. 67; 26 I. A. 113; 7 Sar. P. C. J. 330; 8 Ind. Dec. (N. S.) 286; 9 Ind. Dec. (N. S.) 1001.

(9) 9 A. 263 at p. 297; 5 Ind. Dec. (N. S.) 604.

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tion of—*Prima facie* proof of under-proprietary rights  
—Judgments in previous suits not *inter partes*, admissibility of—Evidence Act (I of 1872), s. 13.

In a suit to contest a notice of ejectment, the Court ought to cancel the notice on the tenant producing *prima facie* evidence that he holds on an under-proprietary tenure. [p. 144, col. 1.]

Where a party sets up a particular right judgments not *inter partes* in previous cases in which a similar right was asserted, are admissible in evidence under section 13 of the Evidence Act [p. 144, col. 1.]

Second appeal from the order of the Commissioner, Fyzabad Division, dated the 3rd of November 1919, in the case of ejectment

## JUDGMENT.

PORTER, J. M. (April 13, 1920).—This is a suit to contest ejectment from one plot, new number 1978/2, area 9 *biswas*, a portion of old number 1052.

The appellant claimed to hold this plot by a tenure known technically as *biswai*, peculiar chiefly to the Fyzabad and Sultanpur Districts, and described by Sykes as an under-proprietary tenure arising out of a special class of mortgage by the proprietor to the cultivator of the latter's holding for a sum of money paid down. Generally, a low rent was reserved, the difference between the interest due on the money and the full rent.

The lower Courts have dismissed the suit. They have been mainly influenced by the fact that the plaintiff-appellant has failed to establish that the defendants in certain suits in 1884 and 1886, in which the same right in another portion of the same number was asserted and established by appellant's uncle, were the respondent's ancestors or predecessors-in-interest. They have consequently rightly held that those judgments cannot operate as *res judicata* in the present suit. The Commissioner has also found that the appellant has failed to prove that the original mortgagee was his own ancestor, or that the original mortgagor was the respondent's ancestor. This is admitted.

What they have failed duly to weigh is, I think, that the judgments and plaints in the suits are in themselves very weighty evidence as showing that the claim was asserted and proved by the appellant's predecessor in respect to a portion of the same land and against respondents' co-sharers.

They have also failed to bear in mind that it is not necessary for the appellant to prove his claim to the hilt. It is sufficient for a Revenue Court if he gives *prima facie* proof of under-proprietary right. The Court will then cancel the notice of ejectment and refer the landholder to the Civil Court.

The facts are these:—The mortgage-deed is dated *Asarh Sudhi 5, Sammat 1868*, over one hundred years ago. It was executed by Zalim Singh in favour of Mansa Misra. It was a mortgage of 7 *bighas* 15 *biswas* land. One of the fields, area 2 *bighas kham*, about 18 *biswas jaribi* was named Chowka Ramwala.

The first Settlement *khassra* shows that No. 1052, area 18 *biswas*, was *jaribi* and was held by Suchit Misra, who was whole brother to the appellant's father. The field bears the same name, Chowka Ramwala, to the east of the village.

At the last Settlement the same field, now No. 1978, same area was held by the same man.

At first Settlement the plot is shown as jointly owned by all the co-sharers. It seems to have been partitioned among them. In 1884 one Mahabir issued notice of ejectment against Suchit for 5 plots, including a part of 1052, 5 *biswas*. Suchit in his plaint asserted the claim that he held this plot on this mortgage tenure (*rahandari*) and he produced in support of his claim the mortgage deed which the appellant relies on. He succeeded, and the notice was cancelled.

In 1886 another notice of ejectment was issued by Mahabir (apparently another person—there are three in the village), this time for 3 *biswas* 15 out of 1052. Suchit brought the same claim in his suit to contest and again succeeded.

It is admitted that the appellant has failed to establish that these Mahabirs are the same persons, or that they are either of them respondents' ancestors.

There is, however, the fact that this field, which bears the same name and is of the same area as that in the original mortgage-deed, has been held since the time of Suchit by the appellant and his co-sharers. The mortgage-deed, over 100 years old, was produced 36 years ago from their custody. The appellant's predecessor

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successfully asserted his claim to another portion of the same field against two co-sharers of the respondent. To my mind there is a strong *prima facie* presumption that the appellant holds the plot on under-proprietary tenure. I would hold that the Courts below have erred in law in failing to give due weight to the importance of the judgments in the previous cases as evidence of the previous assertion of this claim apart from the fact whether they can operate as *res judicata* in this suit (section 13, Evidence Act). I would also hold that they have erred in law in not cancelling the notice of ejectment on the appellant producing sufficient *prima facie* evidence that he holds on an under-proprietary tenure.

I would accept the appeal, and cancel the notice of ejectment. The respondent should pay costs throughout.

HOPKINS, S. M.—I agree.

*Appeal accepted.*

MADRAS HIGH COURT.  
CIVIL REVISION PETITION No. 3 OF 1920.  
August 13, 1920.

*Present:*—Mr. Justice Odgers.  
SURAMPALLI RAMAMURTHI  
—PETITIONER

*versus*

SURAMPALI REDDY AND OTHERS—  
RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. I, rule 10*  
—Partition, suit for, of moveables and immoveables—  
Suit, withdrawal of, in respect of moveables, effect of—  
Court, power of, to transpose parties.

Where in a suit for partition of immovable and moveable property a preliminary decree is passed in respect of the immovable property and the plaintiff withdraws his claim with regard to the moveables, such withdrawal has not the effect of bringing the suit to an end, and the Court has power to transpose parties under Order I, rule 10 of the Civil Procedure Code and to continue the suit.

Petition, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order, dated the 20th October 1919 of the Court of Temporary Subordinate Judge,

Vizagapatam, in I. A. S. Nos. 185 and 232 of 1919, in Original Suit No. 11 of 1918.

Mr. A. Krishnaswami Aiyar and B. Jagannada Doss, for the Petitioner.

Messrs. V. Ramesam, K. Satyanarayana Murthi and T. Ramachandra Rao, for the Respondents.

JUDGMENT.—The order of the Subordinate Judge is sought to be impugned on the ground that a preliminary decree having been passed by consent in respect of the immoveables and the plaintiff having withdrawn his claim with regard to the moveables, there were no proceedings during a stage of which the Judge could transpose the parties as required by Order I, rule 10. In my opinion, this contention cannot be upheld. The order of the Subordinate Judge says (paragraph 4): "before the matter regarding partition of immoveables was finally disposed of," the plaintiff put in his petition for leave to withdraw his claim to the moveables. The suit was clearly still going on and that was not one suit for partition of immoveables and another for that of moveables and it cannot be said that, by the withdrawal by the plaintiff of his claim for moveables, the suit came to an end. It seems to me that the very basis of allowing plaintiff to withdraw was to allow the eighth to tenth defendants to become plaintiffs in his stead, and so to allow the shares of the defendants already ascertained with regard to the immoveables to be proceeded with, with regard to the moveables. The case in *Edulji Muncherji Wacha v. Vullebhoy Khanbhoy* (1) seems to support this view; also those in *Shivmurteppa v. Virappa* (2) and *Tommenidi Adeyya v. Ohelukuri Venkatarayudu* (3).

The order of the Subordinate Judge was right and the civil revision petition must be dismissed with costs (two sets).

M. C. P.

*Petition dismissed.*

(1) 7 B. 167; 7 Ind. Jur. 372; 4 Ind. Dec. (N. S.) 112.

(2) 24 B. 128; 1 Bom. L. R. 620; 12 Ind. Dec. (N. S.) 623.

(3) 23 Ind. Cas 392; (1914) M. W. N. 155; 15 M. L. T. 245.



AREALI VEEMAN v. SUBBAROYAN.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 1121 TO 1203  
OF 1918.

April 20, 1920.

Present:—Mr. Justice Napier  
and Mr. Justice Krishnan.AREALI VEEMAN AND OTHERS—  
DEPENDANTS—PETITIONERS  
versusT. S. SUBBAROYAN AND OTHERS—  
PLAINTIFFS—RESPONDENTS.*Provincial Small Cause Courts Act (IX of 1887),  
s. 23—Suit instituted on Small Cause Court Side of  
Munsif's Court—Question of title—Suit re-instituted on  
Original Side—Suit tried as Small Cause Court suit by  
consent of parties—Revision—Jurisdiction, objection to,  
whether can be raised.*

A suit for rent was instituted on the Small Cause Court Side of a Munsif's Court. The defendant applied for and obtained an order under section 23 of the Provincial Small Cause Courts Act for presentation of the plaint to a Court having jurisdiction to try the question of title. The plaint was then re-presented to the Munsif's Court on the Original Side, when the parties agreed that there was no question of title and wished the suit disposed of as a Small Cause Court suit. On revision the defendant objected that the Court had no jurisdiction as a Small Cause Court to try the suit as the order under section 23 had not been set aside:

*Held*, that the objection could not be taken for the first time in revision.

Petitions, under section 25 of Act IX of 1887, praying the High Court to revise the decrees of the Court of the District Munsif, Karur, in Small Cause Suit Nos. 1396, etc., of 1917.

FACTS appear from the judgment.

Mr. S. T. Srinivasa Gopalachariar, for the Petitioner.—The case having been removed to the file of the original suits, it was not competent to the District Munsif to try it again on the Small Cause Side. The want of jurisdiction cannot be cured by the consent of parties. The parties are not competent to give jurisdiction where it is inherently wanting.

Messrs. T. R. Venkatarama Sastriar and M. S. Vaidyanatha Aiyar, for the Respondents.—The doctrine that consent cannot give jurisdiction is not of universal application. See *Ledgard v. Bull* (1) and *Minakshi Naidu v. Subramanya Sastri* (2). Here, the suits were sent to the Original Side simply for sake of

convenience as it was then understood that a question of title was involved. As it was found that there was in fact no such question parties agreed for their trial as Small Cause suits. The objection as to want of jurisdiction should not be allowed to be raised for the first time in revision.

JUDGMENT.—These revision petitions are against the decrees of the Small Cause Court of Karur in a number of suits brought to recover various sums as rent. They were tried together by consent of parties and the judgment in 1396 of 1917 deals with all the cases. Various objections were raised before us, the only one of real substance being that the Small Cause Court had no jurisdiction to try the suits. They were all originally filed in the Small Cause Court. The defendant applied for and got an order under section 23 of the Small Cause Courts Act (IX of 1887) returning the plaints to be presented to the proper Court having jurisdiction to try the question of title. They were so presented to the Munsif and when taken up for hearing, the parties agreed that there was no question of title that need be tried and wished the suits to be disposed of by the Small Cause Court. This was done, and they were tried and disposed of, on the merits. It is now objected that there was no jurisdiction in the Small Cause Court to try the suits, as the order under section 23 had not been set aside. We think, however, that this is not an objection which we should allow the defendants to take in a revision petition for the first time. We think that the facts of these cases do not bring them within the doctrine that consent cannot give jurisdiction, where there is an absence of inherent jurisdiction in the Court trying the case. [*Vile Ledgard v. Bull* (1) and *Minakshi v. Subramanya Sastri* (2) where the distinctions are explained by the Privy Council.] We, therefore, overrule these objections. A question of limitation was raised as to some of the suits. It is not clear on the record that they are beyond time: for it is not shown that there was any delay between the return of the plaints by the original Court and their being re-presented in the Small Cause Court. On the merits, it is urged that there is no valid contract to pay the increased rent of Rs. 1-4-0 per acre. The agreement has been found by the Munsif and no point was

(1) 9 A. 191 (P. O.); 13 I. A. 134; 4 Sar. P. O. J. 741; 5 Ind. Dec. (N. S.) 561.

(2) 11 M. 26 at p. 35 (P. C.); 14 I. A. 160; 5 Sar. P. O. J. 54; 11 Ind. Jur. 393; 4 Ind. Dec. (N. S.) 18.

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raised before him, that consideration was wanting. We cannot allow it to be raised here. There was also evidence on which the Munsif could find that the agreement was not for a limited period only and the reason for the addition of two annas, viz, the revenue increase, certainly supports the Munsif's view. This objection also fails.

The further objection has been raised in eleven suits in which grain rents have been decreed. Whether rent was payable in kind or money was a question of fact, carefully considered by the Munsif; and we see no reason why we should interfere with his decision on this point. In the result, all the petitions are dismissed with costs. Vakil's fee in each case will be Rs. 7-8-0.

M. C. P.

*Petitions dismissed.*

### MADRAS HIGH COURT.

CIVIL APPEAL NO. 162 OF 1919.

April 16, 1920.

*Present*:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Moore.

KONDAPALLI VIZIYARATHNAM  
AND ANOTHER, MINORS, BY NEXT FRIEND,  
KONA DALAYYA—PLAINTIFFS  
—APPELLANTS

*versus*

MANDAPAKA SUDARSANA RAO,  
MINOR, BY GUARDIAN *ad litem*  
KONDAPALLI VENKATA KRISHNAYA  
AND OTHERS—DEFENDANTS—  
RESPONDENTS.

*Registration Act (XVI of 1908), s. 17 (3)—Authority to adopt contained in Will of minor—Registration, whether necessary.*

An authority to adopt conferred by a Will does not require registration to render it valid, although the executant was a minor and the bequests may not be valid.

Appeal against the decree of the District Court, Ganjam, at Berhampore, in Original Suit No. 2 of 1918.

FACTS appear from the judgment.

Mr. B. Satyanarayana, for the Appellants.—Though the Will was registered there was no valid registration of the power to adopt, as the Will was not presented for registration by either the donor or the donee.

The instrument cannot be said to be a Will as it was executed by a minor who has no legal capacity to make a Will. There are lots of dispositions in it which are all invalid.

Mr. H. Suryanarayana, for the Respondents.—We are not here concerned with the dispositions of property contained in the Will. They may or may not be given effect to. The question of the requirement as to registration does not depend on the validity of the dispositions. In *Arumugam Pillai v. Arunachallam Pillai* (1) it was held that a Registrar cannot refuse to register a Will on the ground that the executant is a minor.

The document in question is a 'Will' within the meaning of section 3 (57) of the General Clauses Act.

JUDGMENT.—We are not prepared to differ from the finding of the learned District Judge that the Will is genuine. As he says, the evidence of execution is not very strong, but that is largely attributable to the fact that the parties who now contest the Will accepted and acted upon it for many years, so that when it was challenged many of the witnesses were dead. The fact that the Will, though made by a minor, contained dispositions of property as well as the authority to adopt does not appear to us to afford any indication that it was not genuine. The deceased was 19 and the fact that his minority had been prolonged to 21 owing to the appointment of a guardian under the Guardians and Wards Act may have been overlooked. The invalidity of the bequests appears to have been discovered after his death and no attempt was made to give effect to them. This negatives the suggestion that they were inserted in a forged Will with some corrupt intention.

The widow herself when she was 23 adopted a boy under the authority given in the Will, and her mother-in-law, who now gives evidence for the plaintiffs, obtained a maintenance-deed from the father of the adopted boy recognizing the adoption. The present case appears to have arisen from the fact that, sometime after the adoption, there was a quarrel between these ladies and the father of the adopted boy. The power to adopt has been questioned as not validly

(1) 20 M. 264; 7 Ind. Dec. (N. S.) 181.

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conferred. Section 17 (3) of the Indian Registration Act requires authorities to adopt, not conferred by a Will, to be registered. The Will in question was registered as a Will, but it is said that this was not a valid registration of the power to adopt, because the Will was not presented for registration by the donor or by the donee, his widow, or by the adoptive son, as required by section 40 (2) of the Act. The answer is that an authority conferred by a Will does not require registration. It has, however, been argued that the instrument executed by the deceased was not a Will because the executant boy, a minor, was unable to make a valid Will. Will is defined in the General Clauses Act, 1897, section 3 (57) as including "a codicil and every writing making a voluntary posthumous disposition of property." The document, therefore, fully satisfies the definition which is applicable to the word "Will" as used in the Registration Act. The question whether effect can be given to the dispositions of property contained in the Will is a different one and must depend on the question of his age at the date of execution, and the further question whether his minority had been prolonged by the appointment of a guardian under the Guardians and Wards Act. These are questions which are beyond the scope of the Registration Act. In conformity with this view, it was held in *Arumugam Pillai v. Arunachallam Pillai* (1) that the Registration department was not entitled to refuse to register a Will on the ground of the alleged minority of the executant.

The appeal fails and is dismissed with costs.

M. O. P.

*Appeal dismissed.*

## ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 50 OF 1917.

April 12, 1920.

Present:—Mr. Stuart, A. J. C., and  
Pandit Kanhaiya Lal, A. J. C.

MUHAMMAD ALI KHAN—PLAINTIFF—  
APPELLANT

versus

GHAZANFAR ALI KHAN AND OTHERS—  
DEFENDANTS—RESPONDENTS.

*Custom, proof of—Wajib ul-arz, entry in, value of—Plaintiff setting up custom—Failure to establish custom, effect of Judgment not res judicata or in rem, admissibility of, in evidence—Muhammadian Law—Marriage—Acknowledgment of marriage, effect of.*

*Stuart, A. J. C.*—Where a *wajib-ul-arz* contains a record merely of the wishes and opinions of the parties it cannot be regarded as establishing any binding custom at variance with the personal law of the parties. [p 157, col. 1.]

When a plaintiff, in order to succeed, has to establish the existence of a particular custom and fails to establish it, it is not open to the Court to do otherwise than dismiss the suit. [p. 157, col. 1.]

A judgment which is neither *res judicata*, nor a judgment *in rem*, is admissible in evidence as showing that a particular claim was previously asserted and rejected. [p. 157, col. 2.]

*Kanhaiya Lal, A. J. C.*—The existence of a custom in allied branches of a common origin lends strong antecedent probability to the prevalence of such a custom in another branch of the family of the same group. [p 162 col. 1.]

Although no presumption of marriage can be made from prolonged cohabitation, yet when a man acknowledges that a woman is his married wife, such acknowledgment, though made from ulterior motives, is sufficient in the eyes of Muhammadian Law to invest the woman with the status of a married wife, and her subsequent born children with the status of legitimacy, unless a marriage is shown to have been legally impossible. [p. 163, col. 1.]

Appeal from the decree of the Subordinate Judge, Lucknow, Tahsil Mohanlalganj, dated 8th January 1917.

Sir Henry Stanyon, and Babu Bisheshwar Nath Sricastava, for the Appellant.

Messrs. Mohammad Wasim, Mohammad Nasim and Nawab Ali, for Respondents Nos. 1 and 2.

Babu Ram Chandra, for Respondent No. 2.

Babu Narendro Nath Ghoshal and Mr. Masih Uddin, for Respondent No. 3.

## JUDGMENT.

STUART, A. J. C.—This is an appeal against the decree of the learned Subordinate Judge of Mohanlalganj, dated the 8th January 1917, dismissing the suit of Mohammed Ali Khan, appellant, for the possession of



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certain villages, shares in villages, and other property, and mesne profits. The villages are situated in the Sitapur and Bara Banki districts. They belonged to Sheikh Mozaffar Ali Khan who died on the 18th April 1890. This gentleman was a Bazid Khani Kharzada of the Bara Banki district. He was married to a lady, called Zohra Bibi, who died on the 9th August 1904. He had in his keeping a certain *Musammât Phundan-un-nisa* who had been a prostitute before she came to him. By her he had several daughters and a son, called Ghazanfar Ali Khan, defendant respondent in this appeal. Ghazanfar Ali Khan asserts that his mother was married to Mozaffar Ali Khan, and that he is the legitimate son of the latter. The family of Mozaffar Ali Khan is a family of standing. They are Siddiki Sheikhs, who trace their origin to the First Khalifa Abu Bakar. According to their family history, their ancestor, Kazi Nasrullah, who was in the twelfth generation of descent from Abu Bakar, was Kazi of Baghdad. He is said to have come to India in the twelfth century during the reign of King Shahabuddin (better known as Muhammad) of Ghori and to have settled in Amroha. His descendants for three generations are said to have held the office of Kazi at Delhi. About 1345 A. D. his great grand-son, Kazi Nasratullah, was sent to Oudh by Muhammad Bin Tughlak to subdue the Bhars. The descendants of this family subsequently divided into three main branches—those of Pahar Khan, Said Khan and Bazid Khan. These three were either brothers or closely related collaterals. They founded three distinct families or *khandans* who are known as the Pahar Khani Kharzadas, the Said Khani Kharzadas, and the Bazid Khani Kharzadas. The principal member of the Pahar Khani Kharzadas is the Taluqdar of Bhatwaman. The Said Khani Kharzadas held Paintipur and other estates. Paintipur was afterwards transferred to the Bazid Khani, Raja of Bilehra. In these proceedings we are concerned entirely with an alleged custom of Bazid Khani Kharzadas. The plaintiff-appellant is in the tenth generation from Nawab Bazid Khan. It may be taken, roughly, that Nawab Bazid Khan died some 300 years ago. There are six im-

portant families of the Bazid Khani Kharzadas in Oudh—the families of the Raja of Mah-mudabad, the late Raja of Bilehra, and the owners of the Haswapara, Muhammadpur, Bishenpur, and Mitaura estates. These proceedings are concerned with property in the Haswapara estate. Imdad Ali owned that estate. Mozaffar Ali Khan and Nasir Ali were the sons of Imdad Ali. Imdad Ali had also two daughters. Nasir Ali had a son Nisar Ali. The plaintiff-appellant, Muhammad Ali Khan, is the son of Nisar Ali. When Mozaffar Ali Khan died three persons applied to have their names entered in the revenue papers as his successors. These persons were his acknowledged wife, *Musammât Zohra Bibi*, Ghazanfar Ali Khan, then an infant of two years old under the guardianship of *Musammât Phundan-un-nisa*, his mother, who claimed to be the legitimate son of the deceased, and the deceased's brother, Nasir Ali. The Tahsildar reported on the 6th June 1890 (Exhibit A-29) that Nasir Ali's name should be recorded on the ground that he was in possession. The Deputy Commissioner, Lieutenant Colonel Grigg, by his order of the 19th June 1890, (Exhibit A-31) directed that the name of Ghazanfar Ali Khan, under the guardianship of his mother, and also the name of *Musammât Zohra Bibi* should be entered on the *khewat* as part owner without specification of extent of share along with the name of Ghazanfar Ali Khan as the son of the *nikah* wife, *Musammât Zohra Bibi* and Ghazanfar Ali Khan remained in possession. It is to be noted that an eight annas share in Bambhauri, in the Sitapur district, was recorded in the name of Nasir Ali. Nasir Ali died in 1900. He survived his son Nisar Ali. He was succeeded by Raza Husain, son of his sister Nareez-un-nisa, and his grand-daughter Kaniz Fatima. On the 10th January 1899, shortly before her death, *Musammât Zohra Bibi* executed a deed of relinquishment (Exhibit A-28) which was registered on the 11th January 1899, by which she gave up all her claims in favour of Ghazanfar Ali Khan. As has already been stated, she died on 9th August 1904. On the 12th March 1902 Ghazanfar Ali Khan instituted a suit for the share in Bambhauri against Raza Husain and Kaniz Fatima. On the 7th April 1902 Raza Husain and Kaniz

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Fatima instituted a suit against Ghazanfar Ali Khan, *Musammât Zohra Bibi*, *Musammât Phundan-un-nisa*, and a transferee, for possession of the property of Muzaffar Ali Khan (who had died eleven years and 264 days before) which was in their possession. The Subordinate Judge decided Ghazanfar Ali Khan's suit for possession of the share in Bambhanri in his favour and dismissed the other suit holding Ghazanfar Ali Khan to be legitimate. Appeals were filed to the Court of the Judicial Commissioner. These were decided in one judgment on the 23rd July 1906. The learned Judges who decided these appeals arrived at the conclusion that Ghazanfar Ali Khan had been unable to prove that *Musammât Phundan-un-nisa* was married to Muzaffar Ali Khan. They further found that there was a family custom by which daughters and their descendants were excluded in favour of sons and their descendants. On those findings they allowed the appeal with regard to the Bambhanri property and dismissed Ghazanfar Ali Khan's suit. On the second appeal they found that the plaintiffs had no case, inasmuch as they were excluded by the present plaintiff-appellant. They dismissed the appeal and upheld the decision of the Subordinate Judge dismissing the suit brought by Raza Husain and Kaniz Fatima. The latter decision became final. An appeal was taken to their Lordships of the Privy Council by Ghazanfar Ali Khan against the dismissal of his suit for the Bambhanri property. That appeal was dismissed by their Lordships of the Privy Council on the 23rd April 1910 [*Ghazanfar Ali Khan v. Kaniz Fatima* (1)]. Their Lordships found that on the evidence Muzaffar Ali Khan and Phundan-un-nisa had not been married. Ghazanfar Ali Khan remained in possession of the property with the exception of the share in Bambhanri. On the 5th February 1914 Muhammad Ali Khan instituted the present suit in the Court of the Subordinate Judge of Bara Banki against Ghazanfar Ali Khan, Phundan-un-nisa (who died in the following year) and certain transferees. The hearing of the suit was

subsequently transferred to the Court of the Subordinate Judge of Mohanlalganj who decided it.

The case put forward by the plaintiff-appellant is that, under the custom of the family holding the Haswapara estate, a childless widow succeeds to the property of her deceased husband for life, and that after her death the property goes to the collateral heirs of her deceased husband. Later on in the proceedings he enlarged this plea to a plea that the custom which he asserted prevailed amongst all Bazid Khani Khanzadas. He further asserted that Muzaffar Ali Khan and Phundan-un-nisa had never been married. He thus put forward as his plea that, on the death of Muzaffar Ali Khan, the estate had devolved for life on *Musammât Zohra Bibi*, and succession had opened in his favour on the 9th August 1904. He also asserted exclusion of daughters and their descendants. Ghazanfar Ali Khan in reply again asserted that Muzaffar Ali Khan and Phundan-un-nisa had been married. The learned Subordinate Judge, who decided the suit, in a very careful and intelligent judgment, found that the existence of the custom asserted by the plaintiff had not been established. He dismissed the suit, finding, at the same time, that *Musammât Phundan-un-nisa* and Muzaffar Ali Khan had not been married.

I now proceed to the determination of the appeal. I have already noted that there are six important families of Bazid Khani Khanzadas. The most important are the families of the Raja of Mahmudabad and the late Raja of Bilehra. Mahmudabad and Bilehra both being *taluk's*, succession to which is governed by Act I of 1869, and the subsequent amending Acts, the question of family custom as affecting succession can only become of importance should all heirs fail under the provisions of the first ten clauses of section 22, Act I of 1869, as amended. Up to the present, the question has not arisen in either of these families. The remaining four families are the families which own the Bishanpur, the Mitaura, the Mahammadpur, and the Haswapara estates. Leaving for the present the Haswapara estate, with which the present proceedings are concerned, out of consideration, I shall consider the evidence with regard to the Bishanpur, the Mitaura, and the Maham.

(1) 6 Ind. Cas. 674; 13 O. C. 170; 14 O. W. N. 690; 7 A. L. J. 579; 11 C. L. J. 609; 12 Bom. L. R. 447; 8 M. L. T. 59; (1910) M. W. N. 812; 20 M. L. J. 579; 32 A. 345; 37 L. A. 105 (P. C.).

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madpur estates relating to the existence of a custom in derogation of the ordinary Muhammadan Law. I may remark *in limine* that the evidence in this case goes to show that the provisions of the ordinary Muhammadan Law have not been followed in most instances by Bazid Khani Kharzadas to determine questions of succession.

The first question to be decided is, whether there is any custom having the force of law which prevails in all the Bazid Khani Kharzada families in question. I need not take into account the alleged customs amongst Pahar Khani Kharzadas and Said Khani Kharzadas, as those branches separated from the Bazid Khani Kharzadas at least ten generations ago. In the case of the Bishanpur estate there is a *wajib-ul-arz* proved at the Settlement of 1865 (Exhibit 53). The *wajib-ul-arz* is with regard to the village of Bishanpur. A translation of the important passage is as follows:—

"The rule of inheritance is this, that if any *lambardar* or co-sharer has two married wives of the *biradari* with one son by one wife and several sons by the other wife, then the one son of the one wife shall get one-half and the several sons of the other wife shall get the remaining half in equal shares. If one of the wives be childless, then, after the death of her husband, she will remain in possession of one-half share till her death without power of transfer, and after her death the sons of the other wife shall divide it among themselves in equal shares. If the *lambardar* or co-sharer dies childless his widow shall remain in possession till her death without power of transfer, and after her husband's heirs will be entitled to get the share. If during his lifetime the husband makes a gift of his share in favour of his wife in lieu of dower or in any other way, the wife shall have power to make a gift, sale and mortgage in respect of the gifted property. A *ghair kuf* married wife or her children will not get shares as against the children of the *biradari*, but they will get maintenance if they are of good character and are obedient. If there be no children by the *biradari* wife, she will be the owner of the share till her death, and after her the children of the *ghair kuf* married wife shall be the owner of the shares. An

unmarried woman or her children shall get maintenance if they are of good character and are obedient to the heirs of the deceased whose mistress the woman was. If the co-sharer has given by means of a writing such things as *sir*, grove and house to the unmarried woman or to the *ghair-kuf* married wife or to their children, then they will remain in possession without power of transfer. Daughter's children get no share in any family according to custom. But if any co-sharer has given anything to his daughter or daughter's son and reduces the same into a writing when they will be the owners of the same, and will have also powers to make a gift and sale."

The custom laid down here is that, in event of the proprietor having two wives and a varying number of sons by each wife, his property is divided according to the number of wives and not *per capita* according to the number of sons. If one of the wives is childless she is entitled to a life-estate in her share with reversion to the sons of the remaining wife on her death. Daughters get no shares. A childless widow gets a life estate with reversion to her husband's heirs. These rules apply only to wives of families of an equal degree with that of the husband. In the case of a wife whose family is not of an equal degree, that is a *ghair kuf* wife, neither she nor her children are to get anything more than maintenance, and they are put in no better position than a mistress and her children who also get maintenance. The provisions of the *wajib ul arz* formed the subject of a judicial decision. Samsam Ali, the owner of the Bishanpur estate, died on the 18th October 1879. He left two wives, Khatun Bando Bibi and Makbulunnisa. On his death the two ladies took joint possession of the property and subsequently divided the estate between themselves. On the death of Khatun Bando Bibi, Makbulunnisa applied to have her name entered in the Collector's register in place of the deceased's name. The application was opposed by Abdul Rahman, son of Abbas Ali, Samsam Ali's brother. The dispute was subsequently referred to arbitration and an award was made allotting Khatun Bando Bibi's share to Abdul Rahman and dividing the moveable property



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between him and Makbulunnisa. On the 22nd January 1895 Makbulunnisa executed a deed of gift transferring a part of her share to her brother's son. Thereupon Abbas Ali, Sameam Ali's brother, sued her and the donee for a declaration that the gift would be void as against him after the death of the donor on the ground that Makbulunnisa had a life-interest only. The judicial proceedings were terminated by a judgment of Mr. Spankie, Additional Judicial Commissioner, of the 14th March 1899 (Exhibit 61). He held that the custom of inheritance recorded in the *wajib ul arz* was a good custom and that the widows of a sonless Khanzada in this family obtained a life-interest in the property and nothing more. This instance thus supports the existence of the custom asserted by the plaintiff appellant.

I now come to the Mitaura estate. There are three *wajib ul araz* on the record—one of the village Banar, one of the village Katri and one of the village Mitaura itself (Exhibits A 22, A 43, A 42). The first Exhibit declares that if a co-sharer has two married wives with a son by one wife and two sons by the other the shares will be divided according to the number of sons, that is, *per capita*. It continues that, if he has only a daughter by one wife and a son by the other, the daughter will get a share as against the son, but that if he has a son and daughter by the same wife the daughter is excluded by the son. In the case of the widow of a childless proprietor it is laid down that she will be the full owner of a half share with full power of transfer. This is the *wajib-ul-arz* of Banar. The *wajib-ul arz* of Katri states that the custom of inheritance is the same as in Banar. The *wajib-ul arz* of Mitaura, which is another village of the same estate, varies the custom. A translation of the paragraph relating to succession is as follows:—

"The male issue becomes entitled to inherit. In the absence of a male issue, if the share of the deceased is divided, or if the rendition of account takes place, then his widow remains in possession of the share and enjoys power of transfer also. But if the share is not divided nor has there taken place any rendition of account then the widow is not entitled to get

the share. She gets only maintenance. In case there is no widow entitled to inherit, the own brother or brother's sons, otherwise the daughter and daughter's sons become entitled to inheritance. If there are sons from several wives then the shares are divided according to the number of sons. The custom of adoption prevails, but the condition is that the person to be adopted must be of the family, and one belonging to another family cannot be adopted, even the widow who is heir to her husband's property can adopt at her own will, from the family of her husband. The adopted son is the heir of the adopter like a natural son and gets no share from his natural father."

Succession to the Mitaura estate was the subject of judicial decision by this Court. Tasadduk Husain was the holder of the estate. He was a Shia. It is to be noted that Mazaffar Ali Khan, with whose property we are concerned in this appeal, was a Sunni. On Tasadduk Husain's death he was succeeded by his widow, Asifunnisa. From her a portion of the property went to her father and brother. Azimunnisa and Zamin Ali sued to recover possession of this portion on the ground that Asifunnisa had no title as a widow governed by the Shia Law. The defendants set up the custom as stated in the *wajib ul araz* to which I have referred. The matter was decided finally by a decision reported as *Mohammad Ali Naki v. Ahmadunnisa* (2) on 11th August 1892. The following is an extract from the judgment, at pages 7 and 8, on the matter of custom:—

"Now, as to the plea of family custom, it was practically abandoned by learned Counsel on both sides before the close of the hearing. I am clearly of opinion that nothing possessing the attributes of valid and binding custom has been established. Several *wajib ul araz* have been read to us, but from none of them can it be gathered that there is any uniform immemorial custom as to the admission or exclusion of females in matters of inheritance among Khanzadas. These *wajib ul araz* set forth varying customs, some excluding females, some giving them a partial, and some an absolute title, and in two of the villages which Tasadduk

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Husain himself possessed (Banar and Helapara) the custom evidenced by the *wajib ul araz* is conflicting, i.e., there is more than one custom as to the same matter in the same family. In fact, all these *wajib-ul-araz* are of the kind commented on by their Lordships of the Privy Council in the case of *Uman Parshad v. Gandharp Singh* (3). They record much more the wishes and opinions of the parties to them than any settled immemorial custom. A good illustration of this is the fact that after the *wajib-ul-araz* of one village had been drawn up, Tasadduk Husain endeavoured to get it altered with a view to give the right of succession to Zamin Ali, his sister's son. I find that no binding custom varying the Muhammadan Law has been proved. The parties, therefore, must be held to be bound by that law; and as, admittedly, they are all Shias the law applicable to them is the law of the Shia sect. Under the law Tasadduk Husain's widow, as a childless widow, had no right to succeed to any share in her husband's estate. She, however, held possession of the whole from July 1875 up to her death in December 1878. On her death the plaintiff succeeded in obtaining possession, forcibly it is said, of the great bulk of the property which is situate in the Sitapur district, but the defendants were by order of the Revenue Authorities put in possession of the small portion now in suit lying in the Bara Banki district."

It will be seen that the plea of custom was argued and decided although the arguments apparently were not pressed at the end of the proceedings. The Court here decided clearly that there was no custom proved and that succession must be according to the provisions of the Shia Law. The custom had been asserted but was not recognised.

I now come to the Muhammadpur estate. The *wajib ul araz* produced from that estate are the *wajib-ul-araz* of Muhammadpur itself (Exhibit 52) and the *wajib-ul-araz* of Kardari (Exhibit A-41). The following is a translation of the paragraph dealing with the question of succession, in Exhibit 52:—

"The rule of inheritance is this, that if any co-sharer has two married wives of

the *biradari* with one son by one wife and several sons by the other wife, then the one son of the one wife shall get one-half and the several sons of the other wife shall get the remaining half in equal shares, that is to say, the share will be divided according to the number of wives without any regard for children. If one of such wives is childless, then, after the death of her husband, she will remain in possession of one-half share till her death without power of transfer; and after her death, the sons of the other wife shall divide it among themselves in equal shares. If the *limbदार* or co-sharer dies childless his widow shall remain in possession of his share till her death. She will have no power to transfer it to a stranger, but if she wishes to give it to her daughter or to some particular heir of her husband she can do so in her lifetime. If she does not give the aforesaid share to any person, the heirs of her husband will be entitled to get it.

"If during his lifetime a husband makes a gift of his share to his wife in lieu of dower or in any other way, and reduces the same into a writing, then the wife will have power to make a gift, sale and the widow gets only maintenance. The partition of heritage is, at all events, made according to number of male issues, whether they are from one wife or from several wives. The wedded wife belonging to low caste and unwedded wife are not entitled to inherit, but get maintenance provided they are of good character. The *sethansi* right and the custom to adopt do not prevail."

It will be seen that this *wajib ul-araz* directly contradicts the *wajib ul-araz* of Muhammadpur inasmuch as it states that if the property of the deceased is divided or if the rendition of account takes place then the widow of the deceased becomes the heir and she enjoys the power of transfer also. It further contradicts the *wajib ul-araz* of Muhammadpur in stating that the division is to be according to the number of male heirs irrespective of the number of widows.

There has been no judicial pronouncement as to the validity of custom in this estate.

I have now to consider whether it can be held that there is any custom applicable to the *Ahandan* or collection of the six families,

(3) 14 I. A. 127 (P. C.); 15 C. 20; 11 Ind. Jur. 474; 5 Bar. P. C. J. 71; Rafique and Jackson's P. C. No. 9; 7 Ind. Dec. (N. S.) 589.

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It is to be noted that, according to the pedigree accepted by the learned Subordinate Judge at o. p. 1092, Bazid Khan had three sons, Inayat Khan, Fateh Khan, and Hidayat Khan. Hidayat Khan was the ancestor of the Mahmudabad family. So the Mahmudabad family separated nine generations back. Inayat Khan had two sons, Muhammad Kaim Khan and Aulia Khan. Aulia Khan was the ancestor of the Muhammadpur family. So the Muhammadpur family separated eight generations back. Muhammad Kaim Khan had three grand-sons, Bedar Bakht, Muhammad Imam Khan, and Ghulam Husain. Bedar Bakht was the ancestor of the Bishanpur family. Muhammad Imam Khan was the ancestor of the Bilehra family, and Ghulam Husain was the ancestor of the Mitaura family. So these three families separated six generations back. Fateh Khan was the ancestor of the Haswapur family. They separated nine generations back. There has thus been ample time for different customs to grow up in the different branches. We have it in the beginning that the Bishanpur family has a custom of succession by which a childless widow obtains only a life-estate that has been judicially recognised and that in the case of the Mitaura family there is a judicial pronouncement that the succession is by Shia Law. In the case of the important Mahmudabad and Bilehra families the question of custom has not arisen and is not ordinarily likely to arise. In the case of Muhammadpur the question has not arisen but may arise. In the case of Haswapara it has now arisen. I consider that, in view of these facts, it is impossible to hold that there is any general custom of succession affecting Bazid Khani Khanzadas. Bishanpur has been found to have such a custom. Mitaura is found to have none. Muhammadpur records two conflicting customs. The question of custom of succession is thus narrowed down with regard to the matter before us in appeal to the custom of succession, if any, affecting Haswapara. No light is shed on the question by evidence with regard to the remaining Bazid Khani Khanzada families. *A fortiori* no light is shed on the question by evidence as to custom amongst Pahar Khani Khanzadas and Said Khani Khanzadas.

I now come to the evidence with regard

to the Haswapar family. Seven *wajib ul arais* were prepared at the time of the Settlement from 1865 to 1870. Imdad Ali was then alive. The *waib-ul arz* of Haswapara (Exhibit 51) was prepared on the 25th December 1867 and was verified by Nasir Ali as agent of his father, Imdad Ali. It may have also been verified by Imdad Ali himself. This latter point is not clear. The paragraph relating to succession may be translated as follows:—

"The rule of inheritance is this, that if any *lambardar* or co-sharer has two married wives from the *biradari*, with one son by the one wife and several sons by the other wife then the one son of the one wife shall get one-half, and the several sons of the other shall get the remaining half in equal shares. If one of these wives is childless, then, after the death of her husband, she will remain in possession of one-half share during her life without power of transfer, and after her death the sons of the second wife shall divide it equally among themselves. If the *lambardar* or the co-sharer dies childless, his widow shall remain in possession (of his estate) during her lifetime without power of transfer, and after her the heirs of her husband shall be entitled to get shares. If during his lifetime the husband makes a gift of his share in favour of his wife in lieu of *melar* or in any other way, the wife shall have power to make a gift, sale and mortgage in respect of that gifted property. A *ghair kuf* married wife or her children will not get shares of those of *biradari* (*sic*), but they will get maintenance provided that they are of good character and are obedient. If the wife of the *biradari* has no child, she will have a life estate in the share, and after her the share will go to her husband's *bhai bhatije* (brothers and nephews) who are entitled to inherit according to law, rules of society (*urfan*) and custom. A wife not married or her children will get maintenance like a *ghair-kuf* married wife. Neither of them will get share whether the share is divided or undivided. If any co-sharer or *lambardar* gives away to his unmarried wife, or to *ghair-kuf* married wife, or to their children, such things as *sir*, grove and house and reduces the same to a writing, they will remain in possession of the same during their lifetime without power of transfer. In my family a daughter's



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son gets no share according to custom, but if any co-sharer gives something to his daughter or daughter's son and reduces the same to a writing, then such daughter or daughter's son shall be the owner of the same and will also have power to make a gift and sale."

It is, however, a very remarkable fact that in Exhibit A 44, the *wajib ul arz* of the village Sadrawan, prepared on the 10th May 1870, which was verified again by Nasir Ali as son and general agent of Imdad Ali, it is stated in paragraph 4—

"There is no custom for the daughter and daughter's son to get inheritance, nor is the widow entitled under any circumstances to inherit her deceased husband whether the property is ancestral or self acquired. If the owner of land dies childless, his inheritance devolves upon his collaterals, preference being given to nearer ones. The widow gets only maintenance. In case there are sons from several wives the shares are divided with reference to the number of sons. The custom to adopt and the *je'hami* right do not prevail."

Again, in Exhibit A-45, the *wajib-ul ara* of Bambhanri, dated the 13th April 1870 verified by Nasir Ali as son and agent of Imdad Ali, the custom regarding inheritance is stated as it prevailed in Sadrawan. Thus, Nasir Ali made two absolutely conflicting statements in 1867 and 1870. In 1867 he stated that under the custom of the family a childless widow had a life-interest in her deceased husband's estate. In 1870 he stated that she had nothing more than a right of maintenance. The learned Counsel for the appellant would have us minimize the effect of the statements made by Nasir Ali in 1870 on the following theory. His suggestion is that in 1870 it occurred to Nasir Ali that if he asserted that a widow had nothing more than a right of maintenance he might be in a position to obtain the property of Muzaffar Ali Khan who was his elder brother when the latter died without giving anything except a right of maintenance to Musammat Zohra Bibi. He points out that when Muzaffar Ali Khan died Nasir Ali actually claimed the property at the time of mutation proceedings denying that Musammat Zohra Bibi had any right. I cannot, however, accept this contention. In 1870 Muzaffar Ali Khan was not more

than 34 or 35 years of age. This is clear from the statements of his age given in Exhibits C1, C7 and C8. I cannot accept it as a likely hypothesis that Nasir Ali in 1870 was deliberately calculating on the prospect of his brother, who was then a man only 34 or 35 years of age, dying without issue. We have no reason to suppose that at that time Musammat Zohra Bibi was considered incapable of bearing a son. Muzaffar Ali Khan was capable of begetting children, as is shown by the fact that he begot several children from Phundan-un nisa. The explanation is rather that there was no real custom and that the members of this family were inclined to invent customs almost from day to day as their inclination took them. Muzaffar Ali Khan himself verified four *wajib ul ariz* at the time of the same Settlement. These were the *wajib-ul-araiz* of Rawal Bhari (Exhibit 32), Implipur (Exhibit 34), Bachhrajman (Exhibit 36) and Bibipur (Exhibit 33). The following is a translation of the passage dealing with the question of succession in Rawal Bhari:—

"The rule of inheritance is this, that if any one has two wedded wives from the *biradari*, with a son from one wife and several sons from the other, then his share will be divided among his sons equally, i.e., regard will be had not to the number of wives, but to the number of sons. If one of such wives be childless then, after the death of her husband, she will get maintenance but no share. In the same way, if there is only one wife and she is childless then, after the death of her husband, she will get possession over the divided share of her husband without power of alienation. But if the share is not divided it will be inherited by the deceased's brother and brother's sons or any other near relative, and the widow will get maintenance. A *ghair-kuf* wedded wife or an unwedded wife and their sons will get maintenance, provided they are obedient. A childless widow belonging to the *biradari* can adopt but in the presence of nearer relatives of her husband she cannot adopt another person, whether the share is divided or undivided. If a co-sharer has given something in the form of *s.r.*, grove or house to his *ghair kuf* wedded wife, or to his unwedded wife, or to the sons from such wives then she or he will remain in possession thereof without

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power of alienation, and when she or he dies without leaving any son, then the nearer relative of the man whose kept mistress she was will get the share. A daughter will not get a share under any circumstances, that is to say, whether there is a son or not. But she will be the owner of the share if her father has given it to her during his lifetime and has reduced the same into a writing."

In the remainder, the custom is stated to be the same as in Rawal Bhari. These *wajib-ul-araz* are not dated. According to these entries, a childless widow obtains a life estate only. But these entries have little value owing to the circumstances in which they were prepared. These villages are not ancestral villages of the Haswapara estate. They were acquired in the following circumstances, as stated in Exhibit 32:—

"Rawal Bhari, Ghiswapur, Iahraganj, Chak Makia, Makiapur, Jafarpur, Mustafabad, *pargana* and *tahsil* Mahmudabad, Ballia *Pargana* Dawa, *tahsil* Nawabganj, Implipur, Kundri, Bibipur, Rajauli and Baohbrajman—After Bazid Khan, it went to his son Muhammad Fateh, and from Muhammad Fateh to Karam Ullah, and after Karam Ullah to Jafar Husain Khan and Isbrat Zaman Khan, who were among the descendants of Karam Ullah. The last two had no sons. The share of Isbrat Zaman Khan came to me, Chaudhri Muzaffar Ali Khan, because his wife was my father's father's sister, while the share of Jafar Husain Khan came to me, Niamat Ali, because his wife was my father's sister. Out of these villages, village Rajauli, has been in possession of Raja Ibad Ali Khan, Talukdar of Bilehra, etc., since 1256 Fasli; and the 12 annas of Baohbrajman has from a long time been in possession of us Raja Ibad Ali Khan, Nabi Bakheh Khan and others; and the remaining villages are in possession of both of us. In 1262 a partition took place between Chaudhri Muzaffar Ali, and the wife of Jafar Husain Khan in the following manner: "

It is thus seen that these villages originally belonged to Jafar Husain Khan and Isbrat Zaman Khan who died without issue. Jafar Husain Khan and Isbrat Zaman Khan were descendants of Ali Ahmad, a son of Karam Ullah, son of Fateh Khan. Reference has already been made to Fateh Khan. Ali Ahmad was the eldest son, Muhammad

Roshan was the second son, and Muhammad Ghaus was the third son of Karam Ullah. Isbrat Zaman Khan had married a lady who was a sister of Muzaffar Ali Khan's father's father. Jafar Husain Khan had married the sister of Alam Ali Hajjaji. Alam Ali Hajjaji was not a Kharzada. If the custom asserted in these *wajib-ul-araz* were a binding custom on the death of Isbrat Zaman Khan the property would have gone to his widow for life and on her death it would have devolved on her husband's nearest collaterals. It did not devolve on her husband's nearest collaterals. It devolved on Muzaffar Ali Khan who excluded his own father, Imdad Ali, who was then alive. He belonged to the Muhammad Ghaus branch who were further in line than the Muhammad Rostan branch. The *wajib-ul-araz* of Rawal Bhari states clearly that in 1262 Fasli 1855 A. D. the widow of Jafar Husain Khan was in possession of half of the villages and he himself was in possession of the remaining half in succession to his grand-aunt and that in that year a partition took place between him and the widow of Jafar Husain Khan. When Jafar Husain Khan's widow died she was succeeded by her nephew, Niamat Ali, who was not a Kharzada. The evidence of Ghani Ahmad Khan, who was believed by the learned Subordinate Judge and whom I believe, (p. 718) shows this. In Exhibit 33, the Bibipur *wajib-ul-araz*, Muzaffar Ali Khan describes Jafar Husain Khan's wife as his aunt—a statement diametrically opposed to the statement in Exhibit 32, the Rawal Bhari *wajib-ul-araz*. Ghani Ahmad Khan's evidence would go to show that Jafar Husain Khan's widow was the aunt of Niamat Ali and the Rawal Bhari *wajib-ul-araz* is clearly correct on this point. His evidence would also go to show that Imdad Ali at first obtained the property from Isbrat Zaman Khan's widow and that Jafar Husain Khan's widow gave the property to Niamat Ali. But whatever be the facts upon this point, it is perfectly clear that both these ladies had not a life-interest in the property but full proprietary title. Whether that proprietary title descended to their heirs rather than to their husband's collaterals (it is to be noted that Imdad Ali was an heir of Isbrat Zaman Khan's wife who was Muhammad Saleh's daughter,

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Muhammed Saleh being the father of Az'zullah who was father of Imdad Ali) or whether they transferred the property during their lifetime, they both had more than a life interest. Yet, Mozaffar Ali Khan, while stating in one paragraph of the *wajib-ul-arz* that he succeeded either by inheritance or by transfer to the property held by the lady with full proprietary title, at a later portion of the *wajib-ul-arz* asserts that such a lady could not have a proprietary title under a custom but only life interest.

It is further to be noted how carelessly these *wajib-ul-arz* are prepared. On any view of the case, Mozaffar Ali Khan, a Bazid Khani Kharzada, belonged to a different family to Niamat Ali who was a Jajaji. In Exhibit 32 the custom of succession in a village in which Mozaffar Ali Khan owned one-half and Niamat Ali owned the remaining half is stated as the joint custom of both. The same is the case in the Implipur *wajib-ul-arz*, Exhibit 34. Niamat Ali was apparently then dead. His sons, Mansur Husain and Imdad Husain, were owners of eight annas in Implipur. They subscribed to a common family custom. In the case of Bachhrajman four annas had been obtained by Mozaffar Ali Khan under the partition. The remaining twelve annas belonged to other Kharzadas. A common family custom is stated in the case of Bibipur (Exhibit 33). Mozaffar Ali Khan alone verified it as the whole of this village had come to him under the partition. We thus have it that out of the seven *wajib-ul-arz* relating to the Haawa para estate Mozaffar Ali Khan's brother stated in one instance that the custom was that a widow had life-interest with no power of transfer. In two other instances he stated that she had no life-interest but only a right of maintenance. In four instances of property which had come to Mozaffar Ali Khan by inheritance or gift, he stated that a widow had only a life-interest without a right of transfer. But in other places he stated that the property came to him and Niamat Ali from ladies who had what must be implied to be a full proprietary title the existence of which militates against his statement that such ladies could not have a proprietary title. Further, it is a remarkable fact that, when giving evidence in legal proceedings on the 26th April 1883 (Exhibit A 34), he pro-

pounded the existence of an absolutely different custom to the custom which he had propounded in these former *wajib-ul-arz*. He there had stated that he was married to two wives, Musammot Zohra Bibi and Musammot Paundan un nisa, who was not of the brotherhood but of a family of prostitutes. He said with regard to his own property: "if my first wife survives she will succeed, after her death the second wife and her issue will succeed to the property. This will be succession to the property in my possession of whatever class. I do not know whether I have had inserted in the *wajib-ul-arz* the custom contrary to the family or not." Later on, he said:—

"My second wife and her daughters will exclude the brothers from inheritance."

It is to be noted that he had stated in these previous *wajib-ul-arz*:—

"A *ghair kuf* wedded wife or an unwedded wife and their sons will get maintenance, provided they are obedient. .... If a co-sharer has given something in the form of *sir*, grove, or house to his *ghair kuf* wedded wife, or to his unwedded wife, or to the sons from such wives, then she or he will remain in possession thereof without power of alienation, and when she or he dies without leaving any son, then the nearer relative of the man whose kept mistress she was will get the share."

The entries in these *wajib-ul-arz* are similar to the entries in the *wajib-ul-arz* in the Mitaura case. In *Mohammad Ali Naki v. Ahmad un nisa* (2) the late Sir William Barkitt said with regard to them:—

"They record much more the wishes and opinions of the parties to them than any settled immemorial custom."

I cannot find from these entries that there is any custom proved, as asserted by the plaintiff-appellant, under which a childless widow succeeds to a life-estate with reversion to the collateral heirs of her deceased husband. The evidence of instances is, on the whole, against the appellant and not in his favour. The only instance in his favour is the instance in Bisbanpur. But the evidence of instances carries me little further when these instances are instances outside the Haawapara estate. The fact that it was found in the Mitaura



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estate that no such custom existed would not prevent a finding that such a custom existed in the Haswapara estate, and, in order to make an instance valuable, it must be an instance in the Haswapara estate. The only instance in the Haswapara estate is the instance of the succession to the property of Isharat Zaman Khan and Jafar Husain Khan and that instance is against the appellant. The evidence of opinion is referred to by the learned Subordinate Judge at o. p. 1167 to o. p. 1199. I note that the Raja of Mahmudabad (Exhibit 48) and the Raja of Bilehra (Exhibit 54) deposed in 1907 and 1903 to the existence of a custom by which a widow obtained only a life-interest. But the evidence of these gentlemen, valuable as it might be with regard to the customs prevailing in the Mahmudabad and the Bilehra branches, is of little value in establishing the existence of a custom in the Haswapara estate, with regard to which they have no special means of knowledge. I accept the view of the learned Subordinate Judge that the oral evidence does not establish the existence of any such custom.

I am thus thrown back to the position that the plaintiff appellant has asserted the existence of a custom which, I agree with the learned Subordinate Judge, he has failed to establish. The learned Counsel who argued with great ability in support of the appeal has asked the Court to arrive at a finding that, inasmuch as the Bazid Khani Khanzadas do not decide question of succession according to the Muhammadan Law, it is for the Court to discover the custom on which they do decide questions of succession and to apply that custom to the decision of the present appeal. I accept his contention that the Bazid Khani Khanzadas do not appear to consider themselves bound in questions of succession by Muhammadan Law. But I cannot accept the proposition that, when a plaintiff, in order to succeed, has to establish the existence of a particular custom and fails to establish its existence, the Court can do otherwise than dismiss his suit. It is a matter of no importance for the determination of this appeal whether Muhammadan Law be applied or whether a custom exists (which has not been proved)

to the effect that the widow of a childless Bazid Khani Khanzada in Haswapara succeeds to full proprietary title in his estate. If Muhammadan Law is applied, the suit is time barred. If the lady had a full proprietary title, the suit is also time-barred and, further, fails on the ground that she transferred her title to Ghazanfar Ali Khan. It was for the appellant to prove, in order to succeed, that the lady had a life-interest and that succession did not open to him until her death. Otherwise, his suit fails as time barred. He has not established that she had a life interest and his suit must, therefore, be dismissed.

There remains a further point. Ghazanfar Ali Khan's learned Counsel has urged the Court to reverse the decision of the learned Subordinate Judge to the effect that Phundan-un-nisa and Muzaffar Ali Khan are not proved to have been married. The judgment of their Lordships of the Privy Council in *Ghazanfar Ali Khan v. mat Kaniz Fatima* (1) does not operate as *res judicata* and it is not a judgment *in rem*. It is admissible in evidence, however, as showing an instance in which Ghazanfar Ali Khan's claim to be the legitimate son of Phundan-un-nisa and Muzaffar Ali Khan was asserted and rejected. Accepting the judgment only to prove this instance, and for no other purpose, the facts remain as follows. Muzaffar Ali Khan had undoubtedly a permanent connection with Phundan-un-nisa who had been a prostitute before she came to him. She lived in his house for many years. She adopted the habits of a respectable woman. She observed *parda*. She bore him many children. She resided with him till his death. These circumstances are compatible either with her being a mistress to whom he was deeply attached, or his wife. In the earlier proceedings no attempt was apparently made to prove a marriage. Even the date of the marriage was not stated with any clearness. In the present proceedings witnesses have been called to prove the marriage. These witnesses have been rightly disbelieved by the learned Subordinate Judge. The only evidence in support of the marriage is the evidence of admissions by Muzaffar Ali Khan that such a marriage took place. The strongest of these admissions was before their Lordships of the Privy Council

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in the previous proceedings. It did not convince them that such a marriage had taken place. There is further evidence of admissions and evidence of treatment which was not before their Lordships. Against this is the striking fact that at no time did Phundan un nisa come into the witness box to depose to the performance of a ceremony. She did not die until some time had elapsed after the institution of the present suit. From the circumstances of the case it might not have been easy for Ghazanfar Ali Khan to have produced reliable evidence as to the performance of a ceremony. It may be that all genuine evidence had disappeared. But the fact remains that it was for him in the present proceedings to prove affirmatively that the ceremony had taken place. I am not in a position to disturb the finding of the learned Subordinate Judge upon the point. I cannot find affirmatively on the evidence that such a ceremony did take place. I do not go so far as to find affirmatively that it did not take place. But the burden of proof was on Ghazanfar Ali Khan to establish that Phundan un-nisa and Muzaffar Ali Khan were married. In my opinion, he has failed to do so.

This finding does not, however, affect the result of the appeal. The plaintiff appellant, having failed to establish the existence of the custom which he alleges, must fail.

I, therefore, dismiss this appeal with costs.

KANHAIYA LAL, A. J. C.—The facts of this case have been set out at length in the judgment of my learned colleague. The dispute in this case relates to the property of Muzaffar Ali Khan. The Bazid Khani family is now represented by six branches, each of which holds a separate estate. Bazid Khan had three sons, Inayet Khan, Fateh Khan and Hidayat Khan. The Bishunpur, Muhammadpur Mitaura and Bilehra estates are represented by the descendants of Inayet Khan. The Haswapur estate was represented, among others, by Muzaffar Ali Khan, one of the descendants of Fateh Khan. The Mahmudabad estate passed from a daughter, who was a descendant of Hidayat Khan, to Muhammad Ikram Khan, one of the descendants of Inayet Khan, and is now held by Raja Ali Muhammad Khan.

Muzaffar Ali Khan died on the 18th April 1890, leaving a widow, *Musammât Zobra Begam*. He also had in his keeping a woman, named *Musammât Phundan*, who was at one time a prostitute. By her he had a son, Ghazanfar Ali Khan. Only two questions arise for consideration in this appeal. The *first* is, whether by virtue of a custom prevailing in the family of Bazid Khan a widow is entitled to succeed to the entire property of her husband for her lifetime without any power of alienation. The *second* is, whether Ghazanfar Ali Khan is the legitimate son of Muzaffar Ali Khan. If Ghazanfar Ali Khan is the legitimate son of Muzaffar Ali Khan, the plaintiff, who is the grandson of Nasir Ali, the brother of Muzaffar Ali Khan, has no right to succeed to the estate of Muzaffar Ali Khan. If he is not his legitimate son, the plaintiff would be entitled to succeed on the death of *Musammât Zobra Begam* in case it is established that she was, by virtue of the custom, entitled to succeed to the estate of her husband only for her life. If she had an absolute interest in the estate left by her husband or was otherwise in adverse possession of it, the plaintiff would not be entitled to succeed.

It is not now disputed that Muzaffar Ali Khan, though originally a Shia, had adopted the Hanafi faith after he took *Musammât Phundan*, who was a Hanafi, into his keeping. According to the Shia Law, a childless widow is not entitled to succeed to land and the question of custom is, therefore, of some importance to the family of Bazid Khani Khanzadas.

The main evidence produced in support of the custom consists of *wajib-ul-arais* recorded at the previous settlements. These *wajib ul-arais* differ as to certain details; but with the exception of the *wajib ul-arais* of two villages, they agree in saying that according to the custom the widow of a sonless man is entitled to inherit the whole of his estate. To that extent they depart from the Shia Law which does not allow any such widow to succeed to land and from the Hanafi Law which does not give her more than a fourth share. They differ as to whether the widow has a mere life estate or has an absolute power of disposal; but most of the *wajib ul-arais* give her merely a life estate.

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The *wajib-ul-arz* of Bishunpur states that the rule of inheritance is that, if a *lambardar* or co-sharer has two married wives of the *biradari* with one son by one wife and several sons by the other wife, then the one son by one wife shall get one-half and the several sons of the other wife shall get the remaining half in equal shares. If one of the wives be childless, then, after the death of her husband, she shall remain in possession of one half share till her death without a power of transfer and after her death the sons of the other wife shall divide it among themselves in equal shares. If the *lambardar* or co sharer dies childless, his widow shall remain in possession till her death without a power of transfer, and after her, her husband's heirs would be entitled to get the share (Exhibit 53). The *wajib-ul arz* was verified by Nabi Bakhsh Khan, Samsam Ali and the *sarbrahkar* of Riasat Ali Khan who were descendants of Bazid Khan.

The *wajib-ul-arz* of Muhammadpur records the custom in the same terms, but adds that, although a childless widow has no power of transfer, she can, if she likes, give the property to her daughter or to some particular heir of her husband in her lifetime (Exhibit 52). The latter clause gives her a limited power of transfer in favour of a certain class. This *wajib-ul arz* was verified by Muhammad Ali Khan, Bakshish Ali Khan and Imdad Ali Khan, who were descendants of Bazid Khan.

The *wajib ul-arz* of Ral Bhari provides that if a co sharer dies childless leaving a widow the widow will get possession over the divided share of her husband without any power of alienation; but if the share was not divided, it would be inherited by the deceased's brother and brother's sons or by any other near relative, and the widow would get maintenance. Where a person leaves sons by more than one wife of the same *biradari*, it provides for the distribution of his estate according to the number of the sons and not according to the number of his wives (Exhibit 32). But no such question arises in this case. This *wajib-ul arz* was verified by Muzaffar Ali Khan himself at a time when there was no dispute as to the question of succession and there is no reason why Muzaffar Ali Khan should have then falsely represented the custom prevailing in his family. This

village belonged to Jafar Husain Khan and Isbrat Zaman Khan, both of whom were descendants of Fateh Khan. The share of Isbrat Zaman Khan went to Muzaffar Ali Khan, the sister of whose father was married to him. The share of Jafar Husain Khan went to Niamat Ali Khan, the sister of whose father was married to him. Abbas Husain Khan, one of the witnesses for the defendants, states that Jafar Husain Khan was succeeded by his widow who gave away the property to Niamat Ali Khan, who was her relation. Ghani Muhammad Khan, another witness of the defendants, says the same. Whether Jafar Husain Khan had, by virtue of any disposition made in his lifetime, conferred on his wife a larger share than she would otherwise have possessed under the custom is not clear. According to the latter witness, the property of Isbrat Zaman Khan devolved on his widow and went, after her death, to Imdad Ali Khan. From Imdad Ali Khan it must have passed in the ordinary course to his son, Muzaffar Ali Khan, but as the village was substantially a Bazid Khani village the custom of inheritance recorded therein may be taken to be the custom prevailing in the Bazid Khani family. Niamat Ali Khan had to sign the *wajib ul-arz* because it recorded many other matters to which the agreement of the co-sharers had to be taken. The parties to this appeal claim to derive their title from Muzaffar Ali Khan and an admission of Muzaffar Ali Khan that the custom of inheritance was as recorded in the *wajib-ul-arz* of the above village is, therefore, entitled to considerable weight. The *wajib-ul-arz* of Implipur (Exhibit 34), Bachhrajman (Exhibit 36) and Bibipur (Exhibit 33) follow the custom recorded in the *wajib-ul-arz* of Ral Bhari.

The *wajib-ul-arz* of Haswapur provides that if a co sharer dies childless, his widow shall remain in possession of his estate during her lifetime without any power of transfer and after her the heirs of her husband shall be entitled to the same. But if, during his lifetime, her husband makes a gift of his share in favour of his wife in lieu of dower or in any other way, the wife shall have power to make a gift, sale or mortgage in respect of the property comprised in the gift (Exhibit 51). This *wajib-ul-arz* was verified by Nasir Ali Khan on behalf of his family,



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Imdad Ali Khan, and by the *patwari* of the village, and there is no reason to suppose that Imdad Ali Khan or Nasir Ali Khan was anxious to dictate at the time a custom which did not exist. The custom as recorded in this *wajib-ul-arz* tallies with the custom as recorded in the *wajib-ul-arz* of Ral Bhari, which was verified by Mazaffar Ali Khan himself, the other son of Imdad Ali Khan. The *wajib-ul-araz* of Kandari (Exhibit 41), Mitaura (Exhibit A-42), Banar (Exhibit A-22) and Katari (Exhibit A-43) recognise the right of a widow to succeed according to the custom and give her an absolute power of disposal.

The right of a childless widow to succeed to the property of her husband is thus recognised by the *wajib-ul-araz* of twelve villages, belonging to the Bazid Khani family, out of which seven expressly declare that she has only a life estate, one gives her only a limited power of disposal and the remaining four give her an absolute right. The evidence of two of the leading representatives of the Bazid Khani family, Raja Ali Muhammad Khan of Mahmudabad and Raja Kazim Husain Khan of Bilehra, who were examined in certain previous cases, goes to corroborate the custom as recorded in the *wajib-ul-araz* first referred to, and to establish that a childless widow is entitled to the property of her husband only for her life without any power of transfer. Raja Ali Muhammad Khan is himself one of the defendants in this case. He purchased some of the disputed properties from Musammat Phundan and Ghazanfar Ali Khan on the 8th March 1913 (Exhibit C47). When examined in 1907 with regard to the custom prevailing in the family to which he belonged, he stated that he knew the custom of Khanzadas as to the widows and that if a man died leaving two widows, one of whom had children and the other had not, the latter would have a life interest in half the estate, but if he left only one widow and no children, the widow would get a life interest. Raja Kazim Husain Khan was the father of Raja Abul Hasan Khan, one of the defendants, who died during the pendency of this suit. On the 1st March 1903 he was examined in the suit filed by Raja Husain and Musammat Kaniz Fatima against Musammat Zohra Bibi, Musammat Phundan and Ghazanfar Ali Khan. He

then stated that he belonged to the Shaikh sect, known as Khanzadas, and that the custom in his family was that, if any Khanzada died leaving a *biradari* widow, a *ghair-kuf* son, and an own brother and his son, then the *biradari* widow would be entitled to be in possession of the property of her husband for her life without any power of transfer and that the brother and nephews of her husband would have in her presence no right. He admitted that he had not seen any decision or *wajib ul arz* and could give no instances; but he asserted that that was the custom in his family and that such cases had taken place in Paintipur and Mahmudabad. No *wajib-ul-araz* were prepared for the Mahmudabad and Bilehra estates to record the custom of inheritance prevalent among the proprietors thereof because the succession to those estates is governed by Act I of 1869, but the admission of two leading members of the Khanzada family with regard to the existence of the above custom, however damaging it may be, now to their interest, is entitled to considerable weight. As observed by their Lordships of the Privy Council in *Gauracharya a Prasad v. Superundharya Prasad* (1), the existence of a custom in allied branches of a common origin lends strong antecedent probability to the prevalence of such a custom in the branch to which Musaffar Ali Khan belonged, and that probability is materially strengthened and confirmed by the entries as to custom dictated and verified by Musaffar Ali Khan himself and his brother, Nasir Ali Khan, at the time of the first Regular Settlement. The learned Subordinate Judge treated the statements made by Raja Ali Muhammad Khan and Raja Kazim Husain Khan as pertinent only to that branch of the family, to which each of them respectively belonged. But, even if that was so, those statements having been made by persons belonging to the families of the same group, have an important bearing on the question at issue, both as admissions made by transferees before they took the transfers and as evidence of the traditions existing as to such custom in other sections of that group.

The *wajib ul-araz* of the villages, Sadrawan and Bambhauri, have been referred to in sup-

(1) 23 A. 37 at p. 42; 10 M. L. J. 267 (P. O.); 5 C. W. N. 83; 271 A. 288; 2 Bom. L. R. 831; 7 Sar. P. C. J. 724.

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port of the contention that the custom relied on was not uniform and invariable. The former records that a widow is not entitled under any circumstances to inherit the estate of a deceased husband, whether such estate is ancestral or self-acquired, and that if the owner of that estate dies childless his inheritance devolves upon his collaterals to the exclusion of the widow, who gets only maintenance (Exhibit A-44). The latter merely refers to the former (Exhibit A-45). But it is noticeable that both these *wajib-ul-araz* were dictated by Nasir Ali Khan on behalf of his father, Imdad Ali Khan, in 1870 and are materially inconsistent with what Nasir Ali Khan himself dictated earlier in 1867 when the *wajib-ul-arz* of the village Haswapur was prepared (Exhibit 51). The custom declared and verified by him in 1867 was that, if the wife of the *biradari* had no child, she would have a life estate in the share of her husband and after her that share would go to the brothers and nephews of her husband. In 1870 he felt impelled by a desire to have the property of his childless brother to declare that a widow was not entitled to any right whatsoever in the share of her husband beyond that of maintenance in direct contradiction of what he and the other members of the family belonging to the alleged groups had stated before.

There have been three instances in which the existence of the custom has been the subject of settlement by judicial decisions. The first of these cases related to some property which belonged to Tasadduq Husain. His widow, Musammât Asif un-nisa, was in possession of that property after his death. When she died, Musammât Azim un-nisa, the sister of Tasadduq Husain, and Zamin Ali, her son, sued to recover a portion of the estate from the father and brother of Musammât Asif un-nisa, who were in possession. The suit was defended chiefly on the ground of a family custom prevalent among Khazadas, by virtue of which, it was said, a widow succeeded to the estate of her deceased husband. The plea was, however, abandoned by the Counsel on both sides before the close of the hearing, and the only point at that time pressed for consideration was, whether the widow was in possession in lieu of her unsatisfied dower (Exhibit A-36). That decision is not,

therefore, of much value. The second case related to the estate of Samsam Ali, who died leaving two widows both of whom divided the estate equally between themselves. On the death of one of the widows the other widow applied to have her name entered in respect of the share held by the deceased but she was opposed by Samsam Ali's brother's son. The dispute between these two persons was eventually referred to arbitration and an award was made allotting the share of the deceased widow to the nephew of Samsam Ali and dividing the moveable property left by her between him and the surviving widow. Subsequently, the surviving widow made a gift of a part of her share in favour of her brother's son. Thereupon, Abbas Ali, the brother of Samsam Ali, sued her and the donee for a declaration that the gift would be void as against him after the death of the donor, alleging that she had only a life interest in the share which she had inherited from her husband. The defence of the surviving widow was, that she had an absolute interest therein. The finding of this Court was, that the surviving widow derived her right from the custom of inheritance recorded in the *wajib ul-arz* and that under that custom she had no power of alienation (Exhibit 61). The third case related to the property of Ahmad Husain Khan, who died childless. His widow claimed inheritance on the basis of custom and was opposed by Nurul Hasan Khan, the brother of the deceased. The finding of Raja Ali Muhammad Khan, to whom the matter was referred for arbitration, was that the widow of Ahmad Husain Khan had failed to prove the alleged custom inasmuch as the entries in different *wajib-ul-araz* varied and the decision in the suit relating to the estate of Tasadduq Husain mentioned already was against its existence (Exhibit A-47). This award was filed in Court and a decree was passed in accordance with its terms on the 17th November 1905 (Exhibit A-48). The arbitrator was, however, the very person who, in his subsequent statement of the 10th November 1907, admitted that though there were many points on which the *wajib-ul-araz* were conflicting, the custom was that if a man left a widow and no children, the widow got a life-interest. In the face of that statement the decision of the arbitra-

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tor, which seems to have been largely influenced by the decision in Tasadduq Husain's case, wherein the question of custom was practically abandoned, can hardly carry any weight.

Some other instances have also been relied on in disproof of the custom set up by the plaintiff, but the evidence produced in support of those instances is vague and indefinite and does not exclude the possibility of transfers having been made *inter vivos* in favour of the person or persons who succeeded. The members of the Bazid Khani family are mostly Shias. Twelve out of fourteen *wajib-ul-arais* produced appear to agree in recognising the right of a childless widow to succeed to the entire estate of her husband, if he has died childless without leaving any other wife, in contravention of the Muhammadan Law which allows her no right whatsoever in the landed property left by her husband. Most of them expressly state that such a widow on succeeding to the property of her husband gets only a life interest; and these entries are corroborated by the oral evidence produced including the testimony of two such leading members of the Bazid Khani family as Raja Ali Muhammad Khan and Raja K. Zim Husain. The few *wajib-ul-arais* which gave a widow an absolute right were verified by persons who were agents not probably so well conversant with the details of the custom as some of the persons of the family themselves, who had dictated the remainder. I am not, therefore, prepared to reject the general trend of the testimony in favour of the existence of such a custom afforded by the remaining *wajib-ul-arais* and to hold that what was contained therein was prompted merely by the wishes or whims of the persons who dictated them, particularly when the *wajib-ul-arais* say in explicit terms that what they recorded was the custom or rule of inheritance prevailing in the family of the co-sharers.

The learned Counsel for the plaintiff-appellant wanted to produce in evidence copies of certain other *wajib-ul-arais* belonging to allied branches which the Court below had refused to admit in evidence because they were filed too late. Considering that the plaintiff-appellant had sufficient opportunity of producing them before the evidence for the defendants began, there is no reason for showing him any indulgence at this stage.

The next question relates to the paternity of Ghazafar Ali Khan, who was born of Musammot Phundan. Musammot Phundan was originally a prostitute. But that fact did not deter Mrzaffar Ali Khan from marrying her, if he chose. In the previous suit filed by Ghazafar Ali Khan against Musammot Kaniz Fatima and another, it was held that Ghazafar Ali Khan was not the legitimate son of Mrzaffar Ali Khan, because there was no evidence of marriage between Musammot Phundan and Mrzaffar Ali Khan and no presumption of marriage could be made from prolonged cohabitation, for Musammot Phundan was, before she was brought to the house of Mrzaffar Ali Khan, according to the case of both sides, a prostitute [*Ghazafar Ali Khan v. Kaniz Fatima* (1)]. Some direct evidence in proof of the marriage has now been adduced which the Court below has disbelieved. Not having been produced in the previous case, it must naturally be regarded with considerable suspicion, and it would be unsafe to place any reliance on it. There is, however, some documentary evidence of an unquestionably genuine character, which is now forthcoming and has a bearing on the question of the acknowledgment and treatment of Musammot Phundan by Mrzaffar Ali Khan as his married wife. A deposition of Mrzaffar Ali Khan of the 26th April 1885 was filed in the previous suit in proof of the acknowledgment (Exhibit A-34); but it was held by this Court that, in view of the fact that Mrzaffar Ali Khan had several children born of Musammot Phundan, he might have considered it advisable to make the best of the existing state of affairs and given out that he was married to Musammot Phundan and recognised her as his wife whenever he spoke of her (Exhibit 29). A petition said to have been filed by Mrzaffar Ali Khan, in which Musammot Phundan was described as *saor a apni* (my wife) was also then discarded from consideration (Exhibit B-7) because it did not describe her as *saor a mankuha apni* (married wife). But a copy of the petition filed by Mrzaffar Ali Khan on the 13th June 1887 in the mutation proceeding instituted by him in respect of the village Sadrawan, now filed, shows that Mrzaffar Ali Khan had described Musammot Phundan as his married wife (*saor a mankuha apni*) (Exhibit B-7). Though



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this acknowledgment is open to the objection that it might have been made from ulterior motives to conceal what might otherwise have been a result of shame it is sufficient in the eyes of the Muhammadan Law to invest *Musammot* Phundan with the status of a married wife and her subsequent born children with the status of legitimacy, unless a marriage is shown to have been legally impossible. The object of an acknowledgment, as explained by Baillie, is the "giving of information for the establishment of a right in favour of another against oneself." The "acknowledgment by a man of a woman as his wife is valid when confirmed by her, and she is not married to another husband and the acknowledgor has not already her sister or four others living with him as his wives." (Baillie's Muhammadan Law, Volume I, page 405). "Where the acknowledgment of such a woman as wife is valid, it is obligatory not only on the acknowledgor and the person acknowledged but on other persons also (*Ibid*, page 405)." "A person may acknowledge another," says Ameer Ali, "as his or her father or mother or husband or wife: and such acknowledgment, if assented to or confirmed by the acknowledged, whether during the lifetime of the acknowledgor or after his or her decease, would constitute a valid relationship, in so far as the parties themselves are concerned." (Ameer Ali's Muhammadan Law, Volume II, 4th Edition, page 273). He later on explains, quoting Fatawai Kazi Khan, that "when it has been said that the acknowledgment of a man is not valid in respect to those above mentioned, it is only meant that it is not obligatory on any other except the acknowledgor and the acknowledged: but with regard to such rights as affect them only, the acknowledgment is valid" (*Ibid*, 274). So says Tyabji: "Where either party has acknowledged that he or she was married to the other (and the other party has confirmed or acquiesced in the acknowledgment) it will be presumed that they are validly married unless prohibition to marry is established between them." (Tyabji's Muhammadan Law, page 100). The decision of this Court and of the Privy Council in the previous case is unquestionably entitled to the highest consideration and

respect but it must be recognised that that decision was not between the parties to the present suit and as pointed out in *Mahamad Amin v. Hasan* (5) no person is to be concluded by a judgment in a case to which he was not a party.

The explicit admission made by Muzaffar Ali Khan that *Musammot* Phundan was his married wife was evidently not before their Lordships of the Privy Council; and, reading that admission with the subsequent conduct of *Musammot* Zohra Begam, the senior wife of Muzaffar Ali Khan, who joined *Musammot* Phundan in executing a deed of mortgage in favour of Raja Amir Hasan Khan on the 10th November 1892 wherein she described *Musammot* Phundan as the wife and Ghazanfar Ali Khan as the son of Muzaffar Ali Khan (Exhibit O13) and subsequently relinquished her rights in favour of Ghazanfar Ali Khan, describing him as a son of *Musammot* Phundan her co-wife (Exhibit A-28), there can be no doubt left that Ghazanfar Ali Khan was treated as a legitimate son of Muzaffar Ali Khan so as to give his transferees a valid title to the property he was transferring. For nearly 24 years the plaintiff took no action nor challenged the right of Ghazanfar Ali Khan whose name was entered in the revenue papers jointly with that of *Musammot* Zohra Begam in respect of the estate left by Muzaffar Ali Khan, deceased, (Exhibits A-29 and A-31). *Musammot* Zohra Begam died on the 9th August 1904 after she had surrendered her rights in favour of Ghazanfar Ali Khan on the 10th January 1899 (Exhibit A-25). The sale deed obtained by Raja Ali Muhammad Khan from Ghazanfar Ali Khan and *Musammot* Phundan was effected in lieu of money due on certain previous mortgages under which the mortgagor was in possession and that possession cannot, in any circumstances, be disturbed until the mortgages are satisfied, because those mortgages were made by Muzaffar Ali Khan himself.

I agree, therefore, in dismissing the appeal with costs.

*Appeal dismissed.*

(5) 31 B. 143 at p. 156; 9 Bom. L. R. 65.

VENKATA RANGAYYA APPA RAO & BOMMADEVARA SATYANARAYANA VARAPRASADA RAO.

MADRAS HIGH COURT.

APPEAL SUIT No. 307 OF 1919.

July 12, 1920.

*Present* :—Sir John Wallis, Kt., Chief Justice  
and Mr. Justice Seshagiri Aiyar.

*Sri Rajah* VENKATA RANGAYYA  
APPA RAO BAHADUR ZEMINDAR  
GARU AND OTHERS—DEFENDANTS  
Nos. 1, 2 AND 4—APPELLANTS

*versus*

*Sri Rajah* BOMMADEVARA SATYA-  
NARAYANA VARAPRASADA RAO  
NAIDU BAHADUR ZEMINDAR  
GARU AND ANOTHERS—PLAINTIFFS AND  
DEFENDANTS Nos. 3—RESPONDENTS.

*Vendor and purchaser—Covenant to indemnify  
purchaser—Costs of litigation affecting title—Liability  
of covenantor, extent of.*

On a contract of indemnity in a deed of sale whereby the vendor covenants to indemnify the vendee against the costs of litigation affecting the title to the property conveyed, the vendee is entitled to recover not merely the taxed costs, but the actual costs which he had to pay to his legal adviser, provided they are not unreasonable. [p. 165, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, Bezwada, in Original Suit No. 28 of 1917.

FACTS appear from the judgment.

Messrs. V. Ramesam and V. Suryanarayana, for the Appellants.—The indemnity covenant does not make defendants liable for the costs of the suit which they instituted. The vendors agreed to remove obstruction at their own cost. The indemnity clause does not cover cases like the present.

In any event, the plaintiff is only entitled to the taxed costs and not to any fancy amount they might have paid to a lawyer. It would be straining the language of the covenant too far to hold that it should cover any excessive amount which a party may choose to pay to his Vakil.

Messrs. S. Srinivasa Aiyangar, and A. O. Sampath Aiyangar, for the Respondents.—The indemnity clause covers a case where the vendee is obliged to institute a suit to support the vendor's title. The plaintiffs have incurred loss in that litigation and are entitled to be re-imbursed. The plaintiff is entitled to enforce the covenant.

Under the terms of the covenant the plaintiffs are entitled to recover from the defendants all reasonable expenses incurred by them. That includes the amount that they actually paid to their Vakil. It was

necessary to engage a Vakil of some standing and eminence in a suit like that which the plaintiffs conducted. In fact, the defendants approved of the plaintiff's choice of their Vakil.

JUDGMENT.—This is an appeal from the judgment of the Subordinate Judge of Bezwada in a suit brought by the Zemindar of South Vallur against the defendants from one of whom he had purchased a certain village to recover the costs which he was put to in defending his title to the village against a third party. He bases his claim upon an indemnity contained in a deed of sale executed by the second defendant who was the actual vendor and also on a covenant contained in an indemnity-bond executed by first, third and fourth defendants, her husband and two sons respectively.

The Subordinate Judge has given judgment for the plaintiff and we think he is right. The covenants in the deed of sale and in the indemnity-bond are practically the same, and the covenant in the sale-deed is accurately translated in paragraph 8 of the Subordinate Judge's judgment. It says: "if the previous owners or any others setting up any rights by transfer from them or any other claiming themselves to be their heirs or any others claiming under any other title should lay any claim or file any suit regarding the title and interest of the property sold and if, by such claim or suit, any sort of loss should accrue to your title or enjoyment all such obstructions we will remove at our cost and secure to you absolute right and enjoyment." Now, although the language used here is somewhat cumbersome, we agree with the learned Subordinate Judge that the effect of these words is to impose upon the covenantor the duty of indemnifying the plaintiff from costs in suits like this in which he was obliged to defend his title to the village. However, the case does not stop there because the deed goes on: "Hereafterwards. (b) if any body should file suit, or (c) if there should be any dispute regarding the nature of the grant or of the tenure of the village from the Government or from any others and if there should accrue any losses on that account all those also we will remove at our cost and will secure to you absolute right and enjoyment." Now, we are clearly of opinion that, even if the first covenant is not clear

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these words are sufficiently wide to cover the present claim because a suit has been filed and loss has accrued on that account to the plaintiff who has had to defend the suit at great expense. Therefore, we hold that both the clauses contain a covenant of indemnity which the plaintiff is entitled to enforce in this suit.

The only other question which has been argued before us is, whether the plaintiff is entitled to recover only the taxed costs or costs between Solicitor and client or, what corresponds to that in this country, the actual costs which he has had to pay to his own legal adviser. We are only concerned in this case with the practice in cases of indemnity such as the present and with regard to such practice it appears to be well-settled law in England that a party is entitled to recover costs as between Solicitor and client and it obviously must be so because, unless it were so, there would be really no indemnity at all. That has been laid down by the high authority of Lord Tenterden in *Smith v. Compton* (1), by Kelly, C. B., and Martin, B., and Piggot, B., in *Howard v. Lovegrove* (2) and Buckley, J., as he then was, in *Great Western Railway Company v. Fisher* (3). The system of awarding costs in litigation is somewhat different in England from what it is in India. There is no system here of taxing costs as between a client and his Vakil. We do not lay down that under such contracts anything which a party had agreed to pay or actually paid could be recovered without regard to whether his conduct was reasonable or not; there can be no question here that what was paid was reasonable having regard to the condition of things prevailing here and was such a payment as would have been allowed if there were taxation here as between client and Vakil corresponding to taxation between solicitor and client in England. No better proof of that need be mentioned than the fact that the defendants approved of the engagement of the late Mr. V. Krishnasami Aiyar, one of the leaders of the Bar in Madras, and when he became a Judge they suggested to the plaintiff that

(1) (1832) 3 B. & Ad. 407; 1 L. J. K. B. 146; 110 E. R. 146.  
 (2) (1870) 6 Ex. 43; 40 L. J. Ex. 13; 23 L. T. 396; 19 W. R. 188.  
 (3) (1905) 1 Ch. 316; 74 L. J. Ch. 241; 92 L. T. 104; 53 W. R. 279.

he ought to get another Vakil of the same position at the Bar which, of course, meant that he should be retained upon somewhat similar terms. It cannot be suggested that there was anything unreasonable in the conduct of the plaintiff or that he incurred any expense which he ought not to recover under his contract of indemnity.

We may also mention as regards this point that notice was given at a very early date to the defendants in this suit which had been instituted against the plaintiff inviting them if they liked to come in and conduct the defence.

The only other point is as regards interest. The plaintiff has claimed, and the Subordinate Judge has allowed, interest at 9 per cent. Having regard to the position and the general circumstances of the case, we think that the rate of 6 per cent. is quite adequate and we accordingly vary the lower Court's decree by giving 6 per cent. instead of 9 per cent., otherwise the appeal is dismissed with costs.

M. C. P.

*Appeal dismissed.*

## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 86  
OF 1918.

June 22, 1920.

*Present*:—Sir Asutosh Mookerjee, Kt.,  
 Acting Chief Justice and Justice Sir Ernest  
 Fletcher, Kt.

KASSIM HASSAN—DEFENDANT—

APPELLANT

versus

HAZRA BEGUM—PLAINTIFF—

RESPONDENT.

*Muhammadian Law—Mutwali, succession to office of—Title to office, whether can be acquired by prescription—Claim to office and to property appurtenant thereto, whether can be barred by limitation—Limitation Act (IX of 1908), Sch. I, Arts. 170, 174—Trusteeship with power to appoint successor, whether recognised by law—Woman, whether competent to hold office of mutwali—Pleadings—Adverse possession, title by, whether can be pleaded in appeal—Sajjadanashin when can be appointed.*

A claim to an office and to property appurtenant



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thereto may be barred by limitation. If the office is not hereditary, Article 120 of Schedule I to the Limitation Act is applicable. If, on the other hand, the office is hereditary, Article 124 governs the matter [p. 169, col. 1.]

A trusteeship with power to appoint a successor is well-known to and recognised by law and may be prescribed for [p. 169, col. 1.]

When title to an office has been acquired by statutory operation whether under Article 120, 124 or 144 of Schedule I to the Limitation Act, the title of the true owner is not revived by re-entry, in other words even if the lawful owner should re-acquire possession he is not thereby remitted to his original title [p. 169, col. 1.]

A religious office can be held by a woman under the Muhammadan law, unless there are duties of a religious nature attached to the office, which she cannot perform in person, or by deputy, and the burden of establishing, that a woman is precluded from holding a particular office is on those who plead the exclusion. A woman is, therefore, not incompetent to hold the office of *mutwalli*. [p. 169, col. 2.]

A plaintiff may be allowed to succeed on a title by adverse possession, pleaded even for the first time in the Court of Appeal, provided such a case arises on the facts stated in the plaint and the defendant is not taken by surprise [p. 170, col. 1.]

A *sanjadanashin* maintains unbroken the spiritual line from the original preceptor. Such an office can exist only by virtue of the direction of the spiritual founder or by a valid custom. [p. 171, col. 2.]

Appeal against the decision of Mr. Justice Greaves, dated the 6th August 1919.

Mr. Fugh, for the Appellant.

Messrs. Langford James and A. K. Roy, for the Respondent.

## JUDGMENT.

MOOKSJE, ACRA. C. J.—The subject-matter of the litigation which has led up to this appeal is a *dargah* (mausoleum or shrine of a Moslem saint) situated in Clive Street in this City. The case for the plaintiff is that she was in possession as *mutwalli* for many years, till the defendant, her son-in-law, after the death of his wife, wrongfully interfered with the performance of her duties on or about the 18th May 1918. She accordingly instituted the present suit on the 30th May 1918, for declaration that the defendant was in wrongful possession of the *dargah*, for recovery of possession from him, and for incidental reliefs. The defendant resisted the claim on the allegations that the plaintiff had renounced the *mutwalliship* in favour of her husband who had been installed as the *sanjadanashin*, and had performed his duties as such till his death in 1911, that thereafter the defendant had been installed as *sanjadanashin*, and that he was lawfully in

possession of the *dargah* at the date of the institution of the suit. Mr. Justice Greaves has decreed the suit on the ground that the plaintiff was lawfully in possession as *mutwalli* and that the defendant, even if selected *sanjadanashin*, by the *fakirs*, could not successfully resist her claim to recover possession as *mutwalli*. The defendant has appealed against this decree. Before we deal with the questions raised before us, it is necessary to set out the history of this endowment so far as it can be gathered from the materials on the record.

In 1834, the property was in the possession of one Jutty Shah who described himself as the *khodim* and *mutwalli* of the holy shrine of Hazrat Joomma Shah. On the 19th October 1834, he executed a testamentary instrument which recites that his ancestors had, from generation to generation, acted as *mutwallis* of the shrine and that he himself had for a period of about sixty years performed the duties of the office, "according to the former rules and long-established usages." By this document, Jutty Shah appointed his infant son, Sheikh Mehtur, to succeed him as *mutwalli* after his death, and nominated several Moslem gentlemen to perform the duties appertaining to the holy shrine till his son should attain years of discretion; a set of detailed rules for the management of the endowment was appended to the instrument. On the death of Jutty Shah, his son (called Mehtur or Nadir) held the office of *mutwalli* till his death in 1858. The *mutwalliship* thereupon passed to Ahmed Shah (said to be a nephew of Jutty Shah), but under what exact circumstances this happened cannot be ascertained at this distance of time. Ahmed Shah held possession as *mutwalli* till his death, which took place on the 12th May 1873. We find that on the very next day, the 13th May 1873, Korban Shah, the son of Ahmed Shah, executed a deed in favour of his son, Vilayet Hossain, whom he appointed as *mutwalli* and trustee of the Will of Jutty Shah. The reasons for this appointment cannot be discovered, but it appears from the document that Korban had lost his wife and the deed enjoined Vilayet Hossain to perform ceremonies, according to orthodox Moslem customs and usages, at the grave of his mother Amina Bibi. Vilayet Hossain continued to hold the office of *mutwalli* till his

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death, which happened on the 16th August 1880. During his term of office as *mutwalli*, Vilayet Hossain instituted a suit in 1875, on the Original Side of this Court, against one Choones Bibi who was in possession of a portion of the trust properties on the strength of a purchase from the previous *mutwalli*, Ahmed Shah, in 1867. The result was that the purchaser defendant disputed the title of Vilayet Hossain to hold the office of *mutwalli*. Mr Justice Phear found that Ahmad Shah had succeeded Nadir Shah as *mutwalli* and held that, as he had exercised undisturbed the right of *mutwalli* for nearly fifteen years, he might be presumed to have been lawfully appointed. As regards Vilayet, however, Mr. Justice Phear held that as admittedly he had no title by actual appointment, he could not maintain the suit as framed in his character as *mutwalli*; nor had he a right to enjoy the property as secular property by right of inheritance. The plaintiff was, in these circumstances, given leave to amend the plaint, but what followed does not appear from the record. The fact remains, however, that, although the effort of Vilayet Hossain to restore to the endowment, property alienated by his predecessor thus proved ineffectual, he continued to hold the office of *mutwalli*, and, previous to his death, he made a testamentary disposition on the 4th September 1874. At the time of his death, he left him surviving his widow Imamunnessa (daughter of one Mahomed Musa) and his own daughter by her, Hazra Bibi (who is plaintiff in the present litigation). Vilayet Hossain, by his Will, appointed his daughter Hazra Bibi as *mutwalli* of what he described as "Jutty Shah's Imambara and dargah in Clive Street" and all properties moveable and immovable appertaining thereto. During the minority of his daughter, however, the management was vested in his widow Imamunnessa. The Will further provided that the widow would cease to hold the appointment if she took a second husband or lost her virtue; in either of these events, Mahomed Musa, the father-in-law of the testator, would discharge the duties of *mutwalli* during the minority of Hazra Bibi. Disputes broke out shortly after the death of Vilayet Hossain, and we find that two suits were instituted in 1881 and 1882 by Mahomed Musa for proof of his Will in solemn form, for its construction,

and for ascertainment of the rights of the parties thereunder. On the 28th August 1883, Mr. Justice Morris appointed a Receiver of the estate in the suits mentioned and directed the payment of Rs. 170 a month to Imamunnessa as also the expenses of the religious ceremonies. Imamunnessa died in 1893, before the termination of the suits. On the 16th January 1902, Mr. Justice Sale made a consent decree on the basis of terms of settlement which were ordered to be carried out. The premises now in dispute were declared to be trust properties incapable of partition and division; at the same time, Hazra Bibi was appointed *mutwalli* of the trust properties and was authorised to conduct and carry out the religious trust according to an approved scheme. The decree thus made in 1902 terminated the dispute as to the succession to the office of *mutwalli*, and Hazra Bibi, who had been married to one Jalil Shah, continued peacefully to perform her duties till the defendant appeared on the scene. Hazra Bibi had a daughter, Chahaty Bibi, who was given in marriage to the defendant Kassim Hossain. There can be little doubt that the defendant was first allowed to take up his residence at the Imambara as the son-in-law of the *mutwalli* Hazra Bibi, and the evidence shows unmistakably that he lived there amicably for five or six years after his marriage, which took place in 1911 or 1912. Chahaty Bibi, however, unluckily for all parties concerned, died towards the end of the year 1917, and, as might be anticipated, her death affected a considerable change in the position of the defendant. Feelings gradually became estranged, and the defendant ultimately set up a title to the disputed properties on the allegation that he had been elected *sajadanashin* by the *fakirs* and other worshippers who congregate in the *dargah*. Such, in outline, was the position of the parties when the controversy between them was brought into Court for determination. The questions which emerge for consideration from the arguments addressed to us may be formulated under two heads as follows, namely, *first*, had the plaintiff title to the office of *mutwalli* of the disputed properties at the date of the institution of the suit; and, *secondly*, was the defendant appointed as *sajadanashin*; if so, did such appointment affect the title of the plaintiff as *mutwalli*.

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As regards the first question, namely, whether the plaintiff had a valid title to the office of *mutwalli* at the date of commencement of this litigation, we must not overlook two outstanding features of this case. In the first place, it is plain that the office of *mutwalli* has been held successively by members of the same family. The testament of Jutty Shah executed in 1834 recites that he had been in possession as *mutwalli* for sixty years in succession to his ancestors, who had successively held the office and discharged its duties from generation to generation. After Jutty Shah, the office was held successively by his son Nadir and his nephew Ahmed, and, thereafter, by Korban (the son of Ahmed), by Vilayet (the son of Korban), and by Hazra (the daughter of Vilayet). In the second place, each incumbent has taken it upon himself to nominate his successor in the office of *mutwalli*. It is not for us to determine now, whether such appointments could or could not have been validly made; but, notwithstanding the general rule enunciated in the cases of *Atimunnessa Bibi v. Abdul Sobhan* (1) and *Phatmabi v. Abdulla Musa Sait* (2), that no right of inheritance attaches to the office of *mutwalli*, the question may well arise whether the uniformity which characterises the successive appointments for nearly a century may not improbably indicate that the practice had a lawful origin in the directions given by the original founder, though they can no longer be traced with certainty from the lapse of time. Apart from this, what is of vital importance to the case of the plaintiff is that her great grandfather, Ahmed Shah, held the office of *mutwalli* for fifteen years from 1808 to 1823 and that thereafter, by virtue of the deed executed by her grandfather Korban Shah in favour of her father Vilayet Hossain, the latter held the office for seven years from 1873 to 1880. Thereafter, the plaintiff herself has held the office, without interruption, as we shall presently see, from 1880 to 1916. The testament of Vilayet Hossain vested the office of *mutwalli* in his daughter from the time of his death, subject to the reservation that during her minority

the management would be carried out by his widow Imamunnessa, or, in certain events, by his father-in-law Mahommed Musa. Such possession of the office of *mutwalli*, whether by Imamunnessa or by Mahommed Musa, would plainly be on behalf and for the benefit of Hazra Bibi. We are not unmindful that by the decree of Mr. Justice Norris, made on the 28th August 1883, the properties were placed in the hands of a Receiver; but in view of subsequent events, this did not operate to interrupt the possession of the office of *mutwalli* by Hazra Bibi. It is significant that the order for appointment of Receiver included a direction for the payment of a fixed sum to Imamunnessa on whom was cast the duty of management of the *waqf* estate by the Will of her husband during the minority of her daughter. Besides this, the decree ultimately made by Mr. Justice Sale on the 16th January 1902, confirmed the appointment of Hazra Bibi as *mutwalli* of the trust properties. In our opinion, it is indisputable that the office of *mutwalli* has been vested in Hazra Bibi by the Will of her father and has been held by her without interruption from the time of his death in 1880 till 1902 when her appointment was confirmed by an order of this Court. It is equally plain on the evidence that after 1902, Hazra Bibi held the office of *mutwalli*, till her title was questioned and her possession was disturbed by the defendant, immediately before the suit. We are in agreement with Mr. Justice Greaves when we hold that we cannot possibly accept as well founded the assertion of the defendant in his written statement that Hazra Bibi renounced the office of *mutwalli* so as to allow her husband to instal himself as the *sajjadunashin*. In our opinion, it is fully established by satisfactory evidence that Hazra Bibi has held the office of *mutwalli* from 1880 and has been in possession thereof by performance of the duties attached thereto, either herself or through her deputies, for a period of not less than thirty-six years. What, then, is the legal effect of such possession of the office, even if we assume for a moment that her nomination to the office of *mutwalli* was not validly made or was not confirmed by a *kazi* or by a judicial officer of equivalent status? The obvious answer is, that the plaintiff has acquired a good title to the office of *mutwalli* by reason of her possession thereof for the

(1) 32 Ind. Cas. 21; 43 C. 467; 22 C. L. J. 577; 20 C. W. N. 113.

(2) 21 Ind. Cas. 944; 28 M. 491; 14 M. L. T. 568; (1914) M. W. N. 75; 26 M. L. J. 116.



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statutory period. The principles applicable in such circumstances were explained in the case of *Salimulla v. Abdul Khayer Mohammad Mustafa* (3). It is indisputable that a claim to office and to property appurtenant thereto may be barred by limitation. The decisions in *Balwant Rao v. Puran Mal* (4), *Jagan Nath Das v. Birbhadra Das* (5), *Kidambi Ragava Chariar v. Tirumalai Asari Nallur Raghava-chariar* (6) show that if the office is not hereditary, Article 120 of the Schedule to the Indian Limitation Act is applicable. If, on the other hand, the office is hereditary, Article 124 governs the matter; *Nilakandan v. Padmanabha* (7), *Alagirisami Naicker v. Sundareswara Ayyar* (8), *Gnanasambanda Pandara Sannadhi v. Velu Pandaram* (9), *Annasami Pillai v. Ramakrishna Mudaliar* (10), *Ramanathan Chetty v. Murugappa Chetty* (11) affirmed on appeal to the Judicial Committee: *Ramanathan Chetti v. Murugappa Chetti* (12) and *Lilabati Misra v. Bishun Ohobey* (13). The substance of these decisions is that a trusteeship with power to appoint a successor is well-known to and recognised by law and may be prescribed for; in the case before us, it is immaterial whether Article 120 or 124 or 144 is held applicable. When title has been so acquired by statutory operation, it is plain that the title of the true owner is not revived by re entry, in other words, even if the lawful owner should re acquire possession, he is not thereby remitted to his original title. This view is supported by the decisions in *Brindaban Ohunder Chowdhury v. Tarachand Bindopadhyas* (14), *Dalip Rai v. Deoki Rai* (15),

*Vasudeva Padhi v. Maguni Devan* (16), *Lilabati Misra v. Bishun Ohobey* (13) which accord with the rule recognised in *Brassington v. Llewellyn* (17), *Bryan v. Cowdall* (18), *Jolly, In re, Gathercole v. Norfolk* (19), *Dawkins v. Penrhyn (Lord)* (20), *Beamish v. Whitney* (21) and *Beamish v. Whitney* (22). The validity of these principles has not been questioned, but the argument has been put forward that the plaintiff was disqualified, by reason of her sex, from appointment to the office of *mutwalli* and could not, consequently, be deemed to have acquired title to such office by prescription, on the analogy of the rule recognised by the Judicial Committee in *Bhaia Thakur v. Jharula Das* (23) which reversed the decision of this Court in *Jharula Das v. Jalandhar Thakur* (24). This contention is fallacious, as it is based on the erroneous assumption that a woman is incompetent, under the Muhammadan Law, to hold the office of *mutwalli*. The true rule on the subject was enunciated by Mr. Justice Abdur Rahim and Mr. Justice Seshagiri Aiyar in *Munnavaru Begam v. Mir Mahapalli* (25). A religious office can be held by a woman under the Muhammadan Law, unless there are duties of a religious nature attached to the office, which she cannot perform in person or by deputy, and the burden of establishing that a woman is precluded from holding a particular office is on those who plead the exclusion. The decision of the Judicial Committee in *Shahoo Banoo v. Aga Mahomed Jaffer Bin lancem* (26) takes the same view and shows that if the religious duties connected with a religious office are such that a woman cannot properly

(3) 3 Ind. Cas. 419; 37 C. 263; 14 C. W. N. 497; 11 C. L. J. 304.

(4) 6 A. 1; 10 I. A. 90; 13 C. L. R. 39; 4 Sar. P. C. J. 435; 3 Ind. Dec. (N. S.) 852.

(5) 19 C. 776; 9 Ind. Dec. (N. S.) 960.

(6) 26 M. 113.

(7) 14 M. 153; 5 Ind. Dec. (N. S.) 108.

(8) 21 M. 278; 7 Ind. Dec. (N. S.) 552.

(9) 23 M. 271 (P. C.); 27 I. A. 69; 4 C. W. N. 329; 2 Bom. L. R. 597; 10 M. L. J. 29; 7 Sar. P. C. J. 671; 8 Ind. Dec. (N. S.) 591.

(10) 24 M. 219; 11 M. L. J. 1.

(11) 27 M. 192; 13 M. L. J. 341.

(12) 29 M. 283; 10 C. W. N. 825 (P. C.); 33 I. A. 139; 1 M. L. T. 327; 3 A. L. J. 707; 4 C. L. J. 1189; 16 M. L. J. 265; 8 Bom. L. R. 498.

(13) 6 C. L. J. 621.

(14) 11 B. L. R. 237; 20 W. R. 114.

(15) 21 A. 204; A. W. N. (1899) 36; 9 Ind. Dec. (N. S.) 840.

(16) 24 M. 387; 28 I. A. 81; 3 Bom. L. R. 303; 5 C. W. N. 445; 7 Sar. P. C. J. 819.

(17) (1858) 1 F & F 27; 27 L. J. Ex. 297; 114 R. R. 1038.

(18) (1873) 21 W. R. (Eng.) 693.

(19) (1900) 2 Ch. 616; 63 L. J. Ch. 661; 83 L. T. 118; 45 W. R. 657; 16 T. L. R. 521.

(20) (1878) 4 App. Cas 61 at p 59; 48 L. J. Ch. 304; 39 L. T. 583; 27 W. R. 171.

(21) (1909) 1 Ir. R. 38; 10 Ir. L. R. 19.

(22) (1909) 1 Ir. R. 360; 10 Ir. L. R. 747.

(23) 24 Ind. Cas 501; 42 C. 214; 20 C. L. J. 360; 18 C. W. N. 1029; 27 M. L. J. 100; 1 L. W. 549; 16 M. L. T. 210; (1914) M. W. N. 636; 12 A. L. J. 1176; 16 Bom. L. R. 845 (P. C.).

(24) 14 Ind. Cas 142; 39 C. 887.

(25) 51 Ind. Cas 489; 41 M. 1033.

(26) 34 C. 118; 5 C. L. J. 134; 4 A. L. J. 30 (P. C.); 11 C. W. N. 297; 9 Bom. L. R. 85; 2 M. L. T. 49; 17 M. L. J. 52; 4 L. B. R. 64; 34 I. A. 46.

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discharge in person or by deputy, then she cannot be appointed to that office. This doctrine is based on the fundamental distinction between the temporal affairs of a mosque and the spiritual functions connected with it; *Hussain Beebes v. Hussain Sherif* (27), *Imam Bee v. Molla Khasim Sahib* (28), *Mujavar Ibrambibi v. Mujavar Hussain Sherif* (29). A similar distinction has been recognised also in the case of Hindu endowments; *Dhuncooverbai v. Advocate-General* (30), *Mohan Lalaji v. Madhusudan* (31). We cannot, consequently, accept the contention of the defendant that the plaintiff is incompetent to hold the office of *mutwalli*. It has next been argued that the plaintiff should not be allowed to succeed on the basis of prescriptive title to the office of *mutwalli* when such a case was not expressly made in the plaint. There is clearly no substance in this contention. The relevant facts were fully set out in the plaint and the plaintiff asked for a declaration, not that she was *mutwalli* by appointment or by hereditary succession, but that on the facts stated the defendant was in wrongful possession and should, consequently, be ordered to deliver up quiet and peaceful possession to her. There is no room for suggestion that the defendant has been taken by surprise and he has thus no foundation for a grievance. As ruled by this Court in *Sundari Dass v. Mudhoo Chunder Sircar* (32), a plaintiff may be allowed to succeed on a title by adverse possession, pleaded even for the first time in the Court of Appeal, provided such a case arises on the facts stated in the plaint and the defendant is not taken by surprise. It was pointed out in the case of *Ram Chandra Sil v. Ramanmani Dasi* (33) that this view is supported by a dictum of Lord Davey in *Vasudeva Padhi v. Moguni Devan* (16), though the contrary opinion has sometimes been maintained. The same rule was adopted in the cases of *Nepen Bala Debi v. Sati Kanta Banerjee* (34) and *Lilabati Misra v.*

*Bishun Ohobey* (13). We hold, accordingly, that at the time of institution of this suit, the office of *mutwalli* was legally vested in the plaintiff and on that basis she was entitled to possession of the trust estate.

As regards the second question, we have to determine whether the defendant was appointed a *sajjadanashin*, and, if so, what was the effect of such appointment upon the title of the plaintiff as *mutwalli*. It may be conceded that there is some evidence to show that the defendant got himself elected as *sajjadanashin*; but this is not sufficient to enable him to resist the claim of the plaintiff for there is no satisfactory evidence of a custom for the appointment of a *sajjadanashin* in this religious endowment in addition to a *mutwalli*. Even if we accept as reliable the evidence adduced by the defendant to make out the alleged election of his father in law and of himself as *sajjadanashin* in 1904 and 1912, respectively, that does not establish the existence of a custom for the appointment of a *sajjadanashin*. The undoubted fact remains that although, according to the recital in the Will of Jutty Shah, the endowment has been in existence for at least a century and a half, there is no trace of a *sajjadanashin* before the alleged election of Jalil Shah in 1904. The true position and functions of a *sajjadanashin* will be found explained in the judgment of Mr. Justice Amir Ali in *Piran v. Abdol Karim* (35), which was followed in *Mahiduddin v. Sayiduddin* (36):

"The *sajjadanashin* has certain spiritual functions to perform. He is not only a *mutwalli*, but also a spiritual preceptor. He is the curator of the *dargah* where his ancestor is buried, and in him is supposed to continue the spiritual line (*silsilla*). As is well-known, these *dargahs* are the tombs of celebrated *dervishes*, who in their lifetime were regarded as saints. Some of these men had established *khankahs* where they lived and their disciples congregated. Many of them never rose to the importance of a *khankah*, and when they died their *mausolea* became shrines or *dargahs*. These *dervishes* professed esoteric doctrines and distinct systems of initiation. They were either *sufis* or the disciples of Mian

(27) 4 M. H. C. R. 23.

(28) 37 Ind. Cas. 889; 5 L. W. 226.

(29) 3 M. 95; 5 Ind. Jur. 193; 1 Ind. Dec. (N. S.)

623.

(30) 1 Bom. L. R. 743.

(31) 6 Ind. Cas. 77; 32 A. 461; 7 A. L. J. 430.

(32) 14 C. 592; 7 Ind. Dec. (N. S.) 392.

(33) 36 Ind. Cas. 890; 20 C. W. N. 773 at p. 785.

(34) 8 Ind. Cas. 41; 12 C. L. J. 459; 15 C. W. N.

(35) 19 O. 203 at pp. 220, 221; 9 Ind. Dec. (N. S.) 581.

(36) 20 O. 817 at pp. 822, 823; 10 Ind. Dec. (N. S.) 545.

NACHIPARAYAN v. NARAYANA GOUNDAN.

Roushan Bayezid, who flourished about the time of Akbar, and who had founded an independent esoteric brotherhood, in which the chief occupied a peculiarly distinctive position. They called themselves *fakirs*, on the hypothesis that they had abjured the world, and were humble servitors of God: by their followers they were honoured with the title of Shah or King. Harklot (Qanoon-e-Islam, 1832, Chapter XXVIII) gives a detailed account of the different brotherhoods and the rules of initiation in force among them. The preceptor is called the *pir*, the disciple the *murid*. On the death of the *pir*, his successor assumes the privilege of initiating the disciples into the mysteries of *dervishism* or *sufism*. This privilege of initiation, of making *murids*, of imparting to them spiritual knowledge, is one of the functions which the *sajjadanashin* performs or is supposed to perform," *Kiran v. Abdool Karim* (35).

"So long as he lived the founder himself was the *sajjadanashin*, 'the one seated on the prayer mat;' in other words, the chief or superior. After his death some one among his heirs, indicated by him as qualified to initiate the *murids* into the mysteries of the *tarikat* or holy path, succeeds him in his office of *sajjadanashin*. He is not only a *mutwalli* but also a spiritual preceptor, and in him is supposed to continue the spiritual line (*silsila*). There are abundant indications on this record that this is exactly the case with the *khankah* of Sasseram. Shah Kabir was, as his title shows, a *dervish*, and from the evidence of the defendant it is clear that the doctrines supposed to be inculcated by these men are, as he calls it, of *tassawuf* or *sufism*. We have dwelt so far on the character of the institution, in order to show how materially it is connected with the personality of the *sajjadanashin* or superior. He is an integral part of the institution and the central figure, so to speak, therein. Its existence depends on his personality. This is evident from the very terms of the grant in question. The grant no doubt is to the *khankah*, but the enjoyment is given to the *dervish* and his descendants, generation after generation. The works they have to perform, and the disciples they have to maintain, are all part and parcel of their own selves. The *urs*, the *fatehas*, etc., are of their deceased ances-

tors." [*Mohiuddin v. Sayiduddin* (36).] See also *Secretary of State v. Mohiuddin Ahmad* (37).

The substance then is that the *sajjadanashin* maintains unbroken the spiritual line from the original preceptor. In the case before us, however, there never was a *sajjadanashin*, before 1904; there is no room for a theory that the original founder expressly directed that a *sajjadanashin* should be appointed from time to time. There is also no custom indicative of his wishes in the matter. There has not been a line of spiritual preceptors, an apostolic succession of spiritual curators. In such circumstances, it is impossible to hold that a person in the position of the defendant, can by the device of an election by *fakirs* and other worshippers force himself on the institution as *sajjadanashin*. The essence of the matter is, that there is no office of *sajjadanashin* in this institution to which the defendant could have been lawfully elected; for, such an office could exist only by virtue of the direction of the spiritual founder or by a valid custom. It is, consequently, plain that the defendant has acquired no legal status which can possibly enable him to defeat the claim of the plaintiff as *mutwalli*.

The result is that the decree made by Mr. Justice Greaves is confirmed and this appeal dismissed with costs.

*Appeal dismissed.*

FLETCHER, J.—I agree.

(37) 27 C. 674; 14 Ind. Dec. (N. S.) 443.

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1462 OF 1919.

September 2, 1920.

*Present*:—Justice Sir Abdur Rahim, Kt.,  
and Mr. Justice Oldfield.

NACHIPARAYAN—PLAINTIFF NO. 1—

APPELLANT

versus

NARAYANA GOUNDAN AND ANOTHER—

DEFENDANT NO. 1 AND PLAINTIFF NO. 2—

RESPONDENTS.

*Easements Act (V of 1882), s. 15—Right of way,  
interruption of—Suit to establish right—Limitation*



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Where a person has enjoyed a right of way for over 20 years over another person's land, and that right is interrupted, the benefit of the previous enjoyment will be destroyed unless he comes within two years of the interruption and gets a decree declaring his right. [p. 173, col. 1.]

Second appeal against the decree of the District Court, Coimbatore, in Appeal Suit No. 224 of 1919, preferred against the decree of the Court of the District Munsif, Tirupur, in Original Suit No. 468 of 1917.

FACTS appear from the judgment.

Mr. K. Sankara Menon, for the Appellant.—There was undoubted enjoyment of the right of way by the plaintiff for 20 years peaceably and uninterruptedly. He did not acquiesce in but protested in the defendant's obstruction of it for four years before suit. Under explanation (2) to section 15, Easements Act, there is no interruption unless the obstruction is acquiesced in.

Mr. S. Subramanya Aiyar, for the Respondents.—Section 15 of the Easements Act expressly requires that the 20 years enjoyment should terminate within two years before suit. Otherwise, no absolute right of easement will be acquired by any anterior peaceable enjoyment for 20 years. The English law on which the Indian enactment was based is more stringent. The English law requires that the peaceful enjoyment for 20 years must be immediately prior to suit.

JUDGMENT.—The contention of the appellant in this case is, that he enjoyed a right of way over the first respondents' land peaceably and without interruption for a period of twenty years. But it is found that, for four years before the institution of the suit, the plaintiff did not enjoy any such right of way being effectively prevented from doing so by the first respondent. Those being the facts, the learned Judge held that the plaintiff's suit failed by virtue of the provision of section 15 of the Easements Act that, "each of the said periods of twenty years shall be taken to be a period ending within the two years before the institution of the suit wherein the claim to which such period relates is contested." The argument on behalf of the appellant is that since the appellant had enjoyed for a period of twenty years the right claimed by him peaceably, openly and without interruption, it made no difference that for four years before the institution of the suit he was prevented from using the pathway inasmuch as he

never submitted to it but protested against such obstruction. He relies on explanation (2) to section 15 which lays down that "nothing is an interruption within the meaning of the section unless where there is an actual cessation of enjoyment by reason of an obstruction by the act of some person other than the claimant and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof." This argument, if given effect to, would really abrogate the condition laid down in that very section that, in order to the right of easement being acquired, the enjoyment of such rights must not only be peaceable, open, and without interruption but such enjoyment must extend to within two years before the institution of the suit. The language of the section seems to be clear that the enjoyment for a period of twenty years must terminate within two years prior to the institution of the suit, otherwise his enjoyment of a right contemplated in section 15 for a period of 20 years, however long, prior to the institution of the suit, would give a person who so enjoyed it an absolute right of easement although for years prior to the suit he never exercised such right at all. That would be really violating the policy apparently underlying the law of easements. The English law of easements on which the Indian law of easements is practically based though with some difference, as has been pointed in some of the cases, in this Court, requires that the 20 years enjoyment of the right must be next previous to the institution of the suit. That is what the English Statute requires, and this is explained in *Glover v. Coleman* (1) by Mr. Justice Brett as he then was. The same view of the law is taken for granted in *Flight v. Thomas* (2). The Indian Legislature in this connection has departed from the English rule to this extent that it lays down that it would be sufficient that if the enjoyment for a period of 20 years extended within two years before the institution of the suit instead of being immediately previous to the institution of the suit, and the rulings of the Indian Courts are unanimous

(1) (1874) 10 C. P. 108; 44 L. J. O. P. 66; 31 L. T. 684; 28 W. R. 163.

(2) (1841) 8 Cl. & F. 231 at p. 240; West 671; 5 Jur. 811; 52 R. R. 468; 8 E. R. 91.

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on the point. In this Court the law is explained in *Kuthu Goundan v. Anantha Goundan* (3). In the Allahabad High Court in *Sultan Ahmad v. Waliullah* (4) and *Muhammad Maroof v. Sultan Ahmed* (5), and in the Calcutta High Court in *Janhavi Chowdhurani v. Bindu Bashini Chowdhurani* (6) and in *Jeggernath Barj v. Kanai Das Byragi* (7). As pointed out by Chamier, J., in *Sultan Ahmad v. Waliullah* (4), the result of the Easements Act and the similar provisions of the Limitation Act is that a right of easement cannot be said to be perfected until the right is declared by a decree of Court, that is to say, a person may enjoy a right of way or right to access of light and air over the servient tenement for a period of twenty years, but if he is interrupted afterwards for one year and the interruption is acquiesced in the benefit of the previous enjoyment will be destroyed unless he comes within two years of the institution of the suit and gets a decree declaring his right.

It was also suggested by the learned Vakil for the appellant that his client had an immemorial right and that, in the circumstances, a lost grant ought to have been presumed in his favour. But this question was not properly raised in the Trial Court.

The result is that the second appeal is dismissed with costs.

M. C. P.

*Appeal dismissed.*

(3) 31 Ind. Cas. 528; 29 M. L. J. 685 at p. 687; 18 M. L. T. 476; 2 L. W. 1107; (1916) 1 M. W. N. 113.

(4) 17 Ind. Cas. 22; 10 A. L. J. 227.

(5) 24 Ind. Cas. 126; 12 A. L. J. 415.

(6) 26 C. 593; 3 C. W. N. 610; 13 Ind. Dec. (N. S.) 981.

(7) 6 C. W. N. 31.

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 39  
OF 1919.

December 2, 1920.

Present:—Mr. Justice Das and  
Mr. Justice Adami.

Rai RADHA KISHUN AND OTHERS—  
APPELLANTS

versus

JAG SAHU AND OTHERS—PLAINTIFFS  
AND RAJ KUMARI KEWAL KUMARI  
—DEFENDANTS—2ND PARTY—

RESPONDENTS.

*Transfer of Property Act (17 of 1882), s. 59—Mort.*

*gage—Pardanashin lady—Attestation, proof of—Hindu Law—Widow, alienation by—Necessity, proof of—Independent advice, whether necessary—Expenses incurred in proper management, whether binding on reversioners.*

Where it is proved that the witnesses to a mortgage-deed did not see the executant, who was a *pardanashin* lady, but saw her signing the deed and impressing it with her seal through a *pardah* which was hanging between them and the executant, and that one of the witnesses knew her by her voice, this is sufficient proof of proper attestation. [p. 174, col. 1.]

When a debt is incurred by a Hindu widow who is a *pardanashin* lady, and the necessity for the loan is established and it is further established that the creditor made due enquiries about the necessity, it is not necessary for the creditor to show that the lady, in entering into the transaction, had independent advice. [p. 174, col. 1.]

A Hindu widow is entitled to incur expenses necessary to the well being of the estate and to borrow money for this purpose and such debts are binding on the reversioners. [p. 174, col. 2.]

Appeal from a decision of the District Judge, Mozafferpore, dated the 15th August 1918, modifying that of the Subordinate Judge, 2nd Court, Mozafferpore, dated the 9th June 1917.

Messrs. S. M. Mullick and Kailash Pati, for the Appellant.

Messrs. Hasan Imam, Sunder Lal and Nawal Kishore Prasad, II, for the Respondents.

## JUDGMENT.

DAS, J.—This appeal arises out of an action instituted by the plaintiffs-respondents to enforce a mortgage-bond executed by one Bachu Koer, a Hindu widow, in their favour. Bachu Koer is now dead and the suit was resisted by the reversioners on various grounds. The bond was for a sum of Rs. 2,300 but it was conceded at the trial that only a sum of Rs. 1,220 was advanced to Bachu Koer, and the plaintiffs claimed a decree for Rs. 1,220 with interest thereon at the rate of 2 per cent. per month.

The plaintiffs' case is that, Rs. 500 was advanced to the widow on the date of the execution of the mortgage and Rs. 720 was set off against certain antecedent debts due to the plaintiffs. Now the Court of first instance gave the plaintiffs a decree for Rs. 600. There was an appeal to the lower Appellate Court by both the parties. That Court, having considered all the evidence in the case, has given the plaintiffs a decree for the whole amount claimed, namely, Rs. 1,220, with interest at 2 per cent. per month.

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In this Court the first point that was argued before us was that there is no mortgage at all inasmuch as the bond was not attested in accordance with the provisions of section 59 of the Transfer of Property Act. The lower Appellate Court has not dealt with this argument at all. It is but reasonable to presume that the point was never argued before that Court. We gave liberty to the learned Vakil, when the case was last argued before us, to file an affidavit before us, stating on oath that the point was argued before the lower Appellate Court. That affidavit has not been filed before us and we must hold that the point was never argued before the lower Appellate Court.

The learned Vakil, however, contended that he was entitled to argue the point as a matter of law but he conceded that he must accept the finding of fact of the Court of first instance. On this point the Court of first instance said as follows:—"The two marginal witnesses and the plaintiff Mooni Lal did not, of course, see Bashu Kuar who was a *pardanashin* lady but they saw her signing the bond and impressing it with her seal through the *pardah* which was hanging between them and Bashu Kuar, and Mooni Lal knew her by her voice." If there is evidence to support the finding, it must follow that the attestation was a proper attestation. The first objection urged on behalf of the appellants must accordingly be overruled.

I now come to the items comprising the sum of Rs. 1,220 for which the plaintiffs have obtained their decrees. As I have mentioned before, Rs. 500 was advanced on the date of the execution of the bond and the balance, namely Rs. 720, was in respect of two promissory-notes, one for Rs. 400 and the other for Rs. 300, Rs. 20 being the interest that had accrued due on the promissory-notes. So far as the first item is concerned, namely, Rs. 500, both the Courts have concurrently found that there was legal necessity for the loan. It was argued before us, however, that it has not been shown that the widow obtained any independent legal advice. It seems to me that if the necessity for the loan is established and if it is further established that the creditor made due enquiries about the necessity, it is not necessary for the creditor to show that the lady, in entering into the transaction, had independent advice.

But it was argued before us that upon the findings of the Courts below the necessity for the loan has not been established. It appears from the document itself that Rs. 500 was advanced to Bashu Kuar for meeting the expenses of an appeal in the Calcutta High Court and for some *saruri khurach*. It has been found that there was in fact at that time an appeal pending in the High Court which had arisen out of a suit instituted by one Martin Gregory against the lady. Martin Gregory was the manager appointed by her to look after the estate, and it appears that the suit of Martin Gregory was a suit for salary due to him. It further appears that the appeal of the lady partially succeeded, but Mr. Sushil Madhab Mullick argued before us that the salary of Martin Gregory was payable not by the estate but by the lady herself and, therefore, she was not entitled to incur that expense as representing the estate of her deceased husband. The Court of first instance has gone into the matter very fully. That Court has shown that there was an attack on the entire estate by one Sahodra Kuar, the daughter-in-law of Bashu Kuar. It appears that Sahodra Kuar propounded a Will to defeat not only the claim of the lady but also that of the reversioners. If that Will was established then, necessarily, the reversioners could claim no interest in the estate at all. The litigation, it appears, came to an end in 1900 but the Court of first instance has found that the trouble was not over till many years after and that Sahodra Kuar had succeeded in stopping collection. It became necessary, in the circumstances, for the lady to appoint a competent man to protect the estate as against one who had put forward a hostile title not only to the widow but to the entire estate. In my view, a widow is entitled to incur expenses necessary to the well being of the estate and if she is entitled to incur a debt in the proper management of the estate, I do not see why that debt should not bind the reversioners. On the finding of the Court of first instance she did employ Martin Gregory in the course of her management of the property. I am unable to say that the employment was not for the benefit of the estate. That being so, the claim of Martin Gregory was a claim



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against the estate and the widow was entitled to appeal from the decree allowing in full the claim of Martin Gregory, and as that appeal partially succeeded, I must hold that the money was borrowed for a necessary purpose.

The next item is one for Rs. 400. In regard to this item the Courts have differed in their opinion. The promissory-note recites that the money was borrowed for litigation expense and *saruri kharach*. The Court of first instance thought that as there was nothing to show that the litigation had reference to the estate at all and also as there was nothing to show how much was borrowed for litigation and how much for *saruri kharach*, the plaintiffs were not entitled to succeed. The lower Appellate Court, however, has recorded a finding that the litigation referred to in the promissory-note was the litigation between Mr. Martin Gregory and the lady. That being so, I agree with the lower Appellate Court that the estate is liable in respect of this item.

The last item is for Rs. 200 which was paid to one Pokur Mull in satisfaction of a decree in execution of which some of the properties were put up for sale. It has been found that Pokur Mull supplied clothe to the lady. It has been found that there was a constant pressure on the estate due to the hostile attack made on it by Sahodra Kuar. But the Court of first instance thought that as there was nothing to show that the cloth was purchased for her use or for the use of her dependents the claim in respect of Rs. 200 could not succeed. The learned Judge thought that, upon the facts established, namely, that there was a constant pressure on the estate and that she was in the habit of buying clothe from Pokur Mull, it was a reasonable inference that the cloth was purchased for the use of Bachu Kuar or her family. In my view, the learned Judge was entitled to draw this inference from the facts established in the case. I am of opinion that the learned District Judge has taken an entirely correct view of the matter and I would accordingly dismiss this appeal with costs.

ADAMI, J.—I agree.

*Appeal dismissed.*

## PATNA HIGH COURT.

CIVIL REVISION No. 232 OF 1918.

February 25, 1919.

Present:—Mr. Justice Mullick and

Mr. Justice Jwala Prasad.

MUNSHI LAL CHOUDHRY—

PETITIONER

versus

NIDHI RAM DUTTA—OPPOSITE

PARTY.

*Chota Nagpur Tenancy Act (VI B. C. of 1908), ss. 27, 27, 228—Rent suit—Decree ex parte—Application to set aside decree, dismissal of—Application for restoration, dismissal of—Appeal, whether lies—Revision—High Court, interference by.*

A rent suit was tried by a Deputy Collector exercising the powers of a Deputy Commissioner under the Chota Nagpur Tenancy Act and was decreed *ex parte*. The defendant's application to set aside the *ex parte* decree was dismissed in default, and a further application for restoration of the previous application was also dismissed. He then filed an appeal to the Deputy Commissioner who set aside the *ex parte* decree and remanded the suit for re-trial:

*Held*, (1) that there was no provision in the Chota Nagpur Tenancy Act for restoration of an application to set aside an *ex parte* decree which had been dismissed for default, and that, therefore, the second application made by the defendant to the Deputy Collector was incompetent; [p. 176, col. 1]

(2) that no appeal lay to the Deputy Commissioner against the order dismissing that application; [p. 176, col. 1.]

(3) that the Deputy Commissioner's order setting aside the *ex parte* decree was, therefore, without jurisdiction; [p. 176, col. 1]

(4) that the Deputy Commissioner having acted without jurisdiction, his order could not be revised by the Revenue Authorities under section 217 of the Chota Nagpur Tenancy Act; [p. 176, col. 2.]

(5) that, therefore, the High Court had jurisdiction to revise the order, which, being without jurisdiction, must be set aside. [p. 176, col. 1.]

Revision from a decision of the Deputy Commissioner, Purulia, dated the 5th July 1918, reversing that of the Deputy Collector, Purulia, dated the 23rd April 1918.

Mr. Abani Bhusan Mukherjee, for the Petitioner.

Mr. G. C. Pal, for the Opposite Party.

## JUDGMENT.

MULLICK, J.—The facts of the case out of which this application for revision arises are these: In Rent Suit No. 1770 of 1908 the plaintiff obtained an *ex parte* decree against the defendant for Rs. 169 on the 19th of February 1918. The suit was tried by a Deputy Collector, exercising the powers of a Deputy Commissioner within the

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meaning of the Chota Nagpur Tenancy Act. On the 4th of March 1918 the defendant filed an application to set aside the *ex parte* decree. That application was dismissed for default on the 21st of March. The defendant made a further application for a restoration of his petition of the 4th of March 1918. That application was dismissed on the 23rd of April 1918. The defendant then filed an appeal to the Deputy Commissioner who, on the 5th of July 1918, set aside the *ex parte* decree and remanded the rent-suit for re-trial. It is against this order of the Deputy Commissioner that the present application, under section 115, Civil Procedure Code, is made to us.

It is contended that the Deputy Commissioner had no jurisdiction to direct the re-trial of the original suit. It appears that section 227 of the Chota Nagpur Tenancy Act allows a defendant to set aside an *ex parte* decree by making an application to the Trial Court. It is clear that the application under this section is to be made to the Deputy Commissioner, if he has tried the suit himself or to the officer who has exercised his powers in that respect in his behalf. It is not to be made to the Deputy Commissioner if he was not the Trial Court.

If the Deputy Collector refuses to restore the case then there is an appeal under section 228 to the Deputy Commissioner. The Act does not make any provision for the restoration of an application under section 227 which was been rejected by the Trial Court unless, perhaps, by way of review of judgment. It is contended, therefore, on behalf of the petitioner that the application for restoration which was dismissed on the 23rd of April 1918 was not entertainable by the Deputy Collector, and that no appeal against that order of dismissal lay under section 228 to the Deputy Commissioner. The learned Vakil for the opposite party replies to this as follows. He says that under section 265 of the Act the provisions of the Civil Procedure Code apply and confer upon the defendant the right to make an application for review of the judgment of the 21st of March 1918 and that the order of the 23rd of April 1918 granting the review was an order appealable under section 215 of the Act, to the Deputy

Commissioner. The contention therefore, is that, apart from section 228, there was an appeal to the Deputy Commissioner under section 215. The first reply to this is that if the Deputy Commissioner was entertaining an appeal against the order of the 23rd of April 1918 then he had no right to set aside the order of the 19th of February 1918. The second reply is that section 215 only gives a right of appeal in respect of orders (as distinguished from judgment in suits and certain other orders) passed under the provisions of the sections which precede section 215. An order made under section 265, therefore, is not appealable under section 215. The third reply is that section 265 confers a right of review against a judgment. The order of the 21st of March 1918 dismissing the restoration application for default was not a judgment and, therefore, there was no right of review against it. Therefore, the last application to the Deputy Collector which was dismissed on the 23rd of April 1918 was not entertainable and, therefore, an appeal also is not competent, whether under section 215 or any other section.

The learned Vakil for the opposite party finally contends that, as section 217 gives the Commissioner and the Board of Revenue revisional powers in respect of orders made under section 215 by the Deputy Commissioner, we should not interfere. That would be a perfectly valid contention if there was such a remedy obtainable from the Revenue Authorities. But section 217 only gives the Revenue Authorities power to interfere in respect of orders by the Deputy Commissioner under section 215 if he has jurisdiction. Where the Deputy Commissioner makes an order without jurisdiction, the Revenue Authorities clearly cannot interfere under section 217. The application, therefore, will be allowed and the order of the Deputy Commissioner dated the 5th of July 1918 be set aside with costs, hearing-fee two gold mohurs.

JWALA PRASAD, J.—I agree.

*Application allowed.*

RAM DEI v. SURAJ BAKHSH.

OUDEH JUDICIAL COMMISSIONER'S  
(COURT.)

FIRST CIVIL APPEAL No 127 OF 1918.

July 6, 1920.

Present:—Mr. Daniels, A. J. C., and  
Mr. Wazir Hasan, A. J. C.

Musammam RAM DEI AND ANOTHER—PLAINTIFFS  
—APPELLANTS  
versus

SURAJ BAKHSH AND OTHERS—DEFENDANTS  
—RESPONDENTS.

Hindu Law—Joint family—Alienation—Antecedent debt, mortgage debt, whether is—Personal obligation to pay, effect of.

A mortgage-debt is not as such an antecedent debt which would justify an alienation of joint family property, but where there is a subsisting personal obligation to pay the debt so incurred, it might, in virtue of this personal obligation, be treated as an antecedent debt. [p. 178, col. 2.]

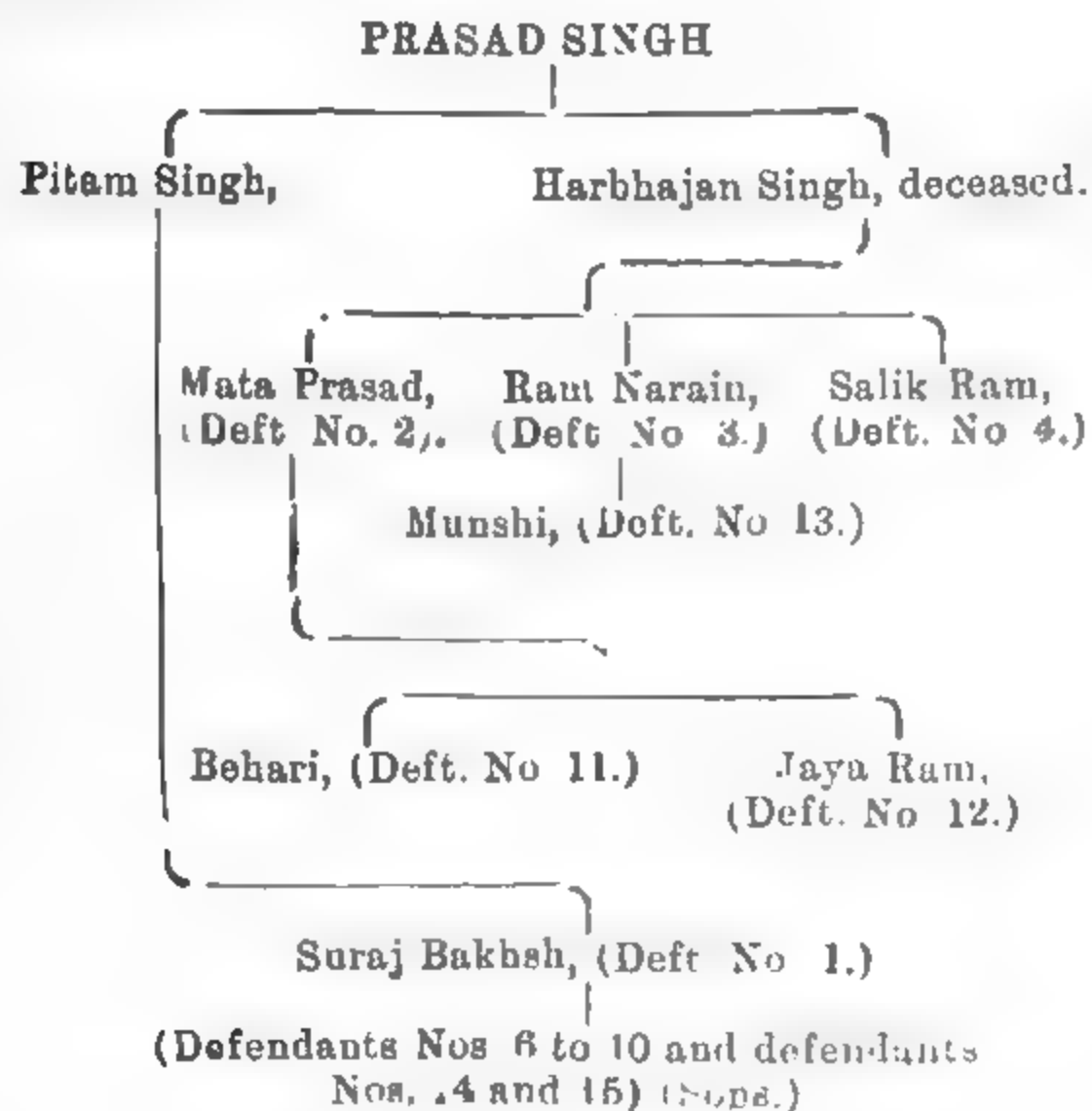
Appeal against the decree of the First Subordinate Judge, Babraich, dated the 9th September 1918.

Messrs. A. P. Sen, H. K. Ghosh and Bisheshwar Nath Srivastava, for the Appellants.

Mr. Ram Ohandra, for Respondents Nos. 4, 6 to 13 and 15.

## JUDGMENT.

DANIELS, A. J. C.—This is a first appeal in a suit for possession on the basis of a sale deed, dated the 11th of June 1909, executed by the first four defendants in favour of the plaintiffs in respect of an area of 149 *bighas*, 9 *biswas* in Matza Nasia included in Tendwa Ujar. The following short pedigree will serve to elucidate the facts of the case:—



At the time of execution of the sale-deed the property was in possession of certain third persons who were usufructuary mortgagees, and a sum of Rs. 825-8-0 was, therefore, included in the sale price to cover the delay which must occur in the plaintiffs' obtaining possession. The remainder of the consideration consisted of Rs. 3,277 payable in respect of prior simple mortgages containing a personal covenant to re-pay and Rs. 1,157-6-0 paid in cash. After the termination of the usufructuary mortgages the plaintiff attempted to obtain possession but were resisted by the defendants. They have filed the present suit in consequence.

The learned Subordinate Judge has found that no part of the consideration was incurred either for legal necessity or for antecedent debt within the meaning of the Privy Council ruling in *Sahu Ram Ohandra v. Bhup Singh* (1), and has dismissed the suit *in toto*. The plaintiffs-appellants contest both these findings except as to the item of Rs. 1,157-6-0 which was paid in cash. As to this they suggest that the principle laid down in *Buntyad Husain v. Mata Din Singh* (2) and *Gur Sahai v. Girdhar Lal* (3) should be followed, and that if the sale deed as a whole is found to be valid it should not be set aside because a minor portion of the sale price was paid in cash. To this contention we accede. It was taken for granted at the time of argument that if the decision on the main question was in the appellants' favour the appeal would be allowed.

The case originally came before a single Judge of the Court, but has been referred to a Bench in order to put an end to a conflict of rulings in this Court as to the effect of the Privy Council decision in *Sahu Ram Ohandra v. Bhup Singh* (1). Before dealing with this main question, there is one minor point to be considered. It will be seen from the pedigree already given that all the remaining defendants are sons of one or other of the four execu-

(1) 39 Ind. Cas. 280; 41 I. A. 126; 21 C. W. N. 608; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 25 C. L. J. 1; 3 M. L. J. 14; (1917) M. W. N. 489; 22 M. L. T. 24; 6 L. W. 213; 39 A. 437 (P. C.).

(2) 36 Ind. Cas. 57; 3 O. L. J. 313; 19 O. C. 122.

(3) 52 Ind. Cas. 75; 22 O. C. 84; 1 U. P. R. (J. C.) 54; 6 O. L. J. 411.



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tants. The whole family has been found by the learned Subordinate Judge to be joint. It has been argued on behalf of the respondents, and the argument found favour in the lower Court, that because each of the remaining defendants, though a son of one of the executants, is also a nephew of the others, the rule of antecedent debt cannot apply as a nephew is under no obligation to pay the debt of his uncle, nor can he be bound by an alienation made by him except for legal necessity. This argument is, we think, fallacious. Each of the defendants, assuming the debt to be antecedent, is bound by the act of his own ancestor. In one of the Privy Council rulings to which a reference has been made in connection with the case, *Girdhari Lal v Kantoo Lal* (4), some of the deeds in suit were executed by ancestors representing two branches of the family.

Apart from the above objection, the only question which has been argued before us is the question what constitutes antecedent debt for the purpose of supporting an alienation of joint family property by a Hindu father or grandfather. The answer depends on the interpretation to be placed on the decisions of the Privy Council in *Sahu Ram Chandra v. Bhup Singh* (1). Prior to their Lordships' decision, it had long been considered to be settled law that a genuinely antecedent debt, whether secured by a mortgage or not, was sufficient to support a sale or mortgage of the joint family estate. The question which has given rise to doubt is, whether their Lordships intended to disturb that rule and, if so, to what extent. Three different views have been taken. The Allahabad High Court has held that an antecedent debt to be binding must be an unsecured or simple debt (*Vide Brij Narain Rai v. Mangla Prasad* (5)). In support of their view they take their stand on the passage in their Lordships' judgment which runs:—

"In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that

the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply and to apply only, to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which do not personally belong to him but are joint family property."

This view has also been approved by the Patna High Court [*Sukhdeo Jha v. Jhapat Jha* (6)]. On the other hand a Full Bench of the Madras High Court, in an elaborately reasoned judgment, has held that the words quoted must be interpreted with reference to the facts of the case under decision and that, where the debt is genuinely antecedent to the transaction in dispute, it is still binding even though secured by a mortgage (*Vide Arumugham Chetty v. Muthu Koundan* (7)). In this Court a third view was taken in two Bench rulings. The Court accepted the position that, whether the debt pleaded as antecedent is a mortgage debt, it could not as such be binding, but held that where there was a subsisting personal obligation to pay the debt so incurred, it might in virtue of this personal obligation be treated as antecedent debt for the purpose of the rule (*Vide Ramman Lal v. Ram Gopal* (8) and *Gur Sahai v. Girdhar Lal* (3)). The first of these rulings was passed in June 1918 and they are regarded as settling the law for this province. Nearly a year later, another Bench of the Court declined to follow the previous *curius curie* and adhered to the Allahabad view [*Vide Muhammad Baqar Ali Khan v. Hozuri Lal* (9) and *Ohandika Baksh Singh v. Widow of Jagan Singh* (10)]. Sub-

(1) 54 Ind. Cas. 946; 5 P. L. J. 120 at pp. 121, 125; 1 P. L. T. 43; (1907) Pat. 67; 2 U. P. L. R. (Pat.) 89.

(2) 52 Ind. Cas. 525; 42 M. 711 at p. 729; 19(1910) M. W. N. 409; 9 L. W. 565; 37 M. L. J. 166; 28 M. L. T. 96.

(3) 47 Ind. Cas. 987; 21 O. O. 203; 6 O. L. J. 24.

(4) 52 Ind. Cas. 108; 6 O. L. J. 297.

(5) 52 Ind. Cas. 449; 6 O. L. J. 381.

(4) 14 B. L. R. 187; 22 W. R. 56; 1 I. A. 321; 3 Bar. P. O. J. 380.

(5) 60 Ind. Cas. 101; 41 A. 235 at p. 239; 17 A. L. J. 249; 1 U. P. L. R. (A.) 49.

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sequently, a third Bench, consisting of the two of the three permanent members of the Court, in an unpublished ruling in First Civil Appeal No. 39 of 1919 [*Bharat Singh v. Sarsuti Singh* (11)] has reverted to the view taken in *Ramman Lal v. Ram Gopal* (8). Such being the state of authorities, this appeal has been laid before us with a view to obtaining a definite ruling which shall settle the law for the Courts in Oudh until such time as the conflict of opinion may be settled by a further pronouncement from the Privy Council itself.

As we are considering the effect of a ruling of the Privy Council it is instructive to see, in the first place, what the precise question was which their Lordships set out to determine. The facts were of a very simple character. The plaintiffs-appellants were claiming to recover the sum of Rs. 15,000 by sale of the joint family property on the basis of a mortgage originally executed on January 6th, 1883, for a sum of Rs. 200 only. The mortgage was executed by Bhop Singh alone in lieu of a cash advance. The contesting respondents were his sons and grandsons. In the ordinary sense there was no antecedent debt whatever. The argument placed before their Lordships was substantially to the effect that, in a suit on a mortgage, the debt must necessarily be antecedent, because the proceedings to enforce the mortgage take place long after the debt was incurred. A Calcutta ruling was cited in support of this view. It was on this point, as the cases cited by their Lordships sufficiently show, that this conflict of authorities had occurred to which their Lordships desired to put an end. As their Lordships point out, there had been conflicting decisions on the same point even in the same High Court. The conflict is well illustrated by two cases cited in the judgment itself. In *Ohidambara Mudaliar v. Koothaperumal* (12) it was held that in the case of a mortgage debt incurred by the father the debt is the primary obligation and the mortgage is only collateral security for its discharge. According to this ruling, there is no distinction in principle between a mortgage given for an antecedent debt and a mortgage given in lieu

of an advance made contemporaneously. On the other hand, in *Venkataramanaya Pantulu v. Venkataramana Doss Pantulu* (13), the same High Court held that a sale or mortgage of joint family property by a father is only binding on the son's share when it is made in lieu of a debt existing prior to the sale or mortgage.

The same two opposing views are to be found in the majority and minority judgments in *Ohandradeo Singh v. Mata Prasad* (14). There was not, and never had been, any doubt that a genuinely antecedent debt would be binding whether secured by a mortgage or not. In this conflict of authorities their Lordships expressed their approval of the view taken by Sir John Stanley and the majority of the Full Bench in *Ohandradeo Singh v. Mata Prasad* (14), which held that the loan in lieu of which the mortgage was executed was not an antecedent debt, so as to enable the family property to be sold up in execution of the mortgage.

Having regard to these considerations, the reasonable view appears to me to be that, though the language of their Lordships may be open to a wider interpretation, they were dealing with the actual question which had come up for decision and that, in using the words "incurred wholly apart from the ownership of the joint estate or security afforded or available by such joint estate," they were dealing only with the security which the creditor was seeking to enforce against the joint family estate. The question of a debt incurred wholly apart from that transaction but secured by some prior mortgage was not before them. There is great force in the remark of the learned Chief Justice of the Madras High Court that, when their avowed object was to settle a conflict of authorities on a particular question it is most unlikely that they should have gone out of their way to unsettle what was treated as settled law in all the High Courts in India. If they had intended to do this, the judgment would surely have given some indication of their intention. I would express my entire agreement with the following passage in his Lordship's judgment in

(11) 60 Ind. Cas. 137; 7 O. L. J. 459; 23 O. C. 214.

(12) 27 M. 326.

(13) 29 M. 200; 1 M. L. T. 28; 16 M. L. J. 69.

(14) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263.

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*Arumugham Chetty v. Muthu Koundan* (7):—

"Having regard to their Lordships' express statement that the enunciation of the principle these terms was intended as a guide to the decision of the controverted question before them, I do not think we should be warranted in extending its application to a case which was not before them and involves considerations which are not referred to in their judgment, especially when such an application of the principle would have the effect of disturbing what has long been regarded as settled law and would give rise to great uncertainty as to existing titles."

In the same case Mr. Justice Sadasiva Aiyar remarks in his referring order, page 715\*: "It seems to be rather a startling proposition that while an antecedent debt of a simple character whether contracted orally or under a simple debt bond can support a subsequent mortgage or sale of the sons' share also in the ancestral property, the fact that the antecedent creditor got the additional security of a mortgage deprives the subsequent alienor of the right given by the Hindu Law to rely upon the antecedent character of the debt discharged by the consideration paid for his alienation. The point directly decided in *Sahu Ram Chandra v. Bhup Singh* (1) is that a loan, contemporaneous with or just previous to the date of a mortgage transaction, could not be treated as an antecedent debt."

This interpretation is supported by the concluding passage in the judgment of the Privy Council itself. In that passage they proceed to state:

"The appellant's argument in support of the validity of the mortgage also took this shape. It was said:—'What difference would it make if the father had contracted the debt an hour, a day, a year before granting the mortgage? Then *de facto* it would be an antecedent debt, and the creditor would have a mortgage good upon that ground.' Their Lordships cannot assent to any such proposition that a mortgage on the family estate would follow the loan. The case as put might instantly raise the presumption that what occurred was substantially this: that the father contracted the debt knowing that he was at the end of his personal resources and that the creditor advanced the money relying upon an understanding

or agreement, express or implied, given to the father. In truth, in order to validate such a transaction of mortgage there must, to give true effect to the doctrine of antecedency in time, be also real dissociation in fact."

This passage appears to me to show clearly that, in using the words "independently of the security afforded by the joint family property", their Lordships had in mind the security which the mortgagee was seeking to enforce and not a prior and independent hypothecation.

It will be conceded that the most authoritative commentary which it is possible to obtain on a Privy Council judgment is a later judgment of the Privy Council itself. In this case we have such a commentary in the decision in *Jogi Das v. Ganga Ram* (15), the decision which has not been referred to in either of the two judgments in *Muhammad Faqir Ali Khan v. Harari Lal* (9) and *Chandika Baksh Singh v. Widow of Jagan Singh* (10). In that judgment Lord Haldane summed up the effect of the ruling in *Sahu Ram Chandra v. Bhup Singh* (1) as follows:—"In that case it was laid down in effect that joint property could not be alienated as against co-sharers by way of mortgage, or otherwise, except for necessity, or for payment of an actual antecedent debt, quite distinct from the debt incurred in the mortgage itself, and that in consequence the transaction in that case could not stand, and it was added that the mere circumstance of a pious obligation does not validate the mortgage."

In view of the elaborate argument which has been addressed to us and the fact that I was a party to the two earliest Bench rulings of this Court in which the Privy Council decision was discussed, I have felt it right to set out my personal view on the question at issue in some detail, but having regard to

(a) the importance of settling the law once for all until such time as the question is finally decided by the Privy Council itself;

(b) the fact that the question is one which has caused much difference of opinion among the Judges of the

(15) 42 Ind. Cas 791; 21 C. W. N. 957; (1917) M. W. N. 739 P. C.).



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Court and that my learned colleague is disposed to differ from me and to accept the view which has prevailed at Allahabad and which found favour with the Judges who decided *Muhammad Bazar Ali Khan v. Hazari Lal* (9), and

(c) that the conflicting decisions of this Court have been a source of much uncertainty and harassment alike to litigants and to the subordinate Courts of the Province,

my learned colleague and I are agreed that the only satisfactory course to take is to fall back on the principle of *stare decisis* and to re-affirm the view laid down in *Ramman Lal v. Ram Gopal* (8). That view, after being accepted for a year, was temporarily disturbed by the two decisions to which reference has been made, but it has been re-affirmed in the latest Bench decision and in a single Judge decision of still later date and we consider, whatever our individual views may be, that we ought to follow it. Except on the ground which we have overruled at the outset of this judgment, it is not disputed that the bulk of the consideration for the deed in suit must be treated as antecedent debt if the rule laid down in *Ramman Lal v. Ram Gopal* (8) is accepted. I would accordingly allow the appeal and decree the plaintiffs' suit with costs in both Courts.

WAZIR HASSAN, A. J. C.—My learned colleague has in his elaborate judgment given expression to the opinion which I personally held on the question of an antecedent debt as settled by the Privy Council in *Sahu Ram Chandra v. Bhup Singh* (1). If the matter were *res integra* and I were free to differ from my learned colleague on that point I would have certainly done so: but in view of the considerations set out in the judgment of my learned colleague I think that I must bow to the principle of *stare decisis* in this case and, therefore, I agree in the order proposed to be passed by him.

*Appeal allowed.*

## MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 653 OF 1919.

August 23, 1920.

Present:—Mr. Justice Krishnan.

VARANASI RAMANNA—DEFENDANT—  
PETITIONER

versus

KILLAMSETTI APPANNA—PLAINTIFF—  
RESPONDENT.

*Arbitration—Award—Arbitrator, one, absence of, from one meeting, whether vitiates award.*

An arbitration award is not vitiated by the mere fact that at one of the meetings of the arbitrators one of them was absent, where it is shown that nothing material was done at that meeting which in any way affected the award.

Petition, under section 115 of Act V of 1902, praying the High Court to revise the decree of the District Court, Ganjam at Barbampore, in Appeal Suit No. 193 of 1918, preferred against the decree of the Court of the District Munsif, Chicacole, in Original Suit No. 6-6 of 1916.

FACTS appear from the judgment.

Mr. P. Narayana-murthi, for the Petitioner.—The award should be the corporate, deliberate opinion of all the arbitrators. It is necessary for the validity of the award that they should all have met and applied their minds to the questions at issue. Here, one of the arbitrators, D. W. No. 3, was absent at one of the meetings. That is enough to vitiate the award. See *Thammiraju v. Bapiraju* (1) and *Nand Ram v. Fahir Chand* (2).

Mr. L. S. Veeraraghava Aiyar, for the Respondent.—The finding of both the lower Courts is that no enquiry took place and nothing of importance was done on the day when D. W. No. 3 was absent. The arbitrators did the enquiry too and all material sittings were in conclave. The award is not void by reason of the absence of an arbitrator at a purely formal and unimportant sitting.

JUDGMENT.—The first objection to the award is that the arbitrators acted beyond the scope of the submission in including in their award a decision about gunny bags and mustard seeds. This objection depends solely on the construction of Exhibit M. I think that the District Munsif's view about it is correct as the document speaks of "all

(1) 12 M. 113 at p. 114; 4 Ind. Dec. (N. S.) 428.

(2) 7 A. 523; A. W. N. (1885) 139; 4 Ind. Dec. (N. S.) 539.

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other matters" also. The next objection taken is that at one of the hearings one of the arbitrators, D. W. No. 3, was absent and it is contended, on the strength of the rulings in *Thammiraju v Bapiraju* (1) and *Nand Ram v. Fakir Chand* (2), that this vitiated the award altogether. No doubt on one day when the arbitrators met D. W. No. 3 was absent and though D. W. No. 4 says some information regarding the price of gingelly was obtained from the parties that day, it is contradicted by P. W. No. 3, one of the three arbitrators, and he is supported in a way by the evidence of P. W. No. 2. The third arbitrator P. W. No. 3 says no enquiry took place on the day D. W. No. 3 was absent. The District Munsif has found that no enquiry took place on that day and the District Judge has not displaced that finding. That being so, the absence of D. W. No. 3 for one day was immaterial, as nothing material seems to have been done that day which in any way affected the award.

The rulings quoted, therefore, do not apply.

The civil revision petition is dismissed with costs.

M. C. P.

*Petition dismissed.*

### CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 172  
OF 1918.

February 23, 1920.

Present.—Mr. Justice Richardson and Justice  
Sir Syed Shamsul Huda, Kt.

HON'BLE SIR BEJOY CHAND MAHATAP  
BAHADUR, MAHARAJ ADHIRAJ OF  
BURDWAN—DEFENDANT NO. 2—

APPELLANT

versus

MRITUNJOY GHOSE AND OTHERS—

RESPONDENTS.

*Bengal Patni Taluks Regulation (VIII of 1819), ss. 8, 14—Sale, notice of, manner of publishing—Irregular sale, nature of—Second sale during pendency of proceedings to set aside first sale, effect of*

Where it is proposed to hold a sale under the Patni Taluks Regulation of a *patni* for arrears of rent due in respect thereof, the Regulation does not require

that notice of the sale should be served personally on the defaulter: the posting of the notice at the Cutchery of the defaulter is a sufficient publication thereof, the receipt of the defaulter or his manager being merely evidence that the notice has been so published [p. 18, col. 2.]

An irregular sale of a *patni* is not void, but voidable, but it can only be avoided by a suit properly framed under section 14 of the Patni Taluks Regulation [p. 18, col. 1.]

Where during the pendency of proceedings to set aside an irregular sale, a second sale of the *patni* is held, the second sale is part of the first and will stand or fall with it. [p. 18, col. 2.]

Appeal against the decree of the Subordinate Judge, First Court, Burdwan, dated the 21st of February 1918.

Sir Rash Behari G'ose, Babus Basanta Kumar Bose, Bepin Behari Ghose, II and Sarat Kumar Mitra for the Appellant.

Mr. U. N. Sen, and Babu Prabodh Kumar Das, for the Plaintiffs Respondents.

Babu Shub Chandra Polit, Bhupendra Nath Ghose and Bhupendra Nath Bose, for defendant No. 22.

Babu Karunamoy Ghose, for defendant No. 1.

JUDGMENT.—This appeal arises out of a suit originally brought by the plaintiffs to set aside the sale under the Patni Regulation of a *patni* known as Lot De-bibarpur for arrears of rent due in respect thereof for the year 1322. The plaintiffs are some of the many co-sharers in the *patni* and own between them a one anna, nine *panda* three *kara* share; Mritunjoy Ghose, the defendant No. 1, was the purchaser at the sale on the 15th May 1916. The Maharaj Adhiraj of Burdwan, the Zamindar, is the defendant No. 2.

During the pendency of the suit the rent due for the first half of the following year 1323 being in arrears the *patni* was again sold on the 16th November 1916 and was purchased by Niranka Chandra Bose. The plaint was accordingly amended. A prayer for setting aside the second sale was added and Niranka was impleaded as defendant No. 22.

The Court below found that the first sale was irregular and set it aside. It was further held that the second sale fell with the first, the proceedings having been taken in the name of Mritunjoy, the purchaser at the first sale.

The appellant before us is the Zamindar, the Maharaj Adhiraj of Burdwan.

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The notice of the first sale was duly stuck up as the Regulation requires in the Collectorate and at the Sadar Cutchery of the Zemindar. So far, we are in entire agreement with the Subordinate Judge.

The appeal depends, in the first instance, on the question of fact whether the notice was "similarly published at the Cutchery or at the principal town or village upon the land of the defaulter." The Regulation provides that this Muffassal notice "shall be served by a single peon who shall bring back the receipt of the defaulter or of his manager for the same." If such a receipt is not procurable provision is made for other evidence of the publication of the notice.

Now, the peon employed by the Zemindar on this errand was Surendra Nath Ghose. He has been examined as a witness and swears that he took the notice to the Cutchery of Atul Krishna Ghose, one of the *patnidars*, at Debibarpur, and that Atul's *gomashta*, Rakhal Chandra Sai, wrote three names at the foot of the receipt, his master's name which he wrote at his master's request, his own signature and the name of the *chukidar* Benimadbab, who was present at the time. According to the Regulation, the signature of the *gomashta* or manager was in itself a sufficient receipt and as against the plaintiffs it is matter for comment that neither Atul himself nor his *gomashta* were put in the witness-box to contradict the peon. Rakhal is also the *gomashta* of Nrisingha Chandra Ghose, one of the *patnidars*, and a witness for the plaintiffs. Another witness, Mongolleswar Buxi, says he was Atul's *Tehsildar*. We are satisfied that he was a 'manager' within the meaning of the Regulation. The learned Subordinate Judge has disbelieved the peon's evidence mainly on the ground that the day on which the notice is said to have been served was also the day on which the marriage of Atul's son was celebrated and though other co-sharers in the *patni*, such as Pulin Behari Ghose, Nirmal Chandra Ghose and Mohini Mohan Ghose, were present on the occasion at his house, yet the peon made no endeavour to take a receipt from any of these persons. This argument does not appear to us to be of any great weight.

Atul was the largest co-sharer. He owned a third share of the whole. The share of the four plaintiffs is, as we have said, only one-anna, nine *gandras* odd. The balance belonged to the defendants described as *proforma* defendants who have not joined as plaintiffs in the suit who have not entered appearance, and among whom Atul is included.

The question whether the publication of the notice at Atul's Cutchery was a sufficient compliance with the law was not raised in the Court below, and was adverted to, but not argued, before us. Strictly speaking, the Regulation does not require personal service of the notice of sale on the defaulter. It requires the notice of the sale to be stuck up at the defaulter's Cutchery. The receipt of the defaulter or his manager is merely evidence that the notice has been so published. All the defaulters in the present case had their Cutcheries, or places where they did their business, at Debibarpur and there can be no doubt that the principal Cutchery was that of the principal share-holder, Atul. As the plaint shows, the proceedings were taken in the name of Ram Chandra Ghose and we gather that the *patni* was registered in the Raj office in that name. Ram Chandra is dead, and the observation of this Court in *Rainarain v. Ananta Lal* (1) probably explains why the objection formulated in the plaint was abandoned. We propose, therefore, to deal with the case on the footing that publication at Atul's Cutchery was sufficient.

On that footing, no formal objection lies because the receipt was not signed by the other co-sharers or any of them and we fail entirely to see why that fact should afford any ground for suspecting the truth of the peon's narrative still less for rejecting it off-hand.

The peon, we may mention, has been in the service of the Raj for seven or eight years and is presumably, therefore, an experienced hand, well acquainted with his duties. His antecedents are not satisfactory. He has served a sentence of one and a half year's imprisonment for forging pay bills. But we are not told how long it is since he came out of prison and the proof of

(1) 19 C. 703 at p. 717; 11 Ind. Dec. (N. S.) 911



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the publication of this notice does not rest on his unsupported word.

It appears that the practice of the Raj office is to utilize the post for the purpose of making sure that the peon goes to the place where the notice has to be published. The peon is directed after publication to despatch a postcard intimating the fact from the nearest post office. There is no Post Office at Debitarpur, but there is a letter-box in which the peon says, he posted his card. The card passed through the Aharbelpa Post Office, as the post mark shows, on the 26th April 1916, the date of publication. It was in due course received at the Raj office and is produced in this case (Exhibit D). There is no dispute that Debitarpur is served by the Aharbelpa Post Office.

The learned Judge finds fault with the peon for not mentioning in the post-card the fact that publication was made in Atul's Cutchery. As we have said, the object of the post card is to ensure the peon's presence at the spot and for that purpose details such as these are unnecessary. The post-card states quite sufficiently that the peon had proceeded to Lot Debitarpur and served the notice there by hanging it up.

The defendant No. 2, the Maharaja, relied on the evidence of the peon on the receipt and on the corroborative evidence afforded by the post card. Other witnesses were examined by the auction-purchaser, the defendant No. 1. They all give evidence, more or less positive, in support of the publication of the notice. The learned Subordinate Judge has rejected their testimony for reasons which in some instances at least do not carry their own recommendation with them. There is no very apparent reason why the evidence of the Pleader, Dakhina Ranjan Buxi, corroborating that of the peon as regards the posting of the post card, should not be accepted. Nor do we see why Sohi Bhusan Buxi should be summarily dismissed as untrustworthy. The Subordinate Judge says he is siding with the defendant No. 1. No reason is given for that statement and the witness himself says that his son had a *dar patni* interest which he lost owing to the sale. The son apparently is Janaki Nath Buxi who was examined

as a witness for the plaintiffs. The evidence of Janaki Nath Banerjee, who also speaks to the notice being published, is not referred to by the Subordinate Judge. At the time this witness was in Atul's service, though he is now in the service of the Bakshis of Debitarpur. He accompanied Atul to the Collectorate when the *patni* was sold. But we do not propose to discuss the whole of the evidence in detail, or to reverse the decision of the Subordinate Judge merely because we might be disposed to take a different view of the credibility of this witness or that. The case does not depend entirely on oral testimony and the evidence must be considered as a whole with reference to its character and the mode in which it should be approached and dealt with.

In the first place, if some of the evidence for the defence must be discounted as that of partisan witnesses, a similar criticism applies to the evidence for the plaintiffs. Mohini Babu, on whom the Subordinate Judge relies, has, no doubt, a respectable position but he is one of the defaulting *patnidars* and a plaintiff. Nirmal, Polin and Nrisingha Ghose are also defaulting *patnidars*. They appear in the category of *pro forma* defendants and, supporting as they do the plaintiffs' case, it is not clear why they did not join in bringing the suit. Two of the other four witnesses who speak to not seeing the peon at Atul's house are *dar-patnidars* whose interests were destroyed by the sale.

Secondly, the evidence of the plaintiffs is wholly of the negative description. The peon and Rakhal may have been at Atul's house without the witnesses seeing them.

Again, the evidence for the defence was taken first and the plaintiffs had to meet that evidence. If they were to succeed they were bound to challenge the receipt produced by the peon. The defence could not be expected to call Atul, the principal *patnidar*, or his manager, Rakhal. In our opinion, as we have already indicated, it was plainly incumbent on the plaintiffs to put those persons in the witness-box. Some attempt has been made to explain the omission to do so. The explanation, however, is unsatisfactory. It appears that Atul had originally claimed to be co purchaser of the *patni* with the defendant No. 1 in equal shares. But the defendant No. 1 had refused

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to admit the claim and before the trial of the present suit, Atul had himself instituted a suit to set aside the second sale of the *patni* and to have it declared that if both sales were set aside he was entitled to his original share in the *patni*. In paragraph 7 of his plaint (Exhibit I) he stated that he did not join as plaintiff in the present suit because the plaintiffs had made false aspersions on him in their plaint. The plaint in the present suit does accuse the *pro forma* defendants of colluding with the defendant No. 1. That, however, did not prevent the plaintiffs from calling three of the *pro forma* defendants as witnesses and there seems no reason why they should not have called Atul likewise. The plaintiff, Mohini Babu, himself said that Atul was not siding with any party. In any case, the omission to call Atul and Rakhal must tell against the plaintiffs. The judgment of the learned Subordinate Judge in this connection speaks with an uncertain sound and we are unable to follow him.

We may add that we have not forgotten that the *chaukidar*, Benimadhub, was not called by the defence but his evidence would have been of quite minor importance.

On the whole case, we have come to the conclusion that the evidence adduced for the plaintiffs is essentially weak evidence and, even if we leave out of account the witnesses examined on behalf of the defendant No. 1, the balance inclines in favour of the peon's story. Regard being had to the receipt, the issue really becomes whether Rakhal was present during the whole or any part of the marriage ceremony on the 26th April. The plaintiffs' witnesses say that he was not there or that they did not see him. But there are the names on the receipt which the peon says were written by Rakhal. There is no evidence that they are not in Rakhal's handwriting. The post-card shows that the peon was in the neighbourhood. If then we take it, as we think we ought to take it, that Rakhal wrote the names, he was also in the neighbourhood. If the peon was in the village, there is so much the less reason to doubt that he performed his duty. If Rakhal was there, he would naturally attend the ceremony at Atul's house to which the peon would also be attracted. The circumstances and the probabilities combine to favour the truth of the peon's story which we must end by accepting. We are

both of opinion that the appeal should succeed.

In coming to that conclusion we have attached no importance to the fact that some of the *patnidars* attended the sale on the 2nd Jaistha. It was held on the 2nd as the first of the month fell on a Sunday. If a *patnidar* does not pay his rent he knows that his *potni* will probably be put up for sale on the next sale day. The rent of the *patni* seems never to have been paid in proper time. There were 22 co-sharers who could not agree and rent was never paid before proceedings were taken under the Regulation to compel payment. The *patni*, it would also seem, is not a very profitable one. The collections amount to sum Rs. 1,900. The rent is Rs. 1,655 and, in addition, there are the collection charges.

The first sale standing, the evidence establishes, and before us it was hardly disputed, that the second sale must stand also. The proceedings were taken in the name of the defendant No. 1, the auction-purchaser, and were duly and regularly conducted throughout.

As the case may possibly go further, we ought not to leave it without noticing the argument urged upon us on the appellant's behalf that, even if the first sale be held irregular, the second sale, the prescribed formalities in respect thereto having been observed, would be valid and effectual. The argument proceeds on the ground that an irregular sale under the Regulation being not void but merely voidable the first sale remained valid till it was rescinded. The purchaser at that sale acquired a lawful title with the right to possession. He was recorded as *potnidar* in the landlord's office. The mere institution of a suit would not affect his title which could only be destroyed by the avoidance of the sale. Meanwhile, proceedings taken against the tenure standing in his name would be according to law. Proceedings under the Regulation, it was added, are taken not against the person or the *patnidar* but against the tenure. If the original *potnidars* impeached the validity of the sale it was their duty to protect themselves by paying the rent during the pendency of their suit. Otherwise, it was said, if the purchaser defaulted, the landlord would have no means of recovering his dues.

Reference was made to *Ranee Surno*

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*Moyee v. Shooshee Mokhee Burmonia* (2) for the purpose of showing that neither the landlord nor the auction-purchaser are guilty of trespass by reason of an informal sale before the sale is avoided. The case also shows that the landlord is not without remedy for his rent. The rule of limitation applied would be equally applicable under the present Limitation Act and nothing more need be said about the recovery of the rent.

In *Rajnarain v. Ananta Lal* (1), cited above, a question arose whether proceedings taken in the names of deceased *patnidars* were valid. Much stress was laid on a passage in the judgment of Tottenham, J., at page 717, in which, speaking for himself and Ghose, J., he says that "proceedings under the Patni Regulation taken for the realization of arrears of *patni* rent are not taken against persons at all, but against the tenure. And the Zemindar is quite right in setting out in his petition and notices the name of the *patni* and the name of the *patnidar* as recorded in his books." The learned Judge, however, differed on another point on which the case went off. In any case, neither the passage cited nor the similar language used in the earlier case of *Raghub Chunder Banerjee v. Brojonath Kosndoo* (3), carries the argument to the necessary length.

Reliance was also placed on *Suresh Chandra v. Akkori Singh* (4). But that case is not much in point. The plaintiffs there were *se-patnidars* and the suit was not a suit under section 14 of the Regulation. It related only to a small portion of the *patni*. The case, no doubt, is authority for the proposition that an irregular sale is not void but voidable. It is also authority for the view that a sale can only be avoided by a suit properly framed under section 14. But nothing was decided as to the effect of a successful suit under the Regulation.

The case cited on the other side of *Joykrishna v. Sarfannessa* (5) is more to the purpose. The plaintiff was the transferee of a *patni* tenure who had not registered his name in the landlord's office. He brought

his suit under section 14. The landlord pleaded that he was not bound to recognise the plaintiff as his tenant and that the plaintiff was not entitled to sue or to be restored to possession. The Court (Sir Comer-Petheram, C. J., and Tottenham, J.) held that "the effect of setting aside the sale will be that the parties must be reinstated in their original position."

Nothing is gained by describing proceedings for sale as proceedings '*in rem*'. The Zemindar sells in the exercise of a statutory power of sale. The rights and duties of the parties are governed by the Regulation which makes the Zemindar "exclusively answerable" for the observance of the forms prescribed (section 8). The purchaser obtains a statutory title to have his name registered in the Zemindar's office and to obtain possession (last clause of section 5). But the validity of the title and the validity of the registration depend on the validity of the sale which is the foundation of the new position created. A second sale, pending proceedings to set aside the first, rests on that foundation, secure or insecure as the event may determine. The second sale is part of the superstructure and will stand or fall with the first.

In the present suit both sales were challenged and, if we had agreed with the Subordinate Judge as regards the first sale, we should also have agreed with him as regards the second.

With these observations, the appeal is allowed; the appellant is entitled to his costs in this Court and the Court below, to be paid by the principal respondents, the plaintiffs in the suit.

The respondents Nos. 1 and 21 (defendant No. 22) are also entitled to the costs actually incurred by them in this Court and the Court below. They will receive between them in equal parts one-quarter of the hearing fee of this appeal. The balance of the hearing fee will go to the appellant, the Maharaja.

*Appeal allowed.*

(2) 12 M. L. A. 244 at p. 253; 11 W. R. P. O. 6; 2 H. L. R. P. C. 10; 2 Suth. P. O. J. 173; 2 Sar. P. O. J. 421; 20 F. R. 331; 1 Ind. Dec. (N. S.) 489.

(3) 14 W. R. 489; 9 B. L. R. 91n.

(4) 20 O. 746; 10 Ind. Dec. (N. S.) 508.

(5) 16 O. 845; 7 Ind. Dec. (N. S.) 814.



RAGHUNATHA RAO v. SECRETARY OF STATE FOR INDIA.

MADRAS HIGH COURT.

CIVIL APPEAL No. 92 OF 1919.

September 9, 1919.

*Present*:—Mr Justice Oldfield and

Mr. Justice Bakewell,

K. RAGHUNATHA RAO—COMPLAINANT

—APPELLANT

*versus*

THE SECRETARY OF STATE FOR  
INDIA IN COUNCIL, THROUGH THE  
COLLECTOR OF TINNEVELLY—

RESPONDENT.

*Land Acquisition Act (1 of 1894), ss. 11, 12—  
Acquisition of land for purposes of quarrying—Com-  
pensation, method of assessing.*

Where a piece of land is compulsorily acquired for quarrying purposes its special adaptability for quarrying is an element for consideration in fixing the amount of compensation, and the basis for calculating the amount to be awarded is the present value of what might be expected to be realized in the future. [p. 188, cols. 1 & 2.]

Appeal against the award of the District Court, Tinnevely, in Compensation Reference No. 7 of 1918.

FACTS appear from the judgment.

Mr. T. V. Muthu Krishnier for Mr. T. M. Krishnaswamy Aiyar, for the Appellant.—The lower Court erred in refusing to go into the question of the special value of the land as a gravel quarry. The use to be made of the land for quarrying should have been taken into consideration in fixing the compensation though it was acquired as cultivable land. People would be willing to pay a substantial price owing to its possessing a more than normal value. See *Daya Khushal v. Assistant Collector, Surat* (1).

Mr. V. Ramesam, the Government Pleader for the Respondent, agreed that the market-value of the land as a gravel quarry should have been considered in fixing the compensation but objected to the Court's acting on the evidence of witnesses for the owner which was all guess work and no witness adopted an accurate method of calculation.

JUDGMENT.—The main question in this appeal is whether the lower Court was right in awarding compensation for the land acquired as cultivable land and not as a gravel quarry. The lower Court refused to award as for a gravel quarry on the ground that the only demand for the pro-

duce of the land as a quarry came from the District Board, a public body, on account of which the acquisition was made, and it referred to the proviso I of section 24 of the Land Acquisition Act and the judgment of Lord Moulton in *Lucas and Chesterfield Gas and Water Board, In re* (2). We need not say much regarding this part of the case, because the learned Government Pleader has not disputed that the lower Court erred in refusing to consider the character of the land as a gravel quarry. It is sufficient to refer to a quotation from the judgment of Mr. Justice Grove in *Countess Ossalinsky and Manchester Corporation, In re* (Browne and Allan's Law of Compensation, 2nd Edition, page 659) extracted in the judgment of Vaughan Williams, L. J., in the case referred to by the District Judge: "The only one of those that can apply to this case is the latter one that the arbitrator has acted *ultra vires*; in other words, that he has made an element of his calculation of the value of this land that which legally cannot or ought not to be an element in its consideration, namely, the enhanced value of the land on account of its capability of being used for diverting and impounding water or of being converted into a reservoir, or for any useful purpose for which persons would pay a substantial price. It appears to me that that in itself is not an objection to the award and that the arbitrator, ought to take that into consideration. If the land has what I may call an adventitious value, that is, something beyond its mere agricultural or normal value (and that is a marketable value in this sense, that persons wishing, for a purpose for which the land is peculiarly applicable, to purchase that land would give a higher price for that land) then the arbitrator has a fair right to take that into consideration: it is a matter, no doubt, contingent: but, still, it is a matter which is not to be ignored or put out of consideration by an arbitrator." The portion of Lord Moulton's judgment to which the learned District Judge refers must be with reference to the circumstances of the acquisition, which was then under contemplation. That acquisition was of a piece of land, which was of

(1) 21 Ind. Cas. 210; 18 B. 37; 15 Bom. L. R. 845.

(2) (1909) 1 K. B. 16 at pp. 30, 31; 77 L. J. K. B. 1009; 99 L. T. 767; 72 J. P. 437; 6 L. G. R. 1106; T. L. R. 858.

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no value for agricultural or other purposes to any one except to the public authority, which was proposing to use it for the construction of a reservoir. The circumstances of the present case are different, because the compensation is really being given for the gravel, the commodity, which the land proposed to be acquired contains and which has had in the past and must be considered as having in the future a market-value independently of the fact that its permanent acquisition is now under consideration. The decision in *Lucas and Chesterfield Gas and Water Board, In re* (2) was referred to in *Daya Khushal v. Assistant Collector, Surat* (1), and we respectfully agree with the conclusion reached in that case that, when a piece of land is compulsorily acquired for quarrying purposes, its special adaptability for quarrying is an element for consideration in fixing the amount of compensation. This conclusion entails dissent from the decision of the lower Court.

We have then to decide what is the proper amount to be awarded on the basis that the land is to be compensated for as a quarry. Firstly, there is before us no finding regarding the amount of gravel on the land. But it is not suggested that the land will be of value for any other purposes. If it is used as a quarry, we can found our award on the amount of gravel which can be realized. The witnesses estimate the amount of gravel at 2,000 to 3,000 cart-loads of gravel per acre. This evidence is, of course, indefinite. The witnesses, in fact, say that they are merely guessing; but we think that they probably mean that they are making the best estimate they can. It is suggested that we can reach no conclusion on this evidence, because it includes nothing to show that any accurate method of estimating was adopted by any witness. It is true that there is nothing regarding the depth of the gravel at any particular place. We find, however, that the question was fully in issue before the lower Court and, if the witnesses were not cross examined with regard to the manner in which they made their estimates, or with regard to their failure to ascertain the depth of the gravel, that is the fault of the Government. Moreover, on the side of Government there is no counter evidence. We, therefore, act on such evidence as is available and, taking the lowest figure spoken to by any of the witnesses,

we find that there are 2,000 cart-loads of gravel per acre.

The next question is as to the valuation of this quantity of gravel. There is some very vague evidence as to the value of a cart-load of gravel from the claimant's witnesses and there is some evidence from the Government witnesses as to the price paid by Government for gravel at a quarry four miles distant and as to the cost of transporting that gravel. It is clear, however, that better evidence must be available, because we know that the Government has recently been buying gravel from the quarry now under acquisition and it should be possible to prove the price which the Government actually paid for gravel from it. That evidence would clearly be the best; and we must express our surprise that it was not laid before the lower Court. As the record stands, we do not feel able to come to any satisfactory conclusion on this part of the case. There is, moreover, another point, which does not seem to have been considered on the evidence, but which should have a material bearing on the conclusion. The price which ought to be allowed for a cart load of gravel must be influenced by the extent of the District Board's demand for it in the near future. For the value of the available gravel at the rate actually paid in the past could not be adopted without disregard of the District Board's loss of the use of the purchase money, which they will have to pay in a lump sum at once, or, to put it from the point of view of the owner of the land, the value to him is the price of the cart-loads of gravel to be extracted from time to time for a certain number of years, not the total value of the whole amount available paid at once. That is, it is the present value of what might be expected to be realised in the future. We must, therefore, call for a finding from the lower Court as to the rate per cart load at which compensation should be paid for the gravel on the land in the light of the foregoing. Fresh evidence may be taken. The finding is due in six weeks and seven days will be allowed for filing objections.

M. C. P.

*Appeal allowed;  
Case remanded.*

JAGESHAR SINGH v. BIR RAM.

## CUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 10 OF 1920.

June 8, 1920.

*Present* :—Syed Wazir Hasan, A. J. C.

JAGESHAR SINGH—PLAINTIFF—

APPELLANT

versus

BIR RAM AND ANOTHER—DEFENDANTS—

RESPONDENTS.

*Limitation Act (IX of 1908), s. 19—Acknowledgment—Debt referred to in subsequent document—Presumption—Acknowledgment of liability, what amounts to.*

Where the acknowledgment of a debt is contained in a document which does not include any definite and certain reference to a debt, the subject-matter of a suit, the presumption, in the absence of any other debt proved to exist, is that the debt acknowledged is the debt under consideration and the burden of proving the contrary rests on the person disputing the debt. [p. 191, col. 2]

"An acknowledgment of liability" under section 19 of the Limitation Act need not necessarily be in respect of the particular relief prayed for in a suit or application. It is a sufficient acknowledgment if it is of liability, whether pecuniary or in relation to other obligations, and is in respect of the property or right which is the subject-matter of the suit or application. The identity of the liability acknowledged need not correspond with the nature of the relief which a plaintiff seeks on the cause of action which embraces his right, and upon which he comes into Court, nor need the specification of the nature of the property or right be exact. [p. 191, col. 2.]

Appeal from the decree of the Subordinate Judge, Sultanpur, dated the 2nd December 1919, reversing that of the Additional Munsif, Sultanpur, dated the 3rd March 1919.

Chowdhri Niamat Ullah, for the Appellant.

Babu Bisheshwar Nuth Trivastava, for the Respondents.

**JUDGMENT.**—On the 22nd September 1909 one Dalip Singh, father of the defendant No. 1, executed a deed of mortgage in favour of the plaintiff for a sum of Rs. 75. The rate of interest stipulated therein was 6 per cent. per annum and the property mortgaged was 1 *bigha*, 11 *biswas* *baribi* land situated in the village Rampur Sakrauri, Pargana Aldema, District Sultanpur. It was a possessory mortgage and one of the conditions was that out of Rs. 71-0, the total profits of the mortgaged land, Rs. 4-8-0 shall be credited towards interest and Rs. 3-4-0 shall be paid annually by the mortgagee to the mortgagor on obtaining a receipt therefor. On the 13th day of May 1905 Dalip Singh executed a deed of further

charge in respect of the same property for a sum of Rs. 36, carrying interest at the rate of Rs. 12 per cent. per annum, in favour of the same mortgagee. Chauharia Singh, son of Dalip Singh, the mortgagor, and defendant No. 1 in this suit, sold his mortgagor's interest in the property to the defendant No. 2 on the 22nd April 1913. The plaintiff's case is that Dalip Singh delivered possession to him of the land mortgaged, that afterwards he took out a portion of 13 *biswas* from that land and that the plaintiff remained in possession of the rest of the property by the realization of rent and continued to pay the *paramana*-money annually to the father of the defendant No. 1 on obtaining a receipt for the same but that in the beginning of the month of Katik 1325 *Fasli* corresponding with October 1915 the defendant No. 2, in collusion with defendant No. 1, dispossessed him without paying the mortgage-money and appropriated the profits of the land mortgaged. He, therefore, sued for possession of the property mortgaged as mortgagee. The plea in defence with which I am now concerned was that the relief for possession was barred by limitation.

The Court of first instance decreed the claim, holding that the plaintiff had been in possession of the property in suit within twelve years prior to the institution of the suit. The defendant No. 2 appealed to the Court of the Subordinate Judge of Sultanpur. The learned Subordinate Judge accepted the appeal and dismissed the plaintiff's suit with costs. The plaintiff has now come to this Court in second appeal.

On the question of possession, the learned Subordinate Judge found against the plaintiff. His finding is as follows:—  
"I am of opinion that the plaintiff's possession has not been satisfactorily established and the learned Munsif's finding on this point is wrong." This finding is conclusive but the appellant contends, as he contended in the Court below, that his suit must be deemed as within time by virtue of certain acknowledgments upon which he relies. In proof of the alleged acknowledgments I have been referred to the following documents:—

(1) The deed of further charge dated the 13th May 1905;

(2) The receipt, dated the 3rd July 1909, granted by the mortgagor to the mortgagee



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for the *paramsana* payable by the mortgagee to the mortgagor under the original mortgage, dated the 22nd September 1899;

(3) The sale-deed in favour of the defendant No. 2 dated the 22nd April 1913.

The material portion of the deed of further charge (Exhibit 2) may be thus rendered in English:—"It is another condition that the *paramsana* payable to the mortgagor under the deed of the 22nd September 1899 for the sum of Rs. 75 shall be set off against the interest payable under the deed of further charge." The receipt (Exhibit 3) purports to be a receipt granted by Dalip Singh, the mortgagor, to Jageshar Singh, the mortgagee (*rehandar*), in respect of the share of Dalip Singh in the village, Rampur Sakrauri, for the years 1315 and 1316 *Fasli* for a sum of Rs. 8 & 0. At the foot of the sale-deed and in the detail of the consideration for the sale, the following statement appears:—"Left with the mortgagee with power to redeem for the purpose of redeeming the mortgage in favour of Jageshar Singh, mortgagee, . . . . . Rs. 136." It is argued on behalf of the appellant that every one of these statements constitutes a valid acknowledgment within the meaning of section 19 of the Indian Limitation Act (IX of 1908), and that from the date of each he is entitled to a fresh period of limitation.

The learned Counsel for the respondents contended, in the first place, that the plaintiff's argument in respect of the effect of the acknowledgments could not be entertained because he did not comply with the provisions of Order VII, rule 6, of the Code of Civil Procedure. This contention is, in my opinion, untenable. The plaintiff came into Court on the allegation that he had been in possession of the mortgaged land since the date of the mortgage and that he had been dispossessed in October 1915. It is clear, therefore, that his suit as brought was not instituted after the expiration of the period prescribed by the Law of Limitation and that he could not have claimed exemption from such law on the ground of acknowledgments. In paragraphs 3, 4 and 5 of the plaint the plaintiff, however, gives a sufficient indication of the facts upon which he relies as constituting

the acknowledgments, and in paragraph 12 of the replication he refers to the sale-deed with particular emphasis on the admission of the mortgage deed in suit contained in the sale-deed.

With regard to the receipt (Exhibit 3) the learned Advocate for the respondent contends that it does not contain any definite and certain reference to the mortgage-deed in suit and that the amount of *paramsana* stated therein does not correspond with what was due to the mortgagor under the deed of mortgage, dated the 22nd September 1899. This contention, again, is unsound. It might be that between the dates of the mortgage and the receipt the profits of the land mortgaged had increased and consequently a larger amount of *paramsana* would become payable by the mortgagee to the mortgagor. The receipt in most unequivocal terms purports to be in respect of *paramsana* due to the mortgagor from the mortgagee and is in connection with the mortgaged share of Dalip Singh. In the absence of any other mortgage between the parties to the receipt under which the *paramsana* money may have been payable, I must hold that the receipt relates to *paramsana* due under the mortgage in suit. During the course of argument in the case of *Spickernell v. Hotham* (1), the Vice Chancellor, Sir W. Page Wood, referred to *Shortrede v. Oheek* (2) and observed that; "it was held in that case that the onus of proving the existence of more than one promissory note to which the letter might refer was thrown upon the person disputing the debt;" and in delivering his judgment said: "only one promissory-note has been proved to exist, for I cannot treat the memorandum attached to the letter of the 2nd of December 1834 as a promissory-note itself. I, therefore, think that there has been a sufficient acknowledgment, and that this debt has been payable with interest from the 2nd of December 1834." The defendants in this case have not even alleged, much less proved, any other mortgage with which reference in the receipt of the 3rd July 1909 could be connected.

(1) (1854) 69 E. R. 285 at p. 287; 2 W. R. 638; Kay 619; 101 R. R. 804.

(2) (1834) 1 A. & E. 57; 110 E. R. 1129; 3 N. & M. 866; 3 L. J. (N. S.) K. B. 125; 40 R. R. 258.

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As regards the sale-deed of the 22nd April 1913 the argument of the learned Counsel is that the sum of Rs. 136 left with the vendee for the purpose of redeeming a mortgage in favour of Jageshar Singh does not tally with the total mortgage-money due under the mortgage of the 22nd September 1899 and the deed of further charge of the 13th May 1909. The mortgage-deed is for a sum of Rs. 75 and the deed of further charge for Rs. 36. These two figures give us a total of Rs. 111 only. In reply to this, the learned Pleader for the appellant points out that there was another mortgage between the same parties for a sum of Rs. 25 of the year 1890 which his client has produced in this case and which the Courts below have admitted in evidence. This is Exhibit 6 on the record. The addition of this sum of Rs. 25 to Rs. 111 gives us a total of Rs. 136 and this last sum exactly fits in with the amount stated in the sale-deed. With regard to the statement in the sale-deed also I hold that it refers to the mortgage in suit as well.

The last and the important point argued by the learned Advocate for the respondent is that none of these acknowledgments is sufficient within the meaning of section 19 of the Indian Limitation Act (IX of 1908) to give a fresh period of limitation for the plaintiff's suit. His contention is that the acknowledgment of liability mentioned in that section must correspond with the right which the plaintiff desires to obtain by his suit and that, inasmuch as the plaintiff in the present suit asks for a decree for possession and the acknowledgments at the best are in respect of a liability for the debt only, these acknowledgments are not valid within the meaning of section 19 of the Indian Limitation Act. This argument calls for a careful consideration of the terms of the section. It is true that the acknowledgment of liability must be in respect of property or right which is also the property or right in suit. This is amply borne out by the word "such" in the sentence "in respect of such property or right." The fallacy in the argument of the learned Counsel is, that he reads "in respect of and property or right" as equivalent to the 'relief' sought in respect of

any property or right. There is no legitimate ground for such a construction. I am of opinion that "an acknowledgment of liability" under section 19 need not necessarily be in respect of the particular relief prayed for in a suit or application. It is a sufficient acknowledgment if it is of liability, whether pecuniary or in relation to other obligations, and if in respect of the property or right which is the subject-matter of the suit or application. It is perfectly clear that the relief prayed for in a suit may be quite a separate and distinct matter from the subject-matter of the suit. The section does not require that the identity of the liability acknowledged should correspond with the nature of the relief which a plaintiff seeks on the cause of action which embraces his right and upon which he comes into Court; nor does it demand any exactness in the specification of the nature of the property or right. Explanation I to section 19 says that, for the purpose of that section, an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right. I do not think that the explanation means that an acknowledgment will be insufficient if it omits to specify *altogether* the nature of the property or right, though it will be sufficient if it omits to specify the "exact" nature of the property or right. The word "exact" is intended to qualify the specification of the nature of the property or right rather than of the property or right itself.

The law as regards the effect of an acknowledgment on the question of limitation of actions in England is not different from the law enacted in the Indian Limitation Act. [See *Maniram v. Seth Rup Chand* (3)]. I may here quote from Banning on the Limitation of Actions, Chapter IV, Mortgagor and Mortgagee, page 160, Third Edition:—"Secondly, where the mortgagee does not enter into possession, but the mortgagor continues in possession,—The 7 Will., IV, and 1 Viet., c. 28 (as amended by the 37 and 38 Viet c. 57) provides that the mortgagor's payment of interest, or his payment of any part of the principal

(3) 33 L. A. 165; 4 C. L. J. 94 (P. C.); 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 33 C. 1047; 2 N. L. R. 130.

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of the mortgage-debt, shall be a sufficient acknowledgment of the title of the mortgagee but, of course, the mortgagor (so remaining in possession) may also otherwise expressly acknowledge the mortgage-debt—and therewith acknowledge also the mortgagee's title as mortgagee." *Maria Ohinnery v. Eyre Evans* (4), *Lewin v. Wilson* (5). A covenant to pay a mortgage-debt in a deed executed subsequently to and referring to the mortgage is an acknowledgment of the existence of the relation of the mortgagor and mortgagee and, therefore, of the mortgagee's title [*Jayne v. Hughes* (6)]. I am fortified in my construction of section 19 by a recent decision of a Bench of this Court in *Basant Singh v. Thakur Rampal Singh* (7). That decision, in effect, entirely covers the point argued before me.

On the question of the construction of the acknowledgments before me also, I am of opinion that they not only amount to an acknowledgment of liability for the debt but that each of them imports an admission of a subsisting mortgage in favour of the creditor. In other words, the interpretation which I place on the language of these acknowledgments makes them out as acknowledgments of the mortgagee's title. The construction of the document containing an acknowledgment is an undoubted function of the Court alone (*Halsbury's Laws of England*, Volume XIX, page 63).

During the course of the arguments the learned Advocate for the respondent pressed on me the decision in *Beni Madho v. Bir Bal Singh* (8), but he candidly admitted that the view of law expressed in this case is not in accordance with the view taken in the Bench case mentioned before. The judgment in the case reported as *Beni Madho v. Bir Bal Singh* (8) was delivered so far back as April 1918. The Bench case to which I have made reference is about a year later

(4) (1864) 11 H. L. C. 115; 11 E. R. 1274; 10 Jur. (N. S.) 855; 11 L. T. (N. S.) 68; 13 W. R. 20; 4 N. R. 520; 145 R. R. 79.

(5) (1886) 11 A. C. 639; 55 L. J. P. C. 75; 55 L. T. 410.

(6) (1854) 10 Ex. 440; 24 L. J. Ex. 115; 24 L. T. (O. S.) 116; 102 R. R. 661; 3 W. R. 65; 3 Com. L. R. 184; 158 E. R. 505.

(7) 51 Ind. Cas. 985; 6 O. L. J. 248; 1 U. P. L. R. (J. C.) 45.

(8) 46 Ind. Cas. 813; 21 O. C. 151.

in date and, if there is any conflict between the two decisions, the only course open to me in the circumstances is to follow the decision of the Bench.

The appeal is allowed, the decree of the lower Appellate Court set aside and that of the Court of first instance restored with costs in all the Courts.

*Appeal allowed.*

# MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1775 OF 1919.

August 11, 1920.

*Present:*—Justice Sir Abdur Rahim, Kt.,  
and Mr. Justice Oldfield.

VEMANNA VENKATACHELLA NAIDU

—PLAINTIFF—APPELLANT

*versus*

ETHIRAJAMMAL—DEFENDANT NO. 3—

RESPONDENT.

*Madras Estates Land Act (I of 1908), s. 6—Tenant continuing in possession after sale of holding, status of—“Having held land as a ryot”, meaning of.*

Prior to the Madras Estates Land Act coming into force, the holding of an occupancy tenant was sold in execution of a decree for rent and purchased by the landlord who did not obtain actual possession, the tenant continuing in possession. In a suit to recover possession brought after the enforcement of that Act, it was pleaded that, by virtue of section 6 thereof, the tenant had acquired a permanent right of occupancy when the Act came into force, and was, therefore, entitled to resist the suit:

*Held*, that after the sale of the holding the possession of the tenant was that of a trespasser, and as he had no interest left in the holding he acquired no right by virtue of section 6 of the Madras Estates Land Act. [p. 19, col. 2]

The phrase “having held land as a ryot” in the explanation to section 6 of the Act, means that the interest in the land of a person has continued till the commencement of the Act at least as a tenant-at-will, and he is actually in possession at that date. [p. 19, col. 2.]

Second appeal against the decree of the District Court, South Arcot, in Appeal Suit No. 771 of 1917, preferred against the decree of the Court of the District Munsif, Sholinghur, in Original Suit No. 642 of 1916.

Messrs. K. Raiah Aiyar, Musalappa Reddi and D. Srinivasa Rao, for the Appellant.



YEMANNA VENKATACHELLA NAIDU v. ETHIRAJAMMAL.

Mr. O. Narasimha Chariar, for the Respondent.

### JUDGMENT.

OLDFIELD, J., delivered his separate judgment on 19th August 1920, having expressed his concurrence with Abdur Rahim, J., on 11th August 1920.

ABDUR RAHIM, J.—I must hold that the learned District Judge is not right in saying that there was no proper proof of the existence of attachment at the date of the purchase of the third defendant. As a matter of fact, we have got the attachment list of 1902 to show that the property was under attachment, and if, at the time of the purchase by the third defendant which was in 1902, the attachment had been raised, it was for him to prove it. The learned District Judge ought to have proceeded on the assumption that the attachment continued. That being so, the purchase by the third defendant can be of no avail against the first defendant or his vendee. But it is argued that, under section 6 of the Madras Estates Land Act, the tenant of the third defendant acquired a permanent right of occupancy when the Act came into force, i.e., in 1908, although the holding had been sold before that date and purchased by the first defendant, the landlord, in execution of his decree for rent. In support of this position a ruling of the Division Bench of this Court has been put forward; *Sivapada Mudali v. Pitty Thayagaraja* (1). No doubt that decision supports the contention of the respondents, but with all respect to the learned Judges I find myself unable to agree with them. The first step in the reasoning in that judgment is that a *ryoti* land, although brought to sale by the landlord and purchased by him, does not cease to be a *ryoti* land. I am prepared to accept that proposition. But I am unable to see how the next step in the reasoning is made out, namely, that a tenant whose holding has already been sold and who had, therefore, no interest whatever left in the holding acquired any right by virtue of section 6. Before section 6 can be applied, apart from the explanation, which I shall presently consider, it must be shown that the man in possession is a *ryot* within the meaning of the Act, and a *ryot* has been defined as a

person who holds agricultural land paying rent to the landlord. Here it is not suggested that, after the holding of the third defendant had been sold, he either paid rent or in any other way attorned to the landlord. He remained in possession after his holding was sold merely as a trespasser.

Reliance is placed on explanation to section 6. In my opinion the explanation does not extend the scope of the section itself to the extent claimed. The explanation is to this effect: "For the purpose of this sub-section, the expression 'every *ryot* now in possession' shall include every person who, having held land as a *ryot*, continued in possession of such land at the commencement of this Act." If we are to give any force to the phrase "having held land as a *ryot*", it must mean that a person whose interest in the land has continued till the commencement of the Act at least as a tenant at-will and who is actually in possession at that date. To give any other meaning to this explanation would be conferring very valuable rights on a person whose possession is that of a mere trespasser and who has no sort of right in the land recognised by law at all. In this case, the third defendant continuing in possession of the land even after the sale was not only a trespasser but was acting in defiance of the law. It must be conceded that, if there had been a final decree declaring that the third defendant had no occupancy rights passed before the Act came into force, section 6 would not help him at all as the land would be exempt from the operation of section 6 as 'old waste'. Can it be said that, where the holding itself has been sold and the tenant has ceased to have any more interest in the land, he is in a better position? The fact that the land does not lose its *ryoti* character has undoubtedly this effect, that if the land-holder thereafter lets any other tenant into possession for the purpose of cultivation then that tenant will acquire occupancy rights in accordance with the provisions of the Act. That is to say, by the purchase the landlord does not add to his home-farm lands and the land remains a *ryoti* land throughout. The decision of the Full Bench in *Gorakula Kanakaiya v. Janardha Padhai* (2) does not, in my opinion, in any

(1) 27 Ind. Cas. 383; 27 M. L. J. 665.

(2) 8 Ind. Cas. 736; 36 M. 439; 21 M. L. J. 31; (1910) M. W. N. 841; 9 M. L. T. 64.

VEMANNA VENKAYACHELLA NAIDU v. ETHIRAJAMMAL.

way touch the present question for there the only question was whether a decree of the Court of trial is a final decree within the meaning of the definition of "old waste" in section 3 before the time for appeal has expired. The other decision referred to in *Sivapada Mudali v. Pitty Thayagaraja* (1) is the decision in *Markopuli Reddiar v. Thandava Kone* (3) but the judgment is very brief. We do not find that the facts are fully given there. We do not know from whom the first purchase was, whether the original ryot or somebody else. In my opinion, therefore, the defence of the third defendant under section 6 of the Madras Estates Land Act is bad.

When the third defendant bought the land in dispute there was a usufructuary mortgage outstanding in favour of second defendant and that mortgage was paid off with the purchase-money. That being so, the learned District Judge finds that the third defendant must be held to be subrogated to the rights under the usufructuary mortgage and by virtue thereof he will be entitled to possession of the land until he is redeemed. The learned Vakil for the appellant, therefore, applies to us for leave to amend the plaint so that the plaintiff may have a decree for redemption in this suit. No such application was made to either of the lower Courts and we do not think that, in the circumstances of this case, we should be justified in allowing amendment of the plaint at this stage. It is not suggested that the right of redemption will in any way be barred. It will be open to the plaintiff to institute a separate suit for redemption if he so chooses. We also considered whether the plaintiff might not be entitled to recover the purchase-money from the first defendant as a consideration for the sale was paid to him. But as the first defendant has not been made a party to this appeal we cannot grant the appellant any such relief.

The result is that the appeal must be dismissed with costs.

K. OLDFIELD, J.—The facts, as I take them, are that the appellant plaintiff is the purchaser of the item now in dispute from the first defendant, who bought the saleable interest in it of its defaulting tenant in a rent-sale

in 1907. First defendant gave a delivery receipt but did not obtain actual possession, probably because in 1892, the land had been transferred to the possession of second defendant by a mortgage, Exhibit V, which, with reference to section 38, Act VIII of 1865, and *Rajagopalachari v. Subbaraya Mudali* (4), was not affected by the rent-sale and had been sold in 1902 by Exhibit VI to third defendant who is now in possession part of the purchase-money having been paid to the second defendant in discharge of his mortgage. Plaintiff's contentions are that third defendant has no right to retain possession or, alternatively, that he should surrender it on being reimbursed what he spent in respect of the suit item on redeeming Exhibit V, the necessary amendment of the plaint being permitted. I agree with my learned brother that the former is unsustainable and deal only with the main argument with which third defendant has resisted the latter that, because he was in possession at the commencement of Act I of 1903, he is entitled under the explanation to section 6 (1) thereof to resist plaintiff's suit for possession on the ground that he has acquired an occupancy right.

The period for which third defendant has retained possession since the rent-sale, falls short of any by which plaintiff's right to sue for possession or redemption can be barred, and there is no question of estoppel. The argument is, then, that the character of the possession referred to in the explanation to section 6 (1) being undefined, even such possession as third defendant's or a defaulter's (for no attempt has been made to show that third defendant is in a better position than his transferor) will confer occupancy right. To take first the case of a defaulter who has lost his interest in the land by a rent-sale and continues in possession in disregard of its result, there is every reason why he should not profit by his conduct: and a construction of the explanation, which would enable him to do so, should, if possible, be avoided. True, such a construction was adopted in *Sivapada Mudali v. Pitty Thayagaraja* (1). But it was supported only by reference to a dictum contained in the referring order in *Gorakala Kanakaiya v. Janardha Padhai* (2)

(2) 20 Ind. Cas. 916, (1914) M. W. N. 798.

(4) 7 M. 31 (F.B.); 7 Ind. Jur. 524; 2 Ind. Dec. (N.S.) 607.

BAL MUKUND RUA GOPIRAM BHOTICA.

and to the landholder's obligation under section 8 (1) to hold the land as landholder notwithstanding his purchase of the occupancy right. With all respect, these reasons seem to me insufficient. *Gorakala Kanakaiya v. Janardha Padhai* (2) was not decided with reference to section 6 or the explanation now in question: and the dictum referred to is only a general warning against confusion between possession and title, not an attempt to interpret the former expression with reference to its context in that explanation or the intention of the Legislature. Section 8 (1) no doubt entails that the land, after the landholder's purchase, remains *ryoti*: but it does not purport to affect the character of the possession referred to in section 6 (1) or its explanation and cannot do so.

As regards the intention of the Legislature in the latter provision, there is every reason against supposing that the result already referred to was contemplated by it. In the context the body of the section refers to *ryots* in possession or to be admitted by the landholder in the future, and it is to be supposed that the explanation refers to possession of a similar kind and to cases of a similar legal origin, such as those of holding over and the like. Certainly, such an interpretation is preferable to one by which it would not merely specify one class of cases already described in more general terms, but would extend the scope of the substantive provisions in a different direction; and I, therefore, agree with my learned brother that we must adopt it.

The foregoing proceeds on the assumption which was made in argument, that third defendant is in the same position as the defaulter, his transferor would have been in, if he had retained possession. But his actual position has been stated and since he cannot plead his purchase against plaintiff's rent sale his possession must, for the present purpose, be regarded as authorised only by the mortgage, which he discharged: and then the objection to the application in his favour of the principle of the decision in *Sivapada Mudali v. Pitty Thayagaraja* (1) is no less. For, whether or no, the learned Judges were consistent in conceding, as they did, that rights in the *kudivaram* interest as between rival claimants other

than the landlord are not intended to be affected by section 6 (1), there is still the fact that the equity of redemption of the mortgage must have been included in the saleable interest of the defaulter, which the landholder bought, and will be unenforceable if third defendant's construction prevails. The result would be that a mortgagee with possession, perhaps with a portion of his term still outstanding, at the commencement of the Act would, in virtue of that possession, acquire a new title, by which his liability to redemption would be extinguished: and, in the absence of anything clearly or directly abrogating the established mortgage law in such cases, that cannot be accepted.

Plaintiff's right being to obtain possession on payment to third defendant of the amount spent by the latter in redeeming the mortgage on his item, it cannot, I agree with my learned brother, be exercised in these proceedings. I, therefore, concur in dismissing the appeal with costs.

M. C. P.

*Appeal dismissed.*

## CALCUTTA HIGH COURT.

CIVIL SUIT No. 1012 OF 1918.

January 21, 1919.

Present: — Mr. Justice Rankin.

BAL MUKUND RUA—PLAINTIFF—

versus

GOPIRAM BHOTICA—DEFENDANT—

*Arbitration—Agreement to refer disputes arising out of contract—Several disputes—Successive awards, whether permissible.*

Where by the terms of a contract the parties agree to refer all disputes arising on, or out of, it to arbitration, the right to make a submission is not exhausted by reason of the mere fact that one award final and complete has issued from it: there may be an indefinite number of awards, as it is possible to have further disputes over the same claim which are not covered by the first award, and the arbitrators have jurisdiction to make awards from time to time in disputes arising out of the contract, as such disputes arise. [p. 198, col. 1.]



BAL MUKUND RUIA V. GOPIRAM BHOTICA.

Sir E. O. Mitter (with him Messrs A. N. Chaudhuri and S. M. Bose), for the Plaintiff.

Mr. L. P. E. Fugh (with him Mr. N. Sircar), for the Defendant.

**JUDGMENT.**—By a contract of 1st December 1917, made on the ordinary form of the Indian Jute Manufacturer's Association, the plaintiff agreed to sell to the defendant three lacs of yards of Hessian cloth. The only express terms which require notice are three:—

Delivery of the said goods to be given and taken as follows:—December 1917.

Each month's delivery to be treated as a distinct and separate contract.

Any dispute whatsoever arising on or out of this contract shall be referred to arbitration under the rules of the Bengal Chamber of Commerce applicable for the time being for decision, and such decision shall be accepted as final and binding on both parties to this contract. The award may, at the instance of either party, and without any notice to the other of them, be made a rule of the High Court of Judicature at Fort William.

These three terms are all part of the printed form with the exception of the words "December 1917" at the end of the first.

The seller by his Counsel has been careful to make clear that it is not disputed that the contract is, by the usage of this market, an instalment contract in so far that it is open to the buyer to require delivery in separate quantities, at all events if each be not less than 50,000 yards, and in this further sense also that the buyer may, if he likes, require performance as to any such quantity taken separately either by giving due shipping instructions to the seller or by demanding Mill's *pucca* delivery orders.

Of the three lacs of yards contracted for, one-half lac was duly delivered and may now be ignored. No delivery was in fact made of any part of the remainder, which divides itself into three separate lots.

The first lot is of 50,000 yards for which a formal shipping instruction for the "City of Calcutta" was given on the 15th of December. Vessel was not ready to load. On 7th January buyer offers to take at once a delivery order. Delivery having

been made in neither form, buyer on the 18th January sends his difference bill by registered post claiming Rs. 8,750. Seller refuses to pay. On the 28th February an arbitration by the Chamber of Commerce is demanded by the buyer, and proceedings, strictly confined to this claim, took their course under this demand, resulting on 24th July in an award of the sum claimed to the buyer with certain interest and costs. This is the first arbitration case.

The second arbitration case had reference to 1,00,000 yards for which another shipping instruction was given on 15th December—this time for the "Chile". The seller finding that the vessel would not begin loading till the 2nd of January, disclaimed responsibility. Buyer insisted. On the 7th January buyer asked for immediate shipment or else delivery order. On the 18th buyer sends another difference bill, this time for Rs. 17,750, on the footing of the price at which the goods had been bought against him by his buyer. On the 19th the seller tendered delivery orders which were refused. On the 21st the seller returned the difference bill and claimed to cancel the contract because of that refusal. On some date, before the 9th of April, Kanoria and Co., who had bought from the buyer, claimed arbitration between themselves and him. This had resulted in an award in their favor before the 24th of June. On the 9th of April the buyer's second case against the seller was commenced, claim being made in the alternative either for the amount of the difference bill or for such sum as might be awarded to Kanoria and Co.

The third arbitration case was not commenced till the 21st of June. It concerned two quantities of 50,000 yards each; one for the "Chile" and one for the "Talabat". As to this I have only the buyer's case: the seller's case never having been lodged. The buyer claimed that shipping instructions were given on 14th and 21st December for these boats respectively; that on 2nd January 1918 he received two letters dated 29th December in which seller said the "Chile" was not yet in port and that the "Talabat" had left long before due date. That on the 3rd January buyer wrote that the goods for "Talabat" should be put on the "City of Manchester" and on the 4th that he

BAL MUKUND RUIA v. GOPIRAM BHOTICA.

Sir B. O. Mitter (with him Messrs A. N. Chaudhuri and S. M. Bose), for the Plaintiff.

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The seller by his Counsel has been careful to make clear that it is not disputed that the contract is, by the usage of this market, an instalment contract in so far that it is open to the buyer to require delivery in separate quantities, at all events if each be not less than 50,000 yards, and in this further sense also that the buyer may, if he likes, require performance as to any such quantity taken separately either by giving due shipping instructions to the seller or by demanding Mill's *pucca* delivery orders.

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would take Mill's pucca delivery order for the other lot. That in the end the seller did neither. That on 15th January the buyer gave notice that his buyers had bought against him as regards the 'City of Manchester' consignment. That on the 16th he demanded a delivery order for the other lot by the next day, and that next day his buyers had bought against him for this lot also. That the seller refused to recognise this liability. That afterwards buyer settled with one of his buyers on 25th February for 7,250 with seller's consent and on seller's promise to pay. That in May he settled with his other buyer for the same sum on the basis of an award obtained against that buyer by a firm to whom he had in turn re-sold.

Now, all that seller did in the third arbitration case was, that on the 18th July he applied to the Tribunal for time to file his case, and on 25th July for more time, and in the end was given till 3rd August by a letter dated 27th July.

On the 25th July, as I have said, an award in favour of the buyer was made in the first arbitration case between these parties, and by letters of 1st and 3rd August from seller's Solicitors to the Tribunal, the seller set up his present claim that the Tribunal had no jurisdiction to proceed with the second and third cases, since in the matter of the contract of 1st December there had been an award, which award they say, with complicated in correctness, "has resulted in a decree". It is given as additional ground that the claim in these cases had arisen completely at the time of the Tribunal's decision. In this action brought by the seller I have to say whether his contention is correct, and whether he is entitled to any relief accordingly.

It was argued for the seller that while the contract was for delivery by instalments, it was one single contract in the sense that there was one promise, one covenant to which all the breaches have reference. That once one award is made under the arbitration clause in a complete form capable of enforcement at law, the Tribunal is *functus officio* and there can be no jurisdiction to make a second. That in this case all the alleged breaches were complete some time before the 25th February 1918 when

the first arbitration case was started. That there was only one cause of action, *vis.*, failure to fulfil the promise to deliver 3 laas of yards. That the buyer has split up his cause of action and made three cases out of one. And that this course is so unjust and unreasonable that, at all events, the principle which underlies Order II, rule 2 of the Civil Procedure Code, if not that rule itself, should be applied by me as a ground for holding that the Tribunal has no jurisdiction to entertain the second and third proceedings now.

The buyer's Counsel, in reply, founded upon a custom, alleged in his written statement to obtain in this market, to the effect that when orders for delivery in different lots are given, the original contract becomes divided into as many contracts as there are separate lots.

He further raised an issue of fact that, whether such custom exist or not, the seller has by his conduct assented to this contract being treated as several separate contracts.

Apart from these questions of fact, he took certain objections logically prior to these issues. He contended that the Tribunal has jurisdiction to decide both these issues and that they are not triable by me.

He contested the proposition that, apart from such a custom, the first award precluded the Tribunal from entertaining the other cases.

As regards the principle of Order II, rule 2, he said that this objection applied at the initiation of the other cases and that either it does not go to the jurisdiction of the Tribunal, or, if it does, the seller consented to such jurisdiction by filing his written answer in the second case of the 11th June 1918 and by his applications to the Tribunal on 18th and 25th July for time to file his answer in the third.

Lastly, and as an answer good in all events, he said that where an arbitrator has any jurisdiction in law no injunction or other relief is obtainable to stay his hand, and the only course is to take objection when the nullity is sought to be enforced as valid.

(A copy of the issues as settled and agreed on is annexed to this judgment).

To the contentions of the buyer as to



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custom, the seller's Counsel intimated that he would contest the existence of the custom. He argued further that the custom was contrary to the express words "each month's delivery to be treated as a distinct and separate contract" and was invalid as unreasonable.

I agreed that evidence as to the existence of the custom pleaded by the buyer should be reserved until after my decision on the prior points. The documents in the three arbitration cases were produced and it was agreed that I should decide the preliminary points on these.

Now, I will take the contract in the sense admitted by the seller, as stated at the commencement of this judgment, and I will examine as to whether or not he has established that the Tribunal is now without jurisdiction to decide the second and third arbitration cases.

I. First, is it true of a submission, such as was in this contract, that under it there can be only one award, meaning thereby a final and complete award enforceable in law? In my opinion there may be an indefinite number of such awards, as many awards as there are disputes arising out of the contract. The submission, if it be in the terms which are present in this contract, is not exhausted by reason of the mere fact that one award, final and complete in itself, has issued from it. The arbitrators are not *functus officio*, one item of their duty done, their duty remains their duty.

The completeness of the first award, so far as regards its own subject-matter, has no relevance to the present point. An award which is incomplete as regards a claim may yet be good if complete as regards those matters in dispute with reference to the claim, which were submitted to the arbitrators. In such a case it is possible to have two awards over the same claim, because it is possible to have further disputes over the same claim, disputes not covered by this first award. An award final and complete as regards a claim precludes another as to that claim only, this, not because the number of awards would be getting high, but because there is nothing further to dispute without disputing the award itself.

This is my view of the effect of the

unreported case of *Ohandan Mall v. Donald Campbell & Co.*\* decided in the House of Lords on 4th December 1916. The judgment in the Court of Appeal and the speeches of the Lords of Appeal will be found in the paper-book in Appeal No. 42 of 1917 in this Court. (Suit No. 1094 of 1916). The terms of the submission are for this purpose indistinguishable from those I have to deal with, and will be found at page 170 in the judgment of the present Master of the Rolls. Rule 26 of the Bengal Chamber of Commerce Rules does not, in my opinion, cut down the jurisdiction of the arbitrators to make awards from time to time in disputes arising out of the contract as such disputes arise.

II. In the second place, on the footing that the breaches alleged in the latter cases are all breaches of the same promise as grounded the first award, I have to decide whether the arbitrators are without jurisdiction to award upon them now. This contention of the seller must be put upon one or more of the following principles:—*res judicata*, bar by suit, principles of common law or equity analogous to these, or such a construction of the submission as would exclude from its ambit any right to entertain proceedings which, if before a Court of Justice, would be held an abuse of the process of the Court.

I think it will re-pay the trouble to make the hypothesis that on 28th February, 9th April and 21st June the buyer had commenced three several suits in a competent Court subordinate to this Court for breaches all prior to the 28th of February and had recovered judgment in the first suit on 20th July. In any case, for the sake of clearness I will do so. I think the position then would have been as follows:—

(1). The lower Court would have had jurisdiction to decide whether the later cases come within Explanation IV in section 11 of the Code. I think it would be bound to hold that they do not; but if they do, and such Court wrongly held that they do not, the only remedy would be appeal. No question of jurisdiction would arise, and no remedy under section 115 of the Code would be appropriate. Such questions could

\*The judgment is printed as Appendix A to 54 Ind. Cas. 256—[Ed.]

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only arise in a limiting case, *e. g.*, if on the footing that section 11 did apply the Court had refused to give effect to the law or if it held wrongly on a point quite unarguable.

(2). The same observations apply to a plea under Order II, rule 2, but with this difference, I think (assuming no such custom as the buyer alleges) that such lower Court, to decide rightly, would have to hold that the later cases were hit by the rule. But again no question of jurisdiction would arise if its decision were merely wrong, if, *e. g.*, it purported to dispense the plaintiff from the provisions of the rule, that would be another matter. It is to be observed that the presence or absence of a judgment in the first suit would be wholly irrelevant in dealing with this plea.

(3) If, putting aside the Code, the plea to the later suits fell to be considered at Common Law, I think myself that to reject it would be right. Such an objection must be matter of substance and I think has to fulfil certain technical conditions even then. In *Brunsdon v. Humphrey* (1) Bowen, L. J., said: "The rule of the ancient common law is that where one is barred in any action real or personal by judgment, demurrer, confession or verdict, he is barred as to that or the like action of the like nature for the same thing for ever." In the present case and on my hypothesis, would these actions be "for the same thing" in substance? I think there can be but one answer, and the only way to attempt another is to insist upon the unity of the promise as making the cause of action technically the same. On this I will quote farther from the same great authority: "The principle is frequently stated in the form of another legal proverb *nemo debet bis vexari, pro eadem causa*. It is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. The difficulty in each instance arises upon the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit? 'The principal consideration' says DeGrey, C. J., in *Hitchin v.*

*Campbell* (2) "is whether it be precisely the same cause of action in both, appearing by proper averments in a plea or by proper facts stated in a special verdict or a special case." "And one great criterion," he adds "of this identity is that the same evidence will maintain both actions."....."The question," says Grose, J., in *Seddon v. Tutop* (3) "is not whether the sum demanded might have been recovered in the former action, the only enquiry is, whether the same cause of action has been litigated and considered in the former action.".....It is evident, therefore, that the application of the rule depends, not upon any technical consideration of the identity of forms of action, but upon matter of substance.

This passage, if only in view of the last words covers and disposes of the objection which I am now considering in this case. I take the principles there laid down to be first principles; not mere *axiomata meliora*, true only of the special range of facts then before the Court.

(4) Before parting with my hypothesis of these cases being brought as actions, I have only to say that if, before the first had been decided, application had been made to strike out the others as oppressive or as an abuse of the process of the Court, it would have been wrong and unreasonable to do more than to consolidate the actions and to make the buyer pay costs thrown away. If such application had been made after judgment in the first case, in view of the lateness of the application, it would probably have been wrong to accede to it at all so far as regards the second case. As to both second and third, an order to strike out would have been improper, some terms as to costs would at the utmost meet the case.

When I come to consider the seller's contentions as applicable to proceedings by arbitration, none of his points as to want of jurisdiction become any stronger. If into this submission I am to import any conditions against multiplicity of arbitrations for the same thing, I know no better principles than I have stated from Lord Bowen and I should not be any stricter than the language of section 11 of the Code, which many Judges have thought too

(2) (1772) 2 W. Bl. 827; 96 E. R. 487.

(3) (1796) 6 T. R. 607; 1 Esp. 401; 3 R. R. 274; 101 E. R. 729.

(1) (1884) 14 Q. B. D. 141 at p. 146; 53 L. J. Q. B. 476; 51 L. T. 529; 32 W. R. 944; 49 J. P. 4.

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strict. But that is for the arbitrators and not for me. In *Donald Campbell's case* Lord Sumner said this: "incidentally the effect of a prior award might come into question in an arbitration upon dispute arising out of a contract if the defendants alleged that the claimants denied that the award already made had decided the matter in dispute."

If, further, I import into this submission an implied term which would exclude oppression or abuse of process the facts here do not come within it.

Lastly, even if I stretch the principle of bar by mere suit to arbitration cases I cannot make it go to jurisdiction and, as the seller has taken steps in both of the later cases, my difficulty would be increased. Besides, I have no right or inclination to stretch it at all. Order II, rule 2 is a special provision doubtless of the completest wisdom but unknown to the Common Law, one, moreover, which attaches an indiscriminate and indeed incalculable penalty to a condition difficult to define. There is, I think, a cardinal error involved in any attempt to appeal even to the principle on which the rule is founded for the jurisdiction of an arbitrator depends not upon the existence of a claim or the accrual of a cause of action, but upon the existence of a dispute. And his right to entertain a second case depends not on the identity of the cause of action but on the identity of the matters in dispute. Where there has been an award not set aside, everything decided by it will be deemed conclusively to have been disputed. The first award, if valid, covers the whole of the issues raised and covers nothing else; any issue not raised is, if disputed, another dispute. In the case referred to already, the House of Lords applied this principle to affirm the validity of a second award on what was really the same claim. Of such a case it is important to say, and I think the House of Lords has implied, that the second dispute must arise subsequently to the first. But in other cases such a requirement would be either meaningless or wrong. If a dispute exists now; if neither party treated the issue as in dispute upon the previous arbitration; if it is not in substance a dispute about the same thing or covered by the first award;

then the most positive proof that the parties were in difference about it before the first case was launched, will not affect the arbitrator's jurisdiction.

In the present case, whether the contract was one or several, there is no room for doubt that the three cases were distinct disputes about separate instalments. The shipping instructions are separate; the correspondence throughout is kept entirely separate on both sides; separate difference rates are claimed, separate difference bills delivered. Though under the same contract, they are in no way mixed up: the course of business requires that they should not be: buyer and seller as to each consignment being links in a chain which stretches between mill and shipper—for all they know, links in a different chain as to each different consignment.

Having gone through the parties' statements in writing before the Tribunal, and the exhibits submitted, I think the cases were very different in many ways. Each is a story with complications of its own: though the general nature and some important facts are the same in all. Whether on a true view of the parties' rights the cases, stripped of all irrelevance, would become more similar or more divergent, is a question. It may even be that one short answer would decide them all. But the parties' own views are what constitute the dispute, and have in this case constituted three disputes.

For these reasons, apart altogether from any custom not admitted by the seller, I think he fails upon the merits, and I prefer to decide upon that ground. I think he has no equity and no grievance, and that his effort to impugn the arbitrator's jurisdiction comes to nothing. I find against him on the third issue, and his other difficulties need not be discussed.

I sustain the objection taken by Sir Benode Mitter at the conclusion of the plaintiffs' case. I hold that there is no case to answer, and I dismiss the action with costs.

#### Issues.

(a) Has the Chamber of Commerce jurisdiction to adjudicate upon usages pleaded in written statement?



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(b) If so, will this Court interfere by injunction?

(c) Is the question as to what customs prevailed, triable by this Court?

(d) Has the Chamber of Commerce jurisdiction to adjudicate upon the contention of the defendant that the plaintiff has assented to the contract being treated as several separate contracts.

2. Assuming usages pleaded do not exist, will this Court restrain the arbitration?

3. Is the Chamber of Commerce precluded from entertaining the second and third cases by reason of its first award?

4. Is the plaintiff by his conduct precluded from questioning the jurisdiction of the Chamber?

5. Do the usages pleaded in fact exist?

*Action dismissed.*

### MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 493 OF 1918.

April 14, 1920.

*Present:*—Justice Sir William Aylmer Kt., and Mr. Justice Krishnan.

ASIA BIVI AND OTHERS—PLAINTIFFS—  
APPELLANTS

*versus*

SEBU MOHAMED ROWTHER AND OTHERS  
—DEFENDANTS NOS. 2 TO 9 AND

HUSBAND OF PLAINTIFF NO. 3—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 13, O. IX, rr. 8, 9, effect of, as *res judicata*—Declaration, suit for, dismissal of—Possession, suit for, whether maintainable—Cause of action.

Where a suit is dismissed for default under rule 8 of Order IX of the Civil Procedure Code, rule 9 of that Order has not the effect of *res judicata* on a subsequent suit, because there was no adjudication on any of the issues in the former suit; the rule merely bars a second suit on the same cause of action. [p. 201, col. 2; p. 202, col. 1.]

Where a suit for a declaration that an alienation in favour of the defendant was invalid was dismissed for default and the plaintiff subsequently brought a suit for partition and separate possession of his share:

*Held*, that the causes of action for the two suits were different though the title alleged was the same

and the second suit was not barred by reason of the dismissal of the first suit under Order IX, rule 9, Civil Procedure Code. [p. 203, col. 2.]

*Naganada Iyer v. Krishnamurthi Aiyar*, 6 Ind. Cas. 233; 24 M. 97; (1910) M. W. N. 212; 8 M. L. T. 60; 20 M. L. J. 535, distinguished.

Second appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in Appeal Suit No. 1 of 1917, preferred against the decree of the Court of the District Munsif, Tinnevely, in Original Suit No. 166 of 1915.

FACTS appear from the judgment.

The Hon'ble Mr. T. R. Ramachandra Aiyar, (with him Mr. T. R. Krishnaswamy Aiyar), for the Appellants.—The lower Court erred in holding that the dismissal of Original Suit No. 434 of 1913 for default barred the present suit. A dismissal under Order IX, rule 9 does not operate as *res judicata*. It only declares that a second suit on the same cause of action is not maintainable. *Ohand Kour v. Partab Singh* (1).

The first suit was for a declaration that the sale by the plaintiff's mother, the first defendant, to second defendant and mortgage by second defendant to ninth defendant were all invalid. Plaintiff alleged joint possession with the defendants. There the cause of action was to remove the cloud on the plaintiff's title. In the present suit plaintiff asks for partition and separate possession. Here the plaintiff wants to separate. The causes of action are distinct. See *Siliman Sahib v. Bontali Haman Sahib* (2), *Giribala Dosi v. Nitya Lal Sinha* (3) and *Ramaswami Aiyar v. Vythintha Aiyar* (4).

Mr. K. Bashyam Aiyangar (with him Messrs. N. Kunittaptham Aiyar and N. A. Krishna Aiyar), for the Respondents relied on *Naganada Iyer v. Krishnamurthi Aiyar* (5).

### JUDGMENT.

KRISHNAN, J.—The plaintiffs are the appellants before us. Their suit has been dismissed by the lower Courts *in limine*, without being tried on the merits, on the ground that it is barred by Order IX, rule 9, of the Civil Procedure Code, by reason of the order in the prior suit, Civil Suit No. 494 of 1913, brought by them against practically

(1) 16 C. 98; 15 I. A. 156; 5 Sar. P. C. J. 243; 12 Ind. Jur. 33; 1 Ind. Dec. (N. S.) 65.

(2) 20 Ind. Cas. 418; 35 M. 247; (1913) M. W. N. 554; 25 M. L. J. 125.

(3) 41 Ind. Cas. 105.

(4) 26 M. 760; 13 M. L. J. 448.

(5) 6 Ind. Cas. 233; 34 M. 97; (1910) M. W. N. 21; 8 M. L. T. 60; 20 M. L. J. 535.

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the same defendants, regarding the same properties, dismissing it for default under rule 8. The lower Courts have held that the cause of action for the two suits is one and the same. The learned Vakil for the appellants contends that they were wrong in so holding.

In considering the applicability of rule 9, it must be carefully kept in view that it has not the effect of *res judicata*, for there is no adjudication on any of these issues in the first case. This is pointed out by the Privy Council in *Ohand Kour v. Partib Singh* (1). The rule merely bars a second suit on the same cause of action. In that case their Lordships observe: "The cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour." Applying this view, they held that the dismissal for default of a prior suit by the reversioners, for a declaration and injunction restraining the widow from alienating her husband's properties was no bar to a subsequent suit by them to declare a gift made by the widow after the disposal of the first suit was not valid against them. The ground of claim in one suit was the intention of the widow to alienate and in the other suit a completed alienation by her.

To decide the question before us we have, therefore, to examine the allegations in the two plaints, in Civil Suit No. 494 of 1913, and in the present suit, to see if the two suits are based on the same cause of action. In the first suit, plaintiffs claimed title to a fractional share in the plaint properties as the heirs under Muhammadan Law of their deceased father, Sheikh Meera Rowther. They stated that their mother had illegally sold their share to their brother, the second defendant, who had subsequently mortgaged the whole property to the ninth defendant and that he had brought a suit and obtained a decree for sale of the mortgaged properties. They contended that the sale was invalid against them, as their mother had no authority to act as their guardian, under the Muhammadan Law and deal with their properties and that, even if she

had, the sale was vitiated by fraud and other grounds stated. Alleging themselves to be in joint-enjoyment of the properties with their co sharers, they sued for a declaration of their title and for an injunction restraining the ninth defendant from executing his decree. That was the suit that was dismissed for default. In the present suit they, no doubt, allege the same title and the same reasons for treating as invalid against them the sale, the mortgage and the decree as well as the subsequent Court auction-sale and purchase in execution of that decree, which took place since the dismissal of the first suit. But they also aver they are no longer willing to remain joint with their co sharers and pray that the properties may be divided by metes and bounds and separate possession of their share may be given to them. The first suit was for a declaration to remove a cloud on their title and the second one for partition and separate possession of the lands falling to their share.

The relief as asked for has, no doubt, no direct bearing on the cause of action, but where reliefs claimed are different, the causes of action are generally found to be different. It seems to me the cause of action in the first suit is not the same as the cause of action in the second suit, though the title alleged is the same in both. Title is only a part of the cause of action. The ground of claim alleged in the first suit is the alienation by the mother and the subsequent dealings by the alienee and his transferee with the properties; whereas, in the second suit, there is super added the intention of the plaintiff not to continue any longer in joint possession with their co-sharers and the refusal or the failure of the latter to divide and give them separate and exclusive possession of the part of the properties representing their share. Till the plaintiffs exercised their volition and decided to separate and the defendants refused or neglected to give them their share, a cause of action could not be said to have arisen for the partition suit. That being so, it seems to me the causes of action for the two suits are different though they overlap to some extent.

It has been held, both here and in Calcutta, that the cause of action for a suit for a declaration of title to property is necessarily different from the cause of action for the suit for possession, as the former requires

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an allegation of possession with the plaintiff or that the plaintiff is not entitled to possession; whereas the latter is based on the allegation of possession being with the defendant. See *Giribala Das v. Nitya Lal Sinha* (3) and *Siliman Sahib v. Bontala Human Sahib* (2). The first case arose with reference to Order IX, rule 9 itself and though the second case had no reference to that rule, it discusses the meaning of the expression "cause of action" in Order II, rule 2 and we must, I think, adopt the same meaning for the expression in both rules. Reference may also be made to *Ramaswami Ayyar v. Vythinatha Aiyar* (4), where there is a full discussion of the meaning of that phrase. It seems to me that a suit for partition and delivery of exclusive possession of part of the property, which was before in joint possession stands on the same footing as a suit for possession of the whole property, as regards the difference between it and the suit for a declaration of title. The cause of action in each case is different.

The learned Vakil for the respondent, however, relied on the case of *Naganada Iyer v. Krishnamurthi Aiyar* (5), as opposed to this view. But I think that case is clearly distinguishable. In that case, it is pointed out that the plaintiff in the first suit alluded to the Government order under which plaintiff was dispossessed, and admitted that defendant had entered upon the land but nevertheless the plaintiff sued for a declaration and injunction only as if he was still in possession (see pages 102 and 103)\*, and that the second suit was based on the same grounds, nothing further having happened in the interval and that the only difference between the two suits was that the latter asked for possession while the former asked for a declaration and injunction only. It was on this view of the facts that the learned Judges held that the second suit was barred by Order IX, rule 9. I express no opinion regarding their view of the case before them; for it does not apply here. They held that the addition of a prayer for possession, the cause of action for which had already accrued prior to the first suit and which was actually disclosed in the plaint, did not remove the bar created by Order IX, rule 9. In the present case there is nothing to indicate that the plaintiff's cause of ac-

tion for partition and separate possession on which they now sue had arisen prior to their first suit.

It was further argued that the cause of action against the ninth defendant was different from the cause of action against the other defendants who are co-sharers with the plaintiffs and that, so far as he was concerned, the cause of action in the two suits was the same. It is doubtful whether, under rule 9, the causes of action against different defendants in the same suit can be considered separately at all. Assuming that it can be, it is clear that the sale and purchase in Court-auction which took place subsequent to the first suit gave the plaintiffs a fresh cause of action to have them declared invalid against them. The dismissal of the previous suit not having the force of *res judicata* is not tantamount to declaring the mortgage and decree to be valid and binding transactions. Their validity can be attacked in the present suit. Even as against the ninth defendant separately this suit is, thus, not barred by rule 9.

In these circumstances, I have come to the conclusion that the lower Courts were wrong in dismissing the plaintiff's suit as barred by rule 9. I would, therefore, set aside their decrees and remand the case to the District Munsif for trial on the merits. Plaintiffs must have their costs in this and the lower Appellate Courts from the ninth defendant, and there will be an order for refund of Court-fees paid by them in those Courts.

AYLING, J.—I agree.

M. C. P.

*Appeal allowed.*

\*Pages of 34 M.—[Ed.]



HEM CHANDRA CHOWDHURY v. CHANDRA MOHAN NAMODAS.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS Nos. 215 AND 253  
OF 1919.

JUNE 29, 1920.

Present :—Justice Sir N. R. Chatterjee, Kt.,  
and Mr. Justice Newbould.

HEM CHANDRA CHOWDHURY—

DECREE-HOLDER—APPELLANT IN BOTH

versus

IN No. 216 1919

CHANDRA MOHAN NAMODAS AND  
OTHERS—JUDGMENT DEBTORS—RESPONDENTS

IN No. 253 OF 1919

SHEIK HEM—RESPONDENT.

*Bengal Tenancy Act (VIII of 1885), as amended by Eastern Bengal and Assam Tenancy Amendment Act (I of 1904), s. 147-A—Decree passed without compliance with provisions of section, whether can be objected to, in execution proceedings. Compromise decree in rent suit—Tenant taking settlement of additional lands and agreeing to pay rent for the entire land—Decree, validity of, whether can be questioned in execution proceedings.*

Under the terms of a compromise arrived at in a suit for rent the defendant took some additional lands and a certain rent was fixed for the entire land (original area and the additional land). The Court in decreeing the suit upon the compromise did not comply with the provisions of section 147-A of the Eastern Bengal and Assam Tenancy Act:

*Held*, that the objection to the validity of the decree on the ground of non-compliance with the provisions of section 147-A of the Eastern Bengal and Assam Tenancy Act could not be entertained in execution proceedings [p. 205, col. 1.]

*Sarjug Saran Lal v. Dukhit Mahto*, 18 Ind. Cas. 809; 17 C. W. N. 496, distinguished.

The validity of a decree cannot be questioned in proceedings in execution thereof, even though the Court in passing the decree has contravened some provision of the law. [p. 205, col. 1.]

Appeals against the orders of the Subordinate Judge, Mymensingh, dated the 29th of April 1919, affirming the orders of the Additional Munsif, 1st Court, at Iewarganj, dated the 20th of February 1919.

Babue Jogesh Chandra Roy and Ramoni Mohan Chatterjee, for the Appellant.

JUDGMENT.—This appeal arises out of proceedings in execution of a decree for rent.

It appears that the plaintiff decree holder claimed rent (in the suit) at the rate of Rs. 22 while the tenant pleaded that the rent of the holding was Rs. 13. The parties then settled the case; the defendants took some additional lands, and for the entire land (the original area and the additional land) the rent was fixed at Rs. 22 per year. A decree was passed upon the compromise, but the Court did not comply with the provisions

of section 147-A of the Eastern Bengal and Assam Tenancy Act.

The decree-holder having applied for the execution of the decree, the judgment-debtor raised objection to the execution on the ground that the provisions of section 147-A not having been complied with, the decree was incapable of execution. The decree-holder has appealed to this Court.

The Court below relied upon the case of *Sarjug Saran Lal v. Dukhit Mahto* (1) in support of the view taken by it. That case lays down that the decree for rent passed in accordance with a compromise in contravention of the provisions of section 147-A of the Bengal Tenancy Act, i. e., without recording evidence to show what the amount of rent was before the dispute arose, is made without jurisdiction, and the tenant is not bound to have it set aside.

It is contended on behalf of the appellant, first, that the non-compliance with the provisions of section 147-A (clause 3) does not render the decree a nullity though a decree passed in contravention of the section may be set aside by proper proceedings being taken in that behalf; and secondly, that the present case is distinguishable from the case reported in *Sarjug Saran Lal v. Dukhit Mahto* (1).

The question whether a non compliance with a particular provision of the law constitutes an irregularity, or renders an order a nullity, has been considered in the recent Full Bench decision in the case of *Hridayanath Roy v. Ram Chandra Barua* (2). It is unnecessary, however, to discuss how far (if any) the principle laid down by the Full Bench affects the decision in the case of *Sarjug Saran Lal v. Dukhit Mahto* (1), because we think that the present case is distinguishable from that case. In the first place, the compromise in that case settled the rent payable for the land held by the tenant, and the Court did not consider the question whether the effect of the compromise would be to enhance the rent in a manner or to an extent not allowed by section 29 in the case of a contract. In the present case, the compromise fixed the rent of the land originally held, together with the additional land which the tenant was to hold under the compromise. It could not be said that there was an enhancement of the rent previously paid by

(1) 18 Ind. Cas. 809, 17 C. W. N. 496.

(2) 58 Ind. Cas. 806; 24 C. W. N. 723; 31 C. L. J. 482.

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the tenant when the holding in respect of which the rent was settled by the compromise, comprised additional lands. Although the Eastern Bengal and Assam Tenancy Act lays down (and the provision is similar to that contained in the Bengal Tenancy Act) that the Court shall not pass a decree in accordance with the compromise unless it is satisfied for reasons to be recorded in writing that the terms of the agreement or compromise are such that, if embodied in a contract they could be enforced under the Act, the compromise in the present case, as stated above, fixed the rent of the lands originally held together with some additional lands. In the next place, that case was one under the Bengal Tenancy Act, section 147-A, sub-section (3) of which provides that the Court shall record evidence in order to ascertain whether the effect of the compromise would be to enhance the rent in contravention of the provisions of section 29 of the Act whereas the present case is governed by the Eastern Bengal and Assam Tenancy Act which does not contain any provision for recording evidence. Lastly, the objection to the validity of the decree has been raised in the present case in execution of the decree. In the case of *Kalipada Sirkar v. Harimohan Dalal* (3) it was held that the Court executing the decree must take the decree as it stands and has no power to go behind the decree or entertain an objection to the legality or correctness of the decree. In that case the decree was passed against a lunatic who was not represented in the suit by a legal guardian and although a Court is not competent to make an operative decree against a person not a party to the suit or properly represented on the record, it was held that such a decree cannot be impeached in execution, but should be annulled or reversed in some direct proceeding taken for that purpose.

For all these reasons, we think that the present case may be distinguished from the case reported as *Saryug Saran Lal v. Dukhit Mahto* (1), and that the objection raised to the validity of the decree cannot be entertained in execution proceedings. The result is that the orders of the Court

(3) 85 Ind. Cas. 856; 44 C. 627; 24 C. L. J. 375; 21 C. W. N. 1104.

below are set aside, and the case sent back to the Court of first instance in order that execution proceedings may be carried on. We make no order as to costs.

This judgment will govern the other case (Appeal from Order No. 253 of 1919).

*Orders set aside.*

## MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 34 OF 1919.

March 26, 1920.

Present :—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Krishnan.

THE OFFICIAL ASSIGNEE OF MADRAS—  
APPELLANT

versus

G. SAMBANDA MUDALIAR—  
RESPONDENT.

*Presidency Towns Insolvency Act (III of 1909), s. 55*  
*Provincial Insolvency Act (III of 1907), s. 36—Insolvent, mortgage by, within two years of insolvency—Good faith—Consideration—Burden of proof—Official Assignee, application by, to expunge admission of proof, effect of—Consideration, portion of, proved—Procedure,*

Where a mortgagee seeks to enforce a mortgage executed by a person within two years of his insolvency, the onus, under section 55 of the Presidency Towns Insolvency Act and section 36 of the Provincial Insolvency Act rests upon the mortgagee to show that the transaction was executed in good faith and for consideration. The fact that the Official Assignee has moved to expunge proof of the mortgage which he had admitted under section 36 of the Second Schedule to the Presidency Towns Insolvency Act, does not alter the onus of proof, as such admission is in no sense an adjudication. [p. 206, cols. 1 & 2.]

Where a portion only of the mortgage consideration is found to have been advanced, the proper order is to set aside the mortgage *in toto* and treat the mortgagee as an unsecured creditor for the amount advanced by him. [p. 208, col. 1.]

An appeal from the judgment and the order of Mr. Justice Coutts-Trotter, dated the 19th March 1919, passed in the exercise of the Insolvency Jurisdiction of this Court, in Insolvency Petition No. 153 of 1916.

Mr. V. Varadaraja Mudaliar, for the Appellant.

Mr. S. G. Sadogopa Mudaliar, for the Respondent.

## JUDGMENT.

WALLIS, C. J.—This is an appeal from the judgment of the Hon'ble Mr. Justice Coutts-Trotter dismissing an application of the Official Assignee to expunge the proof of one Sambanda Mudaliar as a secured creditor on a mortgage alleged to have been executed in June 1916.

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This case has brought to the notice of the Court, not for the first time, the existence in this City of dangerous gangs who take advantage of the fact that the Indian Majority Act enables young men to dispose of their property before they have sufficient sense to manage it and get them to execute conveyances for little or no consideration and thus strip them of their possessions. I am not unaware of the considerations which actuated the Legislature in fixing the age of 18 as the age of majority, but I hope that this matter may receive re-consideration in the near future with the object of stopping scandals such as have come to light in this Court in this case and in other recent cases.

In this case the insolvent, who came of age in 1916 by August of that year had been stripped of all his property and found himself in the Insolvency Court, where his brother had preceded him, and in this case also we have had before us the case of another young man, named Kappuswami, who in a brief career which came to an untimely end made away with the estate which his father had acquired in the well-known firm of Messrs. Thompson and Co, in this City. The learned Judge in another suit has already set aside two mortgages which were obtained by another gang from this insolvent and that decision has been confirmed on appeal; and the reason why a different fate attended the present application appears to be that, as stated by the learned Judge in his judgment, the proceedings before him were conducted upon the footing that the onus was admittedly on the Official Assignee. I do not know how that view came to be taken. In law, a mortgagee setting up a mortgage executed within two years of the insolvency has the onus cast on him under section 55 of this Act, and section 30 of the Provincial Insolvency Act, to show that the transaction was one executed in good faith and for consideration. That has been repeatedly held as regards section 36 and it has also been held as regards section 55, the language of which is identical, by Sir Arnold White, C. J., in *Official Assignee of Madras v. Annapurnammal* (1), and in another Calcutta case. In this case the burden is, if anything, stronger because we have a mortgage at the usurious rate of 24 per cent. by

a young man who has just come of age and who was squandering his property in dissolute courses. I do not know if it was supposed that the fact that the Official Assignee was moving to expunge a proof which he had admitted under section 36 of the Second Schedule to the Act altered the onus of proof; but I think it is clear that it has no such effect. An admission of proof by the Official Assignee, is, in no sense, an adjudication and it is open to him, if he thinks that the proof was improperly admitted, to have an adjudication by Court on notice. It is also open to the other creditors, if they are not satisfied with the admission, similarly to obtain an adjudication, and in that adjudication the matter has to be decided with reference to the ordinary legal presumptions which arise. Possibly, the fact that the insolvent in his examination, Exhibit K 1, in April 1917, told the Official Assignee: "I got the money Rs. 4,000, and odd. It was in rupees and notes I have spent it on drinking and women" may have influenced the view that the onus was on the Official Assignee. The difficulties of these cases are illustrated by the fact that the insolvent made the statement to the Official Assignee, under what inducement we know not, because his explanation that he was drunk when he made it is absurd. However, it is nobody's case that, on the execution of this mortgage, the insolvent was paid Rs. 4,000 in rupees and notes and that circumstance cannot affect the burden. I attach considerable importance to this question of burden of proof because, from the learned Judge's judgment, I think that, if the burden that was placed on the Official Assignee had not been placed on him, he would have arrived at exactly the same conclusion at which we have arrived.

[His Lordship here discusses the evidence as to the consideration, etc., for the mortgage — *Ed.*]

On the whole, I have no hesitation in coming to the conclusion that the mortgagee has failed to discharge the onus that was on him of showing that the transaction was entered into in good faith and for consideration. All that is shown is that a payment of Rs. 340 was admittedly made about the time of the execution of that mortgage. But the Statute says that a mortgage of this kind, if executed without consideration,

(1) 20 Ind. Cas. 901; 14 M. L. T. 150.



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is void. Even as to this Rs. 340, as was held by the late Chief Justice in another case, the proper course is to set aside the whole mortgage and allow the mortgagee to prove as an unsecured creditor for Rs. 340.

I have not dealt with the oral evidence of the insolvent and the widow, Meenakshi Ammal, though it supports the conclusions at which I have arrived because it is obviously unreliable. It is, however, strongly corroborated by the evidence to which I have referred which is in itself sufficient to support the conclusions at which I have arrived.

The appeal is allowed, except as to Rs. 340 with costs both here and below on the Original Side scale.

Certify for two Counsel.

KRISHNAN, J.—This is an appeal from the order of Coutts-Trotter, J., dismissing a petition of the Official Assignee in the matter of the insolvency of a young man, named Devarajulu, praying for the annulment of a mortgage executed by him to one Sambanda Mudaliar, under section 55 of the Presidency Towns Insolvency Act. That section provides that a transfer of property made by a person who is adjudged an insolvent within two years from the date of the transfer shall be void against the Official Assignee and may be annulled by the Court unless the transfer was made before and in consideration of marriage, or was made in favour of a purchaser or incumbrancer in good faith and for valuable consideration. It has been held, with reference to section 36 of the Provincial Insolvency Act, which is worded exactly and similarly as section 55, that if the transfer is shown to be within two years of the insolvency the burden is on the transferee to prove that he comes within the exception by showing good faith and valuable consideration. See *Nilmoni Chowdhuri v. Basanta Kumar Banerjee* (2). This view was approved of in *Anantarama Aiyar v. Yussufi Omer Sahib* (3) and in *Official Assignee of Madras v. Annapurnammal* (1) White, C.J., assumed that the onus was on the transferor in a case under section 55 itself though he did not expressly decide it. The manner in which the section is worded making an ex-

ception in favour of *bona fide* encumbrancers for valuable consideration, clearly throws the onus on the person who alleged that he is within the exception. No case has been cited to us to the contrary, but it was urged in the present case the onus was on, or had been shifted on to, the Official Assignee as at an earlier stage of these insolvency proceedings he had accepted the proof of the mortgage and admitted his claim. I do not think this contention tenable. The Official Assignee's action was based on what he was then led to believe were the real facts of the case by the mortgagee but now he states that he has been shown reason to think that he was wrong in this view and he has applied to the Court to annul the mortgage under section 55. The way in which the Court has to deal with the matter when it comes before it depends entirely on the wording of the section and it is not affected by anything the Official Assignee might have done previously. What the Official Assignee did here was merely to come to a conclusion on the evidence placed before him by the mortgagee, that cannot be treated as an admission against him, or against the body of creditors whom he represents. It follows that the onus is still on Sambanda Mudaliar and has not been shifted.

There is a further reason why, in the present case, the onus should be placed on him to prove consideration for his document. The mortgagor is a young man who had come into property on his father's death and who had just attained his majority. It is clear from his schedule that he was borrowing recklessly. With reference to another mortgage executed by this very youth about the time that the mortgage in question here was executed we recently held, following the ruling in *Moti Gulabchand v. Mahomed Mehdi Tharia Topan* (4), that the burden was shifted on to the mortgagee to prove consideration: See Original Side Appeal Nos. 26 and 43 of 1919. The petition is the same in this case and, therefore, the onus is, in my opinion, on Sambanda Mudaliar, for both the above reasons, to prove the good faith and the consideration for his mortgage before me can uphold it.

[His Lordship here discusses the evi-

(2) 29 Ind. Cas. 814; 19 C. W. N. 865.

(3) 86 Ind. Cas. 903; 31 M. L. J. 133; (1916) 2 M. W. N. 236.

(4) 20 B. 367; 10 Ind. Dec. (N. S.) 807.

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dense as to consideration, etc., for the mortgage.—*Ed.*]

Finding, then, that the mortgagee has failed to prove that his mortgage was made in good faith and for proper consideration, it must be annulled under section 55 of the Act. But, as it is admitted that the mortgagee paid Rs. 340 to Devarajulu, he must be allowed to claim Rs. 340 from the insolvent's estate. The proper order in such a case seems to be, as held by White, C. J. in *Official Assignee of Madras v. Annappurnammal* (1), to set aside the mortgage *in toto* and treat the mortgagee as an unsecured creditor for the amount advanced by him.

I would, therefore, allow the appeal and annul the mortgage, Exhibit H., and direct Sambanda Mudaliar's name to be retained in the schedule as an unsecured creditor for Rs. 340. He must pay the Official Assignee's costs in this appeal and in the first Court. We certify for two Counsel in the lower Court: costs on Original Side scale.

M. C. P.

*Appeal allowed.*

## ODDH JUDICIAL COMMISSIONER'S COURT.

PRIVY COUNCIL APPEAL NO. 11 OF 1920.  
July 8, 1920.

*Present* :—Mr. Lindsay, J. O., and Mr. Wazir Hasan, A. J. C.

SRI KRISHNA DAS AND ANOTHER—  
DEFENDANTS—APPLICANTS

*versus*

THE BENARES HINDU UNIVERSITY—  
PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V 1908), s. 109—Final order, what is—Order deciding competency of person to apply for Probate, whether final.*

An order is final within the meaning of section 109 of the Civil Procedure Code if it finally disposes of the rights of the parties. [p. 209, col. 1.]

An order which merely decides that an incorporated body is a juridical person legally competent to discharge the functions of an executor and as such to apply for Probate, but which leaves outstanding

the question whether, being competent to apply, it is entitled to grant of Probate is not a final order within the meaning of section 109 of the Civil Procedure Code. [p. 209, col. 1.]

Mr. Bisheshwar Nath Srivastava, for the Applicants.

The Hon'ble Mr. Gokaran Nath Misra, for the Opposite Party.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council against an order of a Bench of this Court passed on the 9th April 1920.

The facts are as follows:—

An application on behalf of the Benares Hindu University was made to the District Judge of Lucknow for grant of Probate of the Will of one Sah Bindraban Das who died on the 13th June 1919.

This gentleman made a Will on the 11th November 1913 in which he appointed as his executor a Society known as the Hindu University Society, a body which was registered under Act XXI of 1860. The Will provided that, in the event of this Society becoming absorbed in the Benares Hindu University, the latter body was to act as executor.

The University was incorporated under an Act of the Legislature (Act XVI of 1915) and it is admitted that it assumed all the function exercised by the Hindu University Society.

When the application for Probate was made on behalf of the University, it was opposed by a nephew of the testator one Sri Kishen Das, and his mother *Musammât Santo Bibi*, on the ground that the University was not legally competent under its constitution to act as executor and to maintain an application for Probate of the Will.

The District Judge decided in favour of the objectors, and dismissed the application without calling for proof of the due execution of the Will.

This Court, by its order of the 9th April 1920, overruled the District Judge's decision and held that the University was entitled to act as executor and to apply for Probate.

The preliminary point having been thus decided in favour of the University the case was sent back to the District Judge for trial and decision on the merits. We have now to decide whether the order of this Court is one in respect of which leave

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can be granted to appeal to His Majesty in Council.

If the order of this Court is a "final order" within the meaning of section 109 of the Code of Civil Procedure, the leave must admittedly be given; if it is not final; the application must be refused.

The question of what constitutes a final order for the purpose of appeal to the Privy Council is one which has been the subject of much judicial discussion and it is apparent from the decisions which have been cited to us, and from others to which we have ourselves referred, that there has been considerable difference of opinion as to the nature of the test by which the finality of an order is to be determined. It is not necessary for us to examine these decisions, most of which are referred to in a case of this Court reported as *Hyder Mehli v. Balshah Khanam* (1).

We have before us a recent decision of their Lordships of the Privy Council reported as *Ramchand Manjimal v. Govardandas Vishindas Ratanchand* (2) in which judgment was delivered on the 17th February last by Viscount Cave. It was there laid down that an order is final if it finally disposes of the rights of the parties.

Applying this definition to the case before us, we are of opinion that the order of this Court is not a final order. All that has been decided is that the Benares Hindu University is a juridical person legally competent to discharge the functions of an executor and as such to apply for Probate. There still remains outstanding the question whether, being competent to apply, the University is entitled to grant of Probate. Before that question can be decided, the University must prove the facts which establish its right to have the grant and no such proof has yet been given.

The order of this Court by which the case has been sent back for the determination of this question does not finally dispose of the rights of the parties and is consequently not a final order.

This application is accordingly refused with costs.

*Application refused.*

(1) 49 Ind. Cas. 520; 6 O. L. J. 70; 21 O. C. 336.

(2) 56 Ind. Cas. 802; 18 A. L. J. 591; 24 O. W. N. 721; 12 L. W. 15; 22 Bom. L. R. 606; 39 M. L. J. 27; 2 U. P. L. R. (P. C.) 94; (1920) M. W. N. 407; 28 M. L. T. 87; 47 I. A. 124; 47 C. 918; 14 S. L. R. 191.

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1056 of 1919.

March 25, 1920.

*Present:*—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

THAIKKANDHI POKKANCHERI AND OTHERS—DEFENDANTS NOS. 1, 3, 4 AND 5—APPELLANTS

*versus*

ILLIVATHUKKAL ACHUTTAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Malabar custom—Tiyas of South Malabar—Females, right of, to reside in family house after marriage—Law applicable.*

There is no custom among the *Tiyas* of South Malabar, whereby a female after marriage is entitled as of right to live in her parent's family house. [p. 210, col. 1.]

A person who admittedly belongs to the Hindu community and is domiciled in Southern India is ordinarily governed by the Hindu Law of the *Shastras* as expounded by the Southern Commentators. [p. 210, col. 1.]

Second appeal against the decree of the District Court, South Malabar, in Appeal Suit No. 238 of 1918, preferred against the decree of the Court of the Additional District Munsif, Calicut, in Original Suit No. 170 of 1916.

FACTS appear from the judgment.

Mr. K. P. M. Menon, for the Appellant:—The appellant, who is a *Tiya* woman, is entitled to joint possession of the house with first plaintiff, her brother's son. She is not governed by the ordinary Hindu Law, but by the special custom in Malabar. The existence of the custom has been proved by witnesses who are characterized in the judgment of the Trial Court as "honest".

Mr. O. Madhavan Nair, for the Respondents:—The custom has not been proved. The evidence of most of the witnesses reduces itself to a question of opinion and proves not a legally binding custom but a kind of convention, devoid of binding force. The fact that a *Tiya* woman's property is inherited by her husband and her funerals performed by him and his relations shows that she has no connection with her parents after marriage. The presumption applies that she is governed by the ordinary Hindu Law of Southern India which negatives the right. The onus of proof is on appellant to show that she is governed by a special law or custom



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varying or derogating from the ordinary Hindu Law.

### JUDGMENT.

SADAIVA AIYAR, J.—Defendants Nos 1, 3 and 5 are the appellants before us. The case was argued only on behalf of the first appellant (first defendant). On the date of suit she was a married woman whose husband was alive. The house in dispute belonged to her brother whose son is the minor first plaintiff. The house was inherited by the first plaintiff's father from the father of himself and of the first defendant. Practically, the only question in this case is that raised by the 7th issue, namely, "whether, under the customary law obtaining among the parties, first defendant has a right to be in joint possession of the house and moveables, i. e., jointly with her brother's minor son, the first plaintiff."

I think it must be taken as settled law that a person who admittedly belongs to the Hindu community and is domiciled in Southern India is ordinarily governed by the Hindu Law of the Shastras as expounded by the Southern Commentators. Of course, where there are very wide and well known exceptions, as in the case of the Nair community in Malabar, such ordinary Hindu Law does not apply but the well-known Marumakkathayam system of law. But as I said we do start with the presumption that the general prevailing law of the Mitakshara applies to every Hindu. I do not think that there are any such observations in *Rurichan v. Terachi* (1), as can be treated as casting doubt on this *prima facie* presumption. On the other hand, the case in *Kunhi Pennu v. Chiruda* (2), and the judgment in Second Appeal No. 518 of 1901 decided by Benson and Moore, JJ., support the existence of that legal presumption. In the judgment in the latter case the learned Judges say, "where the nephew's widow of the last male owner claimed to exclude the ordinary heir of the Hindu Law, namely, the daughter of the last owner, her claim", that is, the claim of the nephew's widow, "is not in accordance with the ordinary Hindu Law and she has not proved any special custom in her favour."

That being so, if a married daughter claims a right of residence in her father's house even after her marriage, and especially where her husband is alive, the burden of proof lies upon her to show that there is a special custom varying the ordinary Hindu Law on which she could rely in support of her alleged right.

As regards the evidence given in the present case of that custom, of the six witnesses examined by the first defendant the evidence of the 6th witness is not relied upon by the lower Courts. It may be taken that both the Courts held that the other five witnesses were honest witnesses. I do not think that in second appeal we are entitled to question the opinion of the lower Appellate Court as regards the honesty of any particular witnesses. Taking it, then, that all these five witnesses are honest witnesses, we have to see whether the alleged custom has been sufficiently proved. As pointed out by Mr. Madhavan Nair for the respondent, there are certain statements of the 4th and 5th witnesses which indicate that, though they may be honest witnesses, their evidence should not be given much weight. As regards the other three witnesses, their evidence is only their opinion as to the existence of such a custom; such opinion evidence is, no doubt, some evidence on the question of custom but when it was put to the test to which such evidence should be subjected, as pointed out in *Lachman Rai v. Akbar Khan* (3), it is seen to be of little value unless the evidence establishes that the claim in dispute can be put forward as one which the community recognises as enforceable by law; it may amount to no more than that such a claim is a moral claim recognised by practice or convention and honoured by respectable people among the community. I think the learned District Judge has given very good reasons in paragraphs 7 to 9 of his judgment for his conclusion that no such legal custom as has been put forward by the first defendant has been proved in this case.

That a married woman after marriage is called by the family name of her husband, that her funerals are performed

(1) 15 M. 281; 5 Ind. Dec. (N. S.) 547.  
(2) 19 M. 447; 2 Ind. Dec. (N. S.) 1012.

(3) 1 A. 440; 2 Ind. Jur. 216; 1 Ind. Dec. (N. S.) 27.

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by her husband and his relations, that her property is inherited by her husband and his relations; all these make it improbable that the custom, namely, that of right she is entitled to reside in her parent's family house even after her marriage exists among this community. Without judicial precedents and without at least a few cases where a married woman was attempted to be deprived of her alleged right and was able to enforce it by the decisions of mediators or arbitrators or by the admission of her father or his relations, it is very difficult to find the existence of such a custom on the bare opinion of a few witnesses. The admitted fact that an alienage from her father or brother can defeat her so called right of residence shows that the right is not a legal right as in the case of widows in undivided families governed by the ordinary Hindu Law or in the case of unmarried daughters. I, therefore, agree with the lower Appellate Court and would dismiss the second appeal with costs.

SPENCER, J.—I agree that this second appeal should be dismissed with costs. In *Rarichan v. Perachi* (1) the learned Judges observe: "The word 'Makkathayam' is generally used in Malabar to denote the succession of sons in contradistinction to Marumakkathayam or succession of nephew." After the findings were returned they went on to say: "The evidence is to the effect that the Tiyas of Malabar are not governed by Hindu Law pure and simple, but that their usages with regard to divorce, re-marriage and inheritance are not entirely in accordance with Hindu Law, though the succession of sons does obtain among them." In Second Appeal No 512 of 1911 Benson and Moore, J.J., applied the ordinary Hindu Law to a case of South Malabar Tiyas following the Makkathayam Law and they required the widow of a nephew to establish a special custom among the community in her favour before she could be allowed to prevail over the rights of a daughter of the last full owner.

If the general principles of Hindu Law are applied and if succession of sons obtains among these Tiyas, the onus must fall on the first defendant, a sister of the last male owner, to prove her superior title to succeed against a son of the last male

owner. In the opinion of the lower Appellate Court she did not discharge that onus.

The learned District Judge found that the defendants adduced no evidence to show that married women belonging to the families of Tiyas in South Malabar following the Makkathayam Law have ever been in the habit of enforcing a right to reside in the house of their parents against the wishes of those parents or their sons. Accepting the correctness of this finding, the second appeal must necessarily fail.

M. C. P.

*Appeal dismissed.*

# COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND CIVIL APPEAL No 31 of 1919-20.

February 14, 1920.

Present:—Mr. Harrison, J. M.

DIP CHAND AND OTHERS—

APPELLANTS

versus

Musmmat TOHFA—RESPONDENT.

*Agra Tenancy Act (II of 1901), s. 14—Widow, when can claim benefit of section.*

In the absence of anything to show that a widow has succeeded directly to her husband's holding, she cannot claim the benefit of section 14 of the Agra Tenancy Act, by counting the period of her husband's occupation towards the acquisition of occupancy rights. (p 212, col 1)

Second appeal from the order of the Commissioner, Meerut Division, dated the 16th of October 1919, in the case of determination of tenure.

JUDGMENT.—This is a Zamindar's second appeal in a suit for determination of tenure in which the Commissioner has held that the respondent, a woman, has acquired occupancy rights in succession to her husband having received certain lands in 1317 *Fasli* in exchange for those formerly held by the husband up to 1316 *Fasli*.

It is urged in the appeal that the woman's tenure was the result of an entirely new contract and cannot be recorded as a continuation of her husband's tenure. Although

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the point was not definitely raised in the grounds of appeal, I put it to the parties that the husband, having died in 1316 *Fasli* and there being nothing to show that the woman has directly succeeded to the husband's former holding, there was strong ground for considering that the land she herself got in 1317 *Fasli* was in fact an entirely new holding. In the particular circumstances, I think that the widow cannot claim the benefit of section 14 of the Tenancy Act. There were subsidiary matters raised in the Courts below the chief of which was that both in 1317 and 1318 *Fasli*, another person, named Isa, was recorded as joint tenant with the woman. The Commissioner has held that this man, Isa, was merely a helper in the cultivation, being a relation of her deceased husband and he regarded the woman as the sole tenant. I agree with that view but, as I have already explained, I do not think that, in the circumstances, the woman is entitled to count the period of her husband's occupation towards the acquisition of occupancy rights. I would, therefore, allow the appeal and set aside the decree of the Commissioner, restoring that of the Assistant Collector, though on different grounds, with costs to the appellant in both Appellate Courts.

*Appeal allowed.*

MADRAS HIGH COURT.  
CIVIL APPEAL NO. 49 OF 1919.  
July 28, 1920.

*Present* :—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Aiyar.  
KRISHNASWAMY NAYAKAR—  
PLAINTIFF—APPELLANT

VERSUS

VEERAPPA NAYAKAR AND OTHERS—  
DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), s. 5—Pauper, application by, for excuse of delay in filing appeal. Order granting application, whether can be re-considered.*

An *ex parte* order granting an application for

excuse of delay in applying for leave to appeal as a pauper, is open to re-consideration at the instance of the party prejudicially affected thereby. [p. 212, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in Original Suit No. 54 of 1917.

Mr. K. Bashyam Aiyangar, for the Appellant.

Messrs. T. R. Venkatarama Sastri, K. S. Sankara Aiyar, T. M. Krishnaswami Aiyar and T. M. Ramasami Aiyar, for the Respondents.

**JUDGMENT.**—A preliminary objection was taken in this appeal as to the right of the respondent to be heard, with reference to an order made by Mr. Justice Spencer sitting in the Admission Court excusing the delay of the appellant in applying for leave to appeal as a pauper. It has been argued before us that, seeing that the appeal was presented within the time prescribed for the filing of appeals, the respondent was not really prejudiced, and other arguments to the same effect were urged before us. We are not prepared to accept this contention. It has been held by the Privy Council in *Krishnasami Panikondar v. Ramasami Ohettiar* (1) that, as regards orders of single Judges excusing the delay in the presentation of an appeal "it must, therefore, in common fairness be regarded as a tacit term of an order like the present that, though unqualified in expression, it should be open to re-consideration at the instance of the party prejudicially affected, and this view is sanctioned by the practice of the Courts in India." There does not appear to be any settled practice to the contrary in the case of applications for excuse of delay in applying for leave to appeal as a pauper and we do not think any difference ought to be made. The Civil Procedure Code regards orders giving leave to sue as a pauper as affecting the other side, because it gives the other side the right to be heard when an application for leave to file a suit as a pauper is made and the effect of Order V, rule 1 is

(1) 43 Ind. Cas. 493; 41 M. 412; 34 M. L. J. 63; 4 P. L. W. 54; 16 A. L. J. 57; 7 L. W. 156; 23 M. L. T. 101; 27 O. L. J. 253; 2 P. L. R. 1918; 22 O. W. N. 491; 21 Bom. L. R. 541; 11 Bur. L. T. 121; (1918) M. W. N. 906; 45 L. A. 25 (P. C.).



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that, when an application for leave to appeal as a pauper is made, and the suit was not prosecuted as a pauper suit originally, then the party has a right to be heard, and similarly under the proviso to Order XLIV, rule 2, where a suit was conducted as a pauper suit, the Court has a discretion to order an enquiry, and that implies that the other side should have an opportunity to bring before the Court such facts as may induce it to direct an enquiry. We do not think it is in accordance with the scheme of the Code, or with the general policy that a matter of this sort should be finally decided without giving the other side an opportunity of being heard. We, therefore, heard Mr. Venkatarama Sastri's objections to leave having been granted in this case his contention being that there is no sufficient ground. The case is rather on the line: but, on the whole, we are not prepared to differ from the conclusion at which Mr. Justice Spencer arrived. The case has now to be disposed of on the merits.

What happened was, this was a suit for partition and notice was given to both parties that it would necessarily be taken up on a certain day, as there was no other business for that day. The plaintiff appeared with his Vakil and one of his witnesses. Four witnesses whom he had summoned did not appear, and when his Vakil applied for an adjournment the Subordinate Judge asked him to pay the *batta* for warrants to procure their attendance. When he said he would pay the *batta* the next day, the Judge said that he had been guilty of gross negligence, refused the adjournment and called upon the plaintiff to go on with the suit with such witnesses, as he had. The plaintiff's Vakil thereupon said that he had no instructions and the Court proceeded to dispose of the case *ex parte* on the pleadings. We think that it was the plaintiff's duty to go on with the case as far as he could and we have seriously considered whether his refusal to do so should not lead us to refuse him any relief in this case. On the other hand, we think there was no foundation for the Subordinate Judge's finding that he had been guilty of gross carelessness. On the whole, we think that the proper order is that, if the plaintiff pays the whole costs of this appeal within one month from the communication of this

order to the lower Court, this appeal will be allowed. Otherwise, it will stand dismissed with costs.

M. C. P.

*Appeal allowed.*

### OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 70 OF 1920.

July 26, 1920.

*Present* :—Mr. Lindsay, J. C.RABNATH BAKHSH—PLAINTIFF No. 1 —  
APPELLANT*versus*GANESH PRASAD AND ANOTHER—  
DEFENDANTS NOS. 3 AND 4 AND SHEORAJ  
SINGH AND OTHERS—PLAINTIFFS NOS. 2 TO 5  
—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 95—Mortgage-decree—Sale of mortgaged property—Sale set aside on payment by one of several co-mortgagors, effect of—Charge, whether created.*

Where a sale of mortgaged property in execution of a mortgage-decree is set aside on the decretal amount being paid by one of the co-mortgagors, the payment does not give rise to a charge on the mortgaged property in favour of the co-mortgagor to the extent of the amount which he has paid in excess of his own share of the mortgage-debt, inasmuch as by doing so he cannot be said to have "redeemed the mortgage", the mortgage having been extinguished by the decree. [p. 215, col. 1.]

Appeal against the decree of the Third Additional District Judge, Lucknow, dated the 20th December 1913, reversing the decree of the Probationary Munsif, Lucknow, dated the 19th October 1913.

Mr. Abdul Rauf, for the Appellant.

Messrs. Rajeshwari Prasad and Nasiruddin,  
for Respondent No. 1.

RABNATH BAKHSH V. GANESH PRASAD.

**JUDGMENT.**—I have heard the argument in this case and, although I am not prepared to follow the line of decision which was taken in the lower Appellate Court, I think the result here must be the same and that this appeal must be dismissed.

The facts of the case may be briefly stated as follows. One Debi Singh owned an 8-pies share, which he mortgaged by a simple mortgage to Jiwan Singh. Debi Singh died without issue and his successors were three of his nephews, Chandi Singh, Bachan Singh, and Pablu Singh. Each of these got the property to the extent of one-third. A suit was brought on this mortgage and a decree for sale was obtained by the mortgagee or his representatives. It is proved that the mortgaged property was put up for sale on the 20th of April 1907 and was purchased by a third party, one Sheo Prasad. The amount of the decree was Rs. 500. Before this sale had been confirmed the representatives of Pablu Singh, who had died, paid into Court a sum of Rs. 500 plus 5 per cent. on this amount for payment to the auction-purchaser. I am told that after the sale had taken place the purchaser, Sheo Prasad, deposited the full amount into Court and this payment which was afterwards made to him by the representatives of Pablu Singh seems to have been made under the provisions of section 310A of the old Code of Civil Procedure which was in force at that time. It is an admitted fact that the sale was not confirmed in favour of Sheo Prasad and we may take it that the result of this payment into Court was that the mortgagees got their money and that Sheo Prasad got the 5 per cent. to which he was entitled. These representatives of Pablu Singh are the plaintiffs Nos. 2 to 5 in the present suit. After they paid off this money, it is said, they got possession of the whole 8-pies share which had been mortgaged, and thereafter they are said to have transferred it to the first plaintiff Rabnath Bakhsh.

It is admitted that, although the transfer of the entire 8-pies share was made to Rabnath Bakhsh, nevertheless the *khewat* showed that Chandi Singh and Bachan Singh were in possession of a one third share each.

Another fact to be mentioned is that Bachan Singh after his death was succeeded by his son Bhagwan Bakhsh who sold a one half of his one-third share to Ganesh Prasad and Chandika Singh, who are really the contesting respondents here.

The present suit was brought by Rabnath Bakhsh and his transferors. They sought a declaration that they were the owners of the entire 8-pies share. In the alternative, it was prayed that if they were held not to be owners of the whole they were entitled to a charge upon the shares of the defendants in respect of the Rs. 525 they had paid for redemption of the whole.

The first Court found that plaintiffs were not the owners of the entire 8 pies but held that a charge upon the property had been created by the payment by the plaintiffs of Rs. 525. It further held that the plaintiffs were in possession of the whole share and a decree was given to them entitling them to sell two-thirds of the property to satisfy a charge of Rs. 350, that being the amount for which the defendant's share was liable.

The defendants appealed. The lower Appellate Court has found that there was no charge on the property, that the sum of Rs. 350 could not be recovered by sale of the defendants' share of the property, and that any claim for a simple money-decree by way of contribution was time-barred. The appeal was allowed to this extent. The only question before me in second appeal is, whether the plaintiffs have a charge on the property by reason of the payment made into Court on the 24th May 1907.

The lower Appellate Court found, on the authority of a case reported as *Nawab Jahan Ara Begum v. Mirsa Shuja-ud-din Bukht* (1), that the plaintiffs Nos. 2 to 5 by paying the decretal amount into Court in the year 1907 did not acquire a charge on the property.

If the decision of this question rested only upon the Calcutta authority on which the lower Court relied, I should have found it difficult to follow it, but, as has been pointed out by the learned Counsel for the respondents, the matter has now been

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set at rest by a recent decision of their Lordships of the Privy Council reported as *Het Ram v. Shadi Ram* (2).

So far as I can see, the plaintiffs Nos. 2 to 5 only base their claim to a charge on this property upon the provisions of section 95 of the Transfer of Property Act. That section lays down that, where one of several co-mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.

What ver interpretations may have been placed upon this section it is quite clear that the charge referred to in the section can only arise in favour of "one of several mortgagors" who "redeems" the mortgaged property.

The question is, therefore, can it be said that when the representatives of Pablu Singh paid this sum of Rs. 525 into Court on the 24th of May 1907 they were redeeming the mortgage. It seems to me that the decision of their Lordships to which I have referred negatives that contention.

The suit which was brought on the mortgage executed in favour of Jiwan Singh was brought under the Transfer of Property Act before it was amended by the present Code of Civil Procedure, and there having been an auction sale of the property it must be presumed that before the property was brought to sale there was what was then called an order absolute for sale under section 89 of the Transfer of Property Act as it stood before amendment.

In the Privy Council decision which has been referred to above, the language of section 89 has been judicially interpreted and it has been held that on the making of the order absolute under that section the security as well as the defendants' right to redeem are both extinguished and that for the right of the mortgagee under his security there is substituted a right to the sale conferred by the decree. It follows, therefore, that as soon as the order absolute for sale was made in the suit brought by the mortgagee,

the mortgage security was extinguished and consequently, it cannot be said that any payment which was made after that order was passed was a payment by way of redemption. There can only be redemption of a mortgage so long as the mortgage subsists. After the mortgage comes to an end any payment which has the effect of saving the property from passing into the hands of third parties, is certainly not a payment by way of redemption. And, so, I have come to the conclusion that in this case the payment did not give rise to a charge in favour of the representatives of Pablu Singh who transferred to the appellant here.

The only other point which has been argued before me is one relating to costs. It is said that the contesting respondents, Ganesha Prasad and Chandika Singh, have paid an excessive Court fee in the lower Appellate Court which has not been properly taxed. After hearing Counsel on this matter, I am satisfied that there is nothing in this point.

The result is, therefore, that the appeal fails and is dismissed with costs.

*Appeal dismissed.*

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 450 OF 1919.

July 28, 1920.

*Present:*—Justice Sir Abdur Rahim, Kt.,  
and Mr. Justice Oldfield.

BADVEL CHINNA ASETHU AND  
ANOTHER—DEFENDENTS NOS. 2 AND 3—

APPELLANTS

versus

VATTIPALLI KESAVAYYA AND ANOTHER  
—PLAINTIFF AND DEFENDANT NO. 1—  
RESPONDENTS.

*Civil Procedure Code (Act V of 1908), ss. 11, 105,  
O. IX, r. 13—Ex parte decree, application to set aside—  
Order dismissing application—Appeal from decree—  
Jurisdiction of Appellate Court to decide on merits of  
order refusing to set aside ex parte decree.*

Where an application to set aside an *ex parte* decree has been rejected under Order IX rule 13, Civil Procedure Code, it is not open to the defendant to have the question re-agitated in the appeal from the decree.

(2) 45 Ind. Cas. 718; 40 A. 407; 5 P. L. W. 88; 16 A. L. J. 507; 5 M. L. J. 1; 24 M. L. T. 9; 23 C. L. J. 185; 1918 M. W. N. 513; 20 Bom. L. R. 793; 22 O. W. N. 1033; 9 L. W. 553; 12 Bar. L. T. 74; 45 I. A. 130 (P. Q.).



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itself, and such a right is not given by section 105 of the Code. [p 28, col. 1.]

*Perumbra Nayar v. Subrahmanian Pattar*, 23 M. 445; 10 M. L. J. 61; 8 Ind. Dec. (N. S.); 712, *Krishna Ayyar v. Kuppan Ayyangar*, 30 M. 54; 1 M. L. T. 268; 16 M. L. J. 479 (F. B.), *Maharajah Moheshur Sing v. The Bengal Government*, 7 M. I. A. 283; 8 W. R. P. C. 45; 1 Suth. P. C. J. 325; 1 Sar. P. C. J. 645; 19 E. R. 816, *Gadi Neelaveni v. Marappareddigari Narayana Reddi*, 53 Ind. Cas. 847; 48 M. 94; 37 M. L. J. 599; 26 M. L. T. 377; 10 L. W. 606; (1920) M. W. N. 19 (F. B.) and *Caussanel v. Soures*, 23 M. 260; 8 Ind. Dec. (N. S.) 584, explained and distinguished.

Second appeal against the decree of the District Court, Cuddapah, in Appeal Suit No. 116 of 1917, preferred against the decree of the Court of the District Munsif, Gooty, in Original Suit No. 230 of 1913.

FACTS appear from the judgment.

Mr. T. V. Venkatarama Aiyar, for the Appellants.—In an appeal from the final decree the whole question is re-opened and the merits of the interlocutory orders passed in the course of the proceedings may be re-agitated. It is open to the aggrieved party to show that he was prevented by sufficient cause from appearing. See *Perumbra Nayar v. Subrahmanian Pattar* (1). The position is also established by the Full Bench decision in *Krishna Ayyar v. Kuppan Ayyangar* (2). The provisions of section 105, Civil Procedure Code, warrant such enquiries during the hearing of the appeal from the decree. Defects and irregularities affecting the decision of the case may be rectified in the appeal from the final decree. Section 105 of the new Code is much more elastic than the corresponding section 591 of the old Code, and provides for cases of orders from which no appeal is provided. The absence of the expression 'such order' in section 105 is significant. See Privy Council decision in *Maharajah Moheshur Sing v. The Bengal Government* (3).

Mr. B. Somayya, for the Respondents.—There is a right of appeal expressly provided in cases of orders refusing to set aside *ex parte* decrees under Order IX, rule 13. When that right has not been availed of, the aggrieved party cannot claim an adjudication on the same in the appeal from the decree. The principle of the cases cited by the learned

Vakil for the appellant do not apply to the present case. In *Perumbra Nayar v. Subrahmanian Pattar* (1) there was no appeal preferred against the order under Order IX, rule 13. In *Krishna Ayyar v. Kuppan Ayyangar* (2) there was no application to set aside the *ex parte* decree. Here the application was made and was rejected.

There is nothing in the language of section 105, Civil Procedure Code, to extend its scope to cover cases like the present, or to nullify the effect of the special procedure laid down in the case of *ex parte* decrees. To give successive rights to parties to agitate the same matter which has been set at rest would offend against the doctrine of *res judicata*.

#### JUDGMENT.

ABDUS RAHIM, J.—It is not necessary in dealing with the second appeal to state the history of the litigation, as it has been set out in the previous judgment of the learned Judge against whose decree this appeal has been preferred. Two questions have been argued before us. The first, which relates to the merits, is this whether the finding of the lower Court that the defendants Nos. 2 and 3, the appellants before us, had any notice as to Narasayya's title to the property. It appears that the property stood in the name of the plaintiff and Narasayya. The case of the plaintiff is that Narasayya had no title, inasmuch as he had paid his share of the consideration-money which he was to have paid. We must take it as found in a previous judgment in the course of this litigation that Narasayya had in fact no title although his name stood in the title deeds. The High Court in its previous order of remand had remitted two issues for trial. One was, "Had the defendants Nos. 2 and 3 notice of plaintiff's claim to the entire suit property prior to the transfer in their favour?" (2) Did they act in good faith and take reasonable care to ascertain whether defendants had power to make the transfer within the meaning of section 41 of the Transfer of Property Act?" The first question has been answered by both the Courts in the negative and, there can be no doubt, rightly so.

The answer to the second question is what we are now asked to consider in this second appeal. The learned District Judge says that, although the defendants

(1) 23 M. 445; 10 M. L. J. 61; 8 Ind. Dec. (N. S.) 712.

(2) 30 M. 54; 1 M. L. T. 268; 16 M. L. J. 479; (F. B.)

(3) 7 M. I. A. 283; 8 W. R. P. C. 45; 1 Suth. P. C. J. 325; 1 Sar. P. C. J. 645; 19 E. R. 816.

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Nos. 2 and 3 had no express notice of the plaintiff's claim to the entire property, yet the fact that for several years before the transfer the plaintiff claimed and received rent for the entire property from the defendants themselves was sufficient to call upon the defendants to enquire as to how the plaintiff claimed the entire rent. The learned Judge states his conclusion in these words: "The defendants Nos. 2 and 3 made no enquiries at all and there seems to be considerable ground for the theory that defendants Nos 2 and 3 wanted to annoy plaintiff in connection with the dispute about a house." Thus, the appellants failed to make any *bona fide* enquiry into the matter and in second appeal it is difficult to hold that the lower Court had not sufficient material on which to come to this conclusion. In fact, no attempt has been made by the learned Pleader for the appellant to satisfy us that there was really no evidence to justify the conclusion.

The next point for consideration is, whether the District Judge is right in holding that the order rejecting the application made under Order IX, rule 13 (section 108 of the old Code) was final and that it was open to him to deal with that question in the appeal against the decree of the District Munsif. So far as I can see, there is no direct decision on the question. Our attention has been drawn to the decision in *Perumbra Nayar v. Subrahmainan Patla* (1). But there the learned Judges expressly refused to decide the question whether, where an application to set aside an *ex parte* decree had been made under the special procedure provided in this connection and refused and no appeal was preferred against the order of refusal, it was still open to the defendant in an appeal against the decree to raise the same question and have the decree set aside on the ground that the defendant was prevented by sufficient cause from appearing and properly conducting the defence. It was also suggested that the Full Bench decision in *Krishna Ayyar v. Kuppan Aiyangar* (2) supports the appellant's contention. But there no application had been made to set aside the *ex parte* decree under section 108 of the Civil Procedure Code which governed that case and that decision,

therefore, cannot be taken as a ruling on the point in dispute before us. *Krishna Ayyar v. Kuppan Ayyangar* (2) proceeds on the basis that in a case where no application under the special procedure provided by the Code for setting aside the *ex parte* decree has been made, it is open to the defendant in appealing against the decree to take the objection in the appeal. But that does not cover a case where an application was made and rejected and the order rejecting the application was not contested by way of appeal from that order. Assuming that it is open to a defendant in the appeal against the *ex parte* decree to object to the decree on the ground that he had not sufficient opportunity to adduce evidence in a case where he did not choose to avail himself of the special procedure, it does not by any means follow that, where he did actually avail himself of the special procedure and failed, still it would be open to him to have the same question re-agitated by appealing against the decree. Mr. T. V. Venkatarama Aiyar, the learned Vakil for the appellants, argued that the language of section 105, Civil Procedure Code, is wide enough to cover a case like this. It says: "Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction, but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal." That *prima facie* refers to an order from which no appeal is provided. But it is argued that the corresponding section of the old Code has been modified in order to extend the provision to cases of orders other than those from which no appeal is provided. In section 591 of the old Code the words were: "Where a decree is appealed from, any error, defect or irregularity in any such order affecting the decision of the case, etc." The word 'such' does not find a place in section 105 of the new Code. I am, however, inclined to think that this should not make any difference in the construction of section 105 of the new Code so far as this point is concerned. The word 'such' might have been intended, as pointed out in *Woodroffe*

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and Amir Ali's Commentary on the Civil Procedure Code, to limit the application of the section to orders passed under the Civil Procedure Code. In any case, the language of section 105 does not seem to me to give the defendants the right to re-open the question whether he had sufficient opportunity given to him to adduce his evidence in cases where he has availed himself of the special procedure provided by the Code and his application to set aside the *ex parte* decree has been finally rejected. To hold otherwise, would be opening the door to speculative litigation. Much emphasis was also laid by Mr. Venkatarama Aiyar on the observation of the Privy Council in *Maharajah Moheshur Sing v. The Bengal Government* (3) which has been quoted in a recent decision of this Court in *Thimmanayanim v. Venkatcharlu* (4). That observation was not made with reference to any such express provision of the Civil Procedure Code as we have now. It only laid down that the general law does not contemplate that wherever an interlocutory order is passed unfavourably against a party that party must appeal against it and, if he does not do so, he will be precluded from impeaching it in the appeal against the decree. That, however, is very different from what we are asked to hold in the present case. It may well be doubted whether an order rejecting the application made under Order IX, rule 13, comes within the sense of an ordinary interlocutory order such as was under consideration before the Privy Council. I, therefore, hold that this contention also fails.

In the result, the appeal must be dismissed with costs.

OLLFIELD, J.—I entirely agree with the judgment just now delivered by my learned brother, and I supplement it on the second point dealt with only, because I recently had occasion in another case to refer to two of the cases relied on and my reference to them now appears liable to misconstruction. In *Gadi Neelaveni v. Marappareddigari Narayana Reddi* (5) I said that *Coussanel v. Soures* (6) had been overruled in *Krishna*

*Ayyar v. Kurpan Ayyangar* (2). On a closer consideration of the cases that seem to me to be mistaken. In fact *Coussanel v. Soures* (6) is overruled by *Krishna Ayyar v. Kurpan Ayyangar* (2) on a point with which we are not concerned in the present appeal and with which the Full Bench was not concerned. I will only add that the misdescription of the case in my judgment in *Gadi Neelaveni v. Marappareddigari Narayana Reddi* (5) did not affect the opinion expressed therein.

The point which *Krishna Ayyar v. Kurpan Ayyangar* (2) really decides relates to the power of the Court to order a remand. No case has been cited before us in which the question now under consideration, whether a party against whom a decree has been passed *ex parte* can proceed in succession under Order IX, rule 13, as well as by taking objection to the order placing him *ex parte* in his appeal against the substantive decree has been dealt with. On principle, it would appear that he could only do so at the expense of the rules as to *res judicata*; and there can be no reason why the adjudication on his application under Order IX, rule 13 if there were one should not be conclusive against him for the purpose of any subsequent appeal. In the present case it is suggested that the facts that his application under Order IX, rule 13 was not carried further than the District Munsif's Court and that he acquiesced in the District Munsif's unfavourable order, would make a difference to his right to appeal against the decree on this ground. The answer to this is that the District Munsif's order, not having been appealed against, has become final. It seems to me that it would be a matter for great regret if a party could pursue both of two alternative remedies in succession and that the recognition of a right to do so would be a unique incident in our procedure. I am accordingly relieved to find that such a right has not been recognised by authority. I agree with my learned brother in the order proposed by him.

M. C. P.

Appeal dismissed.

(4) 6 Ind. Cas. 239; 20 M. L. J. 805; (1910) M. W. N. 226; 8 M. L. T. 72; 34 M. 228.

(5) 63 Ind. Cas. 847; 43 M. 94; 37 M. L. J. 593; 26 M. L. T. 377; 10 L. W. 60; (1920) M. W. N. 19

(F. B.)

(6) 28 M. 260; 8 Ind. Dec. (N. S.) 584.



BHOODA v. MURARI LAL.

COURT OF THE BOARD OF REVENUE,  
UNITED PROVINCES.

SECOND APPEAL No. 43 OF 1919-20.

April 20, 1920.

Present:—Mr. Porter, J. M.

BHOODA—APPELLANT

versus

MURARI LAL—RESPONDENT.

*Landlord and tenant—Occupancy holding—Rent, payment of, by tenant for himself and deceased brother—Lump receipt granted by landlord—Receipt, whether admission of tenant's succession to brother's holding.*

The fact that a Zemindar gives a lump receipt for rent paid by a tenant for his occupancy holding as well as for rent on account of his brother's holding subsequent to the latter's death, is not tantamount to an admission by the landlord that the tenant has succeeded to his deceased brother's holding as occupancy tenant.

Second appeal from the order of the Commissioner, Meerut Division, dated the 13th of October 1919, in the case of ejection.

**JUDGMENT.**—The only ground urged in this appeal is that the landlord-respondent admitted the appellant-tenant to the occupancy holding of his brother Ude on the death of the latter, six years ago, and by the realization of rent acknowledged him as occupancy tenant of Ude's holding. It is not contended here that the appellant shared in his brother's holding. The case is distinguishable from the facts of *Petition No. 3 of 1914-13*, a case reported as *Babu Ram v. Jait Ram* (1).

In the present case there is nothing to show that any arrears due from Ude were realized from Bnola. There is no doubt that the appellant (who has a separate occupancy holding) did not share in his brother's holding.

In the case relied on, the evidence as to the collateral sharing in the cultivation was doubtful and the Member of the Board who decided the case held that the occupancy rights were admitted by the landlord, who had collected from the collateral arrears of rent due by the deceased.

In the present case there has been no such admission. The appellant was clearly not entitled to succeed and the fact that the Zemindar has given a lump receipt for the rent paid by the appellant for his own occupancy holding and the rent which he has paid for his brother's holding subsequent to

(1) 1 U. D. 87.

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the death of the latter, in no way, constitutes an admission that the appellant has succeeded to his brother's holding as occupancy tenant.

I dismiss the appeal with costs.

*Appeal dismissed.*OUDH JUDICIAL COMMISSIONER'S  
COURT.

FIRST CIVIL APPEAL No. 30 OF 1919,

July 22, 1920.

Present:—Mr. Daniels, A. J. C.

and Mr. Wazir Hasan, A. J. C.

RAM SARAN—PLAINTIFF—APPELLANT

versus

Bhaya MANGAL SINGH

AND OTHERS—DEFENDANTS

—RESPONDENTS.

*Hindu law—Antecedent debt—Necessity, proof of, whether necessary—Pious obligation of sons, extent of—Separation, whether affects obligation—Secured and unsecured debts, distinction between.*

It is only when legal necessity cannot be established that the question of antecedent debt becomes material. [p. 221, col. 1.]

A pious obligation which arises only on the death of an ancestor and an antecedent debt which may support an alienation while the ancestor is alive, are distinct grounds on which justification for an alienation may be pleaded [p. 22, col. 2.]

There is no authority for the proposition that the pious obligation of a son or grandson to pay his ancestor's debts depends on whether the two were joint or separate in estate. The doctrine is founded on religious considerations to which the question of jointness or separation is entirely irrelevant. [p. 222, col. 1.]

Where a Hindu is under a pious obligation to pay a debt and pays it off by incurring another debt, the latter in turn becomes an antecedent debt binding on his sons. [p. 222, col. 1.]

Where the ancestor is dead, the pious obligation to pay his debts is not concerned with the question whether the debts are secured or unsecured, but only with the question whether they are lawful debts not incurred for an illegal or immoral purpose. [p. 222, col. 1.]

Appeal against the decree of the Subordinate Judge, Gonda, dated the 29th March 1919.

Messrs. J. P. O. Bhattacharyi, and H. K. Ghosh, for the Appellant.

Mr. Basudeo Lal, for Respondents Nos. 2 and 3.

RAM SARAN v. MANGAL SINGH.

**JUDGMENT.**—This was a suit by Ram Saran, plaintiff, to enforce two simple mortgages by sale of the mortgaged property, which is the joint family property of the first defendant, Bhaya Mangal Singh, the executant of both mortgages, and his two sons, the second and third defendants, Thakur Prasad Singh and Shamsheer Bahadur Singh. The execution of the mortgages was not seriously disputed. Bhaya Mangal Singh did not appear. His two sons defended the suit and have defended the appeal on the ground that the mortgages are not binding on them or on the family property of which they are joint proprietors. The entire suit has been dismissed by the learned Subordinate Judge except that he has given a personal decree against the first defendant.

The first mortgage, dated the 25th October 1911, was for a sum of Rs. 3,500 made up as under,—

	Rs.	A.	P.
1. Paid in cash before the Sub Registrar ...	2,260	7	6
2. Credited on account of a prior mortgage-deed of 3rd April 1911 executed in favour of the plaintiff's father by defendant No. 1 ...	1,239	8	6
Total ...	3,500	0	0

The plaintiff endeavoured to show that Rs. 940 of the amount paid before the Sub-Registrar was borrowed for an antecedent debt and the remaining amount of Rs. 1,320 for the purposes of a family business. The learned Subordinate Judge has disbelieved the evidence on this head and we agree with the reasons given by the learned Sub Judge for so doing. The evidence regarding the shop is of the most flimsy description. It had to be admitted by the witnesses in cross examination that the shop belonged to one Raghubar Dayal, the fact which they for the most part suppressed in examination in chief. This Raghubar Dayal might have been called but was not. In fact, in regard to each of these three items the plaintiff has preferred to rely on worthless evidence, when, if his claim was true, good evidence was available. Rs. 540 is said to have been paid to one Dhondhe, but though the document in

favour of Dhondhe is said to have been returned to the first defendant after satisfaction, the defendant was not called on to produce it. As for Dhondhe himself, we agree with the Subordinate Judge that he is a partisan and worthless witness. The other item is said to have been paid as rent of the Balrampur Estate. That Estate keeps regular accounts but no witness representing the Estate was called to prove the payment, nor was any *siaha* or other account called for. It is unnecessary to say more regarding these items.

The learned Subordinate Judge, though he has not given any clear finding, appears to have accepted the evidence that Rs. 1,239-8 6 were credited in satisfaction of an earlier mortgage of the year 1911 which is on the record as Exhibit 8. We are satisfied with the truth of the evidence to this effect, which, indeed, has not been seriously contested before us. That mortgage carried a personal liability to re-pay the amount borrowed and, therefore, is within the rule laid down by this Court in *Ramman Lal v. Ram Gopal* (1) as to the effect of the Privy Council judgment, in *Sahu Ram Chandra v. Bhup Singh* (2). This rule has been recently affirmed by this Court in *First Civil Appeal No. 127 of 1918, Ram Dei v. Suraj Bakhsh* (3). It may be added that this debt would be binding on the sons on any view of the Privy Council judgment, since almost the entire amount of the deed of 1911 was borrowed to re-pay money debts not secured on the joint family property. Apart from the representation in the deed there is the evidence of the witnesses who proved it that it was executed in lieu of the prior bonds. The ground on which the learned Subordinate Judge has rejected this item is to be found in his remark that the plaintiff should have proved that all the antecedent debts, in lieu of which the mortgage deed purported to have been executed, were taken by defendant No. 1 for legal necessity justifiable under

(1) 47 Ind. Cas. 987; 21 O. C. 200; 5 O. L. J. 629.

(2) 89 Ind. Cas. 280; 44 I. A. 126; 21 O. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 487; 19 Bom. L. R. 498; 26 O. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 487 (P. O.).

(3) 60 Ind. Cas. 177; 23 O. C. 204; 7 O. L. J. 509; 2 U. P. L. R. (J. C.) 156.

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the law. This is a mistaken view of the law. It is only when legal necessity cannot be established that the question of antecedent debt becomes material.

The second deed was executed on 12th May 1915 for a sum of Rs. 8,000 the whole of which was paid before the Sub-Registrar. This sum is said to have been made up of three items:—

	Rs.	A.	P.
1. Paid to the Balrampur Estate in satisfaction of a foreclosure decree	7,017	7	9
2. Paid in lieu of a prior debt to Musammât Gaya Dei ...	653	3	5
3. Paid to Ram Het in lieu of a prior debt ...	346	0	0

We are fully satisfied with the genuineness of the first two items. A decree held by the Balrampur Estate against Bhaya Mangal Singh and others has been put in, as also the receipt for the amount paid which has been verified by the evidence of Saiyed Jafar Tyar (P. W. No. 14.), the General Agent of the Estate. The copy of the receipt put in shows that the payment was certified to the Court under Order XXI, rule 2.

As regards the second item, not only has the deed been put in but Musammât Gaya Dei's General Agent has deposed to the receipt of the money and has proved a registered receipt for the amount given by him to the first defendant only six days after the execution of the deed in suit.

The deed was a simple mortgage carrying a personal liability to re-pay which was not extinct when the amount was re-paid.

The third item we consider unproved. No deed was produced in support of it. The only evidence is that of the alleged creditor, Ram Het. He declares that Mangal Singh had taken a loan from him and re-paid it by instalments and that this sum of Rs. 346 was the last instalment. He admitted in cross examination that he made no endorsement of the payment on the back of the deed and gave no receipt. We are not prepared to accept his evidence.

The debt in respect of which the foreclosure decree was obtained was originally incurred by Kishun Dat Singh, the grand-father of the first defendant. The special grounds on

which the learned Subordinate Judge has disallowed this item are four in number,—

1. That the decree was against three other persons besides the first defendant and, therefore he was not liable to pay the amount of Rs. 7,017 out of Rs. 11,286.

2. That Kishun Dat was separate from his grand-son and that a grand-son is not liable for the debt of his separated grand-father.

3. That the second and third defendants are Kishan Dat's great grand-sons and as such are not liable for the debt of their great-grand-father.

4. That a foreclosure decree cannot constitute antecedent debt.

The first objection is not easy to understand, in view of the fact that the learned Subordinate Judge had himself admitted in evidence, rightly or wrongly an agreement under which the debts of Kishun Dat were partitioned between his descendants and this debt fell to the share of Mangal Singh. It was objected in this Court that the agreement in question was not legally proved and the objection appears to be correct, but the fact that there had been an agreement appears from the mortgage-deed. The evidence shows that the plaintiff made enquiries and satisfied himself of the existence of this decree against the plaintiff and this is sufficient. The decree was, moreover, a joint decree against all four defendants and it is proved that Kishun Dat was dead when the deed in suit was executed and when the decree was paid off. A pious obligation on his sons and grand-sons to pay his debts had, therefore, arisen. The Privy Council, in *Sahu Ram Chandra v. Bhup Singh* (2), has distinguished between a pious obligation which arises only on the death of the ancestor on the one hand and antecedent debts which may support an alienation while the ancestor is alive on the other, as distinct grounds on which justification for an alienation may be pleaded.

The learned Subordinate Judge's second objection is based on an isolated remark in Trevelyan's Hindu Law to the effect that "the Hindu Law imposes upon a son and grand-son the duty of paying the debts of his father and paternal grand-father from whom he has not separated" (2nd Edition, page 308). The words italicised are taken from an *obiter dictum* in a judgment of the



BAI SHIRINBAI v. RATANBAI.

Allahabad High Court in a case in which a creditor was seeking to recover a debt of the father from the property of his separated sons [*Fakir Chand v. Daya Ram* (4)]. The only issue actually before the Court was one of limitation. Apart from this doubtful dictum, there appears to be no authority for the proposition that the pious obligation of a son or grand-son to pay his ancestor's debts depends on whether the two were joint or separate in estate. The doctrine is founded on religious considerations to which the question of jointness or separation is entirely irrelevant. As was laid down by their Lordships of the Privy Council in *Hunoomanpersaud Panday v. Musammat Babooee Munraj Koonweree* (5):

"By the Hindu Law the freedom of the son from the obligation to discharge his father's debt has respect to the nature of the debt and not to the nature of the estate."

In his third objection, the learned Subordinate Judge appears to have fallen into some confusion of thought. The question is not whether a great-grand-son is liable to pay the debt of his great-grandfather. If the debt was one which Mangal Singh himself was under a pious obligation to pay, then the debt which he incurred to pay it off becomes antecedent debt binding in turn on his sons.

The fourth objection would have had great weight if Kishun Dat Singh had been alive. But where the ancestor is dead, the pious obligation to pay his debts is not concerned with the question whether the debts are secured or unsecured, but only with the question whether they are lawful debts not incurred for an illegal or immoral purpose. Moreover, the purpose for which this amount was paid would appear to constitute legal necessity. As the mortgage was made by the first defendant's grand-father, the property was ancestral property in the hands of his descendants and, but for the payment made by Mangal Singh, it would have been irretrievably lost to the family under a final foreclosure decree.

(4) 25 A. 67; A. W. N. (1902) 199.

(5) 6 M. L. A. 393; 18 W. R. 81n.; 25 Ind. 273n; 2 Suth P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

These are the only points which have been argued. For the reasons given above, we allow the appeal in part and decree the plaintiff's claim in respect of Rs. 1,239 8 6 out of the first deed with proportionate interest thereon, and in respect of Rs. 7,670 11-2 out of the second deed (Rs. 7,017-7-9 in respondent of the Balrampur decree and Rs. 653 3 5 paid to *Musammat Gaya Dei* in satisfaction of an antecedent debt) with proportionate interest thereon. The plaintiff and the contesting defendants will pay and receive costs in both Courts in proportion to success and failure. The decree will be prepared in accordance with Order XXIV, rule 4. No appeal has been preferred against the personal decree passed by the lower Court against defendant No. 1, and that decree will be maintained in respect of the remaining portion of the consideration of the two deeds, i. e., Rs. 5,324-12-8 with costs and interest as given in the lower Court's decree.

The plaint also contained a prayer for a personal decree under Order XXXV, rule 6, in case the mortgaged shares proved insufficient. We think it would be premature to grant this relief now. There will be time enough for the plaintiff to make an application for such a decree when the circumstances described in the rule have arisen.

*Appeal partly allowed.*

### PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

January 8, 1921.

Present:—Viscount Haldane, Viscount Cave, Lord Sumner, Lord Parmoor and Sir John Edge.

BAI SHIRINBAI—APPELLANT

versus

RATANBAI AND OTHERS—RESPONDENTS.

Will, construction of—Gift for life to widow with direction "duly, and as I have directed her orally", to make a Will—Direction, whether void for uncertainty.

A testator by his Will appointed his wife executrix with full powers of management, gave her his estate for life and empowered her "duly, as I

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have directed her orally, and according to the times, to make her Will." He also made a gift over in case his wife should die without making her Will:

*Held*, that the words cited gave the wife a general power of testamentary disposition and not merely a power exercisable in the manner specified in the oral directions: and that, therefore, the power was not void for uncertainty. [p. 225, cols. 1 & 2]

*Hetley, In re, Hetley v. Hetley*, (1902) 2 Ch. 866; 71 L. J. Ch. 769; 87 L. T. 265; 51 W. R. 202, distinguished.

Appeal from a decree of the Bombay High Court, (Scott, C. J., and Macleod, J.), dated September 3, 1915, reported as 51 Ind. Cas. 209, affirming with variations a decree of Beaman, J.

FACTS of the case and the material parts of the Will are sufficiently stated in their Lordships' judgment. On this appeal—

Mr. Upjohn, K. C., (with him Mr. E. B. Rakes) for the Appellant, submitted that on the true construction of the Will the widow, Kuvarbai, though she had not absolute property, had a life-interest, with power to dispose *inter vivos*, and also a power of testamentary disposition. This latter power might be either general or special—limited to a power of selection amongst "heirs" and "heirs of heirs"—but, in the events which had happened it did not matter which it was. The Courts below had erred in holding that there was an intestacy and that the power of testamentary disposition was void for uncertainty. The case of *Hetley, In re; Hetley v. Hetley* (1), on which they had relied, was easily distinguishable: in that case, to see how the power of appointment was to be exercised, you had to ascertain what were the testator's wishes, verbally expressed by him to his wife, and it was held that parol evidence of these was inadmissible: here, on the other hand, the words "as I have directed her orally," are merely testator's reason for giving her the power, and do not limit the mode of exercise. The testator here goes on to dispose of his property in the event of his wife's not having disposed of it, that is inconsistent with his having told his wife how she was to dispose of it. [Reference was made to *Thomson's Estate, In re; Herring v. Barrow* (2): same case, *Thomson's*

*Estate, In re; Herring v. Barrow* (3) and *Pounder, In re; Williams v. Pounder* (4)].

Mr. E. B. Rakes, followed, and with regard to the meaning of *malik mukhtiyar* referred to *Lalit Mohun Singh Roy v. Chukkun Lal Roy* (5).

Mr. Tomlin, K. C., (with him Mr. C. V. Rawlence), for the Respondents, submitted that the wife had not power to dispose of the corpus *inter vivos*: the words *malik mukhtiyar* simply refer to powers of management. If there is any power of testamentary disposition, it is bad. If the power is a special one, you have to find what the subjects and objects of it are: and you cannot define the objects by looking at the instrument which purports to execute it. The objects must be those defined by oral directions. You have to go to those directions to decide,

1. Whether the power is general or special.

2. If special, what the objects are.

The scheme of the Will is to keep the property together for the benefit of the family.

An express conferment of power *plus* the expression of a wish may be good: but here you cannot sever the conferment of the power from the words of direction. You must give some effect to those words: and the moment you have to find out what they were, the power fails: it is bad for uncertainty, as pointed out in *Hetley, In re; Hetley v. Hetley* (1) (*supra*), which was a very similar case, though the words there were less ambiguous.

Mr. Upjohn, K. C., replied.

## JUDGMENT.

VISCOUNT Cave.—This appeal, from the High Court of Judicature at Bombay, raises questions as to the construction of the Will of one Bomanji Kaikbushro Modi, who died in or about the year 1875. The parties are Parsis to whom the Indian Succession Act No. 10 of 1865 applies.

The testator made his Will, dated the 9th January 1872. By clause 3, after reciting that he had two sons, named Nuseerwanji and Sorabji, and a wife, named Kuvarbai; he appointed his wife as his

(3) (1890) 14 Ch. D. 263; 49 L. J. Ch. 622; 43 L. T. 35; 23 W. R. 802.

(4) (1876) 56 L. J. Ch. 113; 56 L. T. 104.

(5) 24 I. A. 76 at p. 88; 24 C. S. 4; 1 C. W. N. 387; 7 Sar. P. O. J. 155; 12 Ind. Dec. (N. S.) 1224.

(1) (1902) 2 Ch. 866; 71 L. J. Ch. 769; 87 L. T. 265; 51 W. R. 202.

(2) (1879) 13 Ch. D. 144.

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executrix with full powers of management. By clause 4, after referring to his immovable and moveable property of all kinds, he proceeded:

"Of all that I duly make my wife, the said Kuvarbai, '*malik mukhtiyar*' (absolute owner) during her life, just as I am the owner, and during her life none of my other heirs, representatives or relatives or kinsmen can question her in regard to any matter whatever."

Clause 7 was as follows:—

"7. Agreeably to what is written above, my wife shall, during her lifetime, duly carry on *vahicat*, (*i.e.*, management) in respect of every kind of my property and effects and make expenses on auspicious and inauspicious occasions just as I (have been doing). And in her lifetime keeping God and Meher Daver (the Dispenser of Justice) before her mind, my wife shall duly, as I have directed her orally, and according to the times, make her Will, and all my heirs and the heirs of my heirs shall duly act agreeably to the same."

Clause 8 commenced with the following words:—

"Should my wife, that is to say, executrix, die without making her Will, that is to say, testamentary writing, as mentioned in paragraph seven above, then both my sons, Nusserwanji and Sorabji, shall duly become *malik*, (*i.e.*, owners) in equal shares of all kinds of my property and effects, and both of them shall duly take certificate (that is, obtain Probate) from the Court,"

and there followed directions to the sons to pay out of the property which they might take certain sums to the testator's daughters and their children. Clause 10 contained certain dispositions which were to take effect if the testator's wife died without making a Will and if any of his sons should die before his wife. The Will concluded as follows:—

"I have made this Will of my free will and pleasure and while in sound mind and consciousness. My wife and children, that is to say, heirs, all shall duly act agreeably to the same."

The testator died, as above stated, in or about the year 1875. The testator's son Nusserwanji died in or about the year 1904.

It appears that the testator's widow, Kuvarbai, during her lifetime made over certain parts of his estate to her surviving son, Sorabji. Kuvarbai made her Will, dated the 16th May 1905, and thereby appointed her son Sorabji her executor, and after certain dispositions in favour of her other issue, concluded as follows:—

"With regard to my remaining immovable or moveable property and moneys in cash, &c., whatever there may be and wherever the same may be, and whether the same may be mine or whether the same may have been received by me on behalf of (from) my husband, or which I myself may have been authorised according to my husband's Will to give away, I make over the whole thereof (*i.e.*,) everything to my said son Sorabji Bomanji Modi."

This Will evinced a clear intention on the part of the widow to execute the power given to her by her husband's Will. Kuvarbai died in 1906 and Sorabji in 1915.

Shortly after the death of Sorabji this suit was commenced by Ratanbai, daughter and representative of Nusserwanji, against Shirinbai, daughter and representative of Sorabji, and other members of the family, alleging that the property made over by Kuvarbai to Sorabji remained part of the testator's estate and that Kuvarbai had no power to make a Will dealing with the testator's estate, and that the whole of such estate was divisible on the death of Kuvarbai either under clause 8 and the succeeding clauses of the Will or among the testator's heirs as on an intestacy, and claiming administration of the estate on the above footing. The defendant, Shirinbai, by written statement has denied the plaintiff's claim and alleged that Kuvarbai took an absolute interest under the Will, or a life-interest with power to dispose of the corpus during her lifetime or by Will. She also pleaded the Statute of Limitations. The other defendants who appeared supported the plaintiff's claim.

The Trial judge, Mr. Justice Beaman, held on the construction of the Will, (1) that Kuvarbai took a life estate with an uncontrolled power of disposition by acts *inter vivos*; (2) that the power given to her to dispose of the testator's estate after her death was not a general power but a special



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power enabling her to dispose of it in accordance with directions which he had given to her orally, that parol evidence was inadmissible to show the nature of the directions so given, and accordingly that the power was void for uncertainty [*Hetley, In re; Hetley v. Hetley* (1)]; (3) that as Kuvarbai had made a Will, although such Will was ineffectual to dispose of the testator's estate, yet she had not, within the meaning of clause 8, "died without making her Will," and accordingly that clause 8 and the subsequent clauses failed to take effect, and the testator's estate became distributable on the death of Kuvarbai as on an intestacy; and (4) that the suit was not statute-barred; and he made a decree for administration on that footing.

On appeal to the High Court, the learned Judges of that Court (Scott, C. J., and Macleod, J.) held that Kuvarbai took a life-interest without power of disposition by acts *inter vivos*, and varied the decree accordingly; but in other respects they affirmed the judgment of the Trial Judge. Thereupon, this appeal was brought by the defendant Shirinbai, the plaintiff and the other defendants being made respondents.

Their Lordships think it plain that Kuvarbai took a life interest only, and not an absolute interest, under the Will and it is convenient, before considering the nature and incidents of such life-interest, to consider the second question dealt with by the Trial Judge, namely, the nature of the power of disposition given to Kuvarbai by clause 7 of the Will. The relevant words are:—

"And in her lifetime, keeping God and Meher Daver (the Dispenser of Justice) before her mind, my wife shall duly, as I have directed her orally, and according to the times, make her Will, and all my heirs and the heirs of my heirs shall duly act agreeably to the same."

It is plain from the direction to the testator's heirs to act agreeably to his wife's will, as well as from the gift over, that these words were intended to give to the testator's wife some power of testamentary disposition over his estate; and the question is whether he meant to give her a general power of disposition or only a power exercisable in manner specified in his oral directions. In

other words, did he mean that she should, in accordance with his oral directions, make her Will disposing of the property as she should in her discretion think fit, or did he intend that she should by her Will dispose of the property in accordance with his oral directions? In their Lordships' opinion, the former is the true view. The structure of the sentence favours it; for, if the testator had intended that his wife's disposition should be in accordance with his oral directions, the words "as I have directed her orally" would properly have followed and not preceded the words "make her Will." The direction that the wife's Will shall be made "according to the times," or (as Mr. Justice Macleod translates the Gujarati words) "according to the circumstances," and the reference to the "Dispenser of Justice," show that she was to have a discretion; and, although it may be conjectured that the testator had explained to his wife his reasons for giving her a power over his estate and had enjoined her to exercise it if occasion should arise, there is nothing in the Will to show that he had attempted by any oral directions to prescribe the manner in which the power should be exercised. Indeed, the latter clauses of the Will afford a strong indication to the contrary effect; for, if the testator had intended that his Will should be declared by his wife, he would hardly have proceeded himself to make a declaration of his wishes. The language of the Will in this case is very different from that used in the case of *Hetley, In re; Hetley v. Hetley* (1) (*supra*), upon which the respondent relied, where the testator, after giving his property to his wife for life, desired and empowered her to dispose of his estate "in accordance with his wishes verbally expressed by him to her" and made no other disposition.

For the above reasons, their Lordships are of opinion that, upon the true construction of the testator's Will, his widow Kuvarbai took a general testamentary power, which was duly exercised by her Will. If so, the questions raised at the trial as to the widow's right to dispose of part of the capital of the estate in her lifetime, as to the construction of the gift over in the event of her not making a Will, and as to the Statute of Limitations, do not call for a

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decision. Their Lordships accordingly express no opinion upon these questions.

Their Lordships will humbly advise His Majesty that this appeal be allowed and the decree of the High Court set aside, except as to costs, and that it should be declared that the testator's widow had power by Will to dispose of his estate. No order for administration appears to be required, but the plaintiff and the other persons entitled as legatees under the Will of Kuvarbai will have liberty to apply as to their legacies. The respondent, Ratanbai, will pay the costs of this appeal.

*Appeal allowed.*

Solicitors for the Appellant.—Mr. T. L. Wilson and Co.

Solicitors for the Respondents.—Mr. Wallons and Co.

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1396 of 1919.

January 11, 1921.

Present :—Mr. Justice LeRossignol.

MANGAL SINGH—PLAINTIFF—

APPELLANT

*versus*

ATRA—DEFENDANT—RESPONDENT.

*Registration Act (XVI of 1908), s. 17—Monthly lease—Rent payable annually—Registration, whether necessary.*

A lease fixed a monthly rent and provided for ejectment of the tenant on failure to pay rent. Rent was, however, made payable annually :

*Held*, that lease was a monthly one and did not require registration.

Second appeal from the decree of the Senior Subordinate Judge, Ferozepore, dated the 11th June 1919, reversing that of the Munsif, Second Class, Moga, District Ferozepore, dated the 7th March 1919.

Mr. Kanwar Narain, for the Appellant.

Mr. Sundar D.s., for the Respondent.

**JUDGMENT.**—This was a suit for recovery of rent and possession of the house from the tenant. The Court below has dismissed the suit on the ground that the entry in the plaintiff's *bahi* is a lease from year to year that it should have been registered and, not being registered, is inadmissible and also excludes oral evidence.

It may exclude oral evidence of the contract but it does not exclude evidence of plaintiff's title.

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However, in my opinion the document, which may be treated as a very crude lease, did not need registration.

It is a lease of the hut or house for Rs. 0 8 0 per mensem, with a provision for ejectment if the rent be not paid. There is also a provision that, though the rent is payable monthly, it shall be actually paid at *nimani* each year; the first payment of Rs. 6 was to be made some five or six months after the commencement of the lease.

I do not think that this stipulation converts the monthly terms into annual terms. The lease was monthly at annas 8 per mensem but Rs. 6 had to be paid each *nimani*. There was nothing in the lease to prevent plaintiff from ejecting the defendant at the end of any month for which the rent had not been already paid, nor from giving him notice of the termination of the lease.

For these reasons, I accept the appeal, set aside the lower Appellate Court's decree and remand for a decision on the merits. Costs to follow final event. Stamp to be refunded.

*Appeal allowed.*

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 863 of 1919.

February 13, 1921.

Present :—Mr. Justice Sadasiva Aiyar  
and Mr. Justice Spencer.

AMEENAMMAL—PLAINTIFF—APPELLANT

*versus*

MEENAKSHI—DEFENDANT—

RESPONDENT.

*Res judicata—Mortgage suit—Defendant omitting to put forward counter-claim—Separate suit, whether maintainable.*

Where a transaction of mortgage has become fully ripened, so that the rights and liabilities of the parties can be dealt with by the Court before which the suit is brought in respect of that transaction, whether the suit is for foreclosure by the mortgagee or for sale by the mortgagee, or in the alternative for foreclosure or sale by the mortgagee, or for redemption by the mortgagor, all questions, including even claims for rent due on transactions inseparably connected with the mortgage, relating to the taking of accounts between the mortgagor and the mortgagee, ought to be decided in one and the same and in the very first suit and no second suit can be brought by either party for any claim arising out of that same transaction of mortgage [p. 224, col. 1.]

Therefore, where in a suit upon a mortgage

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the defendant omits to put forward a counter-claim for any sum that may be due to him from the mortgagee arising out of the mortgage transaction a separate suit for recovery of that sum is not maintainable [p. 229, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Sivaganga, in Appeal Suit No. 80 of 1918, preferred against the decree of the Court of the Additional District Munsif, Sivaganga, in Original Suit No. 324 of 1917, (Original Suit No. 201 of 1917), on the file of the Principal District Munsif's Court, Sivaganga.

Mr. L. A. Govindaraghava Aiyar, for the Appellant.

Mr. T. K. Venkatrama Sastri, for the Respondent.

## JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is the appellant. (Both plaintiff and defendant are women). The facts out of which this suit has arisen may be shortly stated thus. The plaintiff was the simple mortgagee of certain lands under a bond of 1899 executed by third persons to her predecessors-in-title. She hypothecated that hypothecation right and other properties to the defendant in 1908 for Rs. 200. The hypothecated hypothecation right became barred in 1911, owing to a suit not having been brought against the third persons either by the plaintiff (the mortgagee under it) or by the defendant (who obtained transfer of that mortgage from plaintiff by way of security). Then the defendant brought a suit in 1915 against the plaintiff on her (defendant's) own mortgage of 1908 for recovery of the amount due to her. The defendant in that suit, (namely, the present plaintiff) pleaded that the present defendant (plaintiff in that suit) having by her default failed to sue for and recover from the third persons the money due under the bond of 1899 left with the defendant as security, she (the defendant) was liable to account to the plaintiff for much more than the amount sued for, on the bond of 1908 and that, therefore, the suit ought to be dismissed. That plea of the defendant in that suit (the present plaintiff) was accounted therein. It was found that more money was due to the present plaintiff by reason of the defendant's accountability for her default than was claimable by the defendant under the bond of 1908 and the defendant's former suit was accord-

ingly dismissed. The plaintiff brought the present suit to recover the difference between the amount alleged by her to be due to her as damages, caused by the defendant's default and the amount due to the defendant under the mortgage of 1908. Several defences were raised in this suit. One of the contentions put forward by the defendant before us, namely, that the plaintiff has no cause of action and no right to claim damages for the defendant's default in suing the third persons (mortgagors of 1899) cannot be accepted, as the plaintiff's right to claim such damages was established in the former suit and is, therefore, *res judicata*.

The only defences which need be considered are: (1) that the suit is barred by limitation; and (2) that the suit is barred by *res judicata*, by reason of the decision in Original Suit No. 226 of 1915, that is, the suit brought by the present defendant against the present plaintiff for recovery of her mortgage amount and sale of the mortgaged properties. The District Munsif decided the question of *res judicata* in favour of the plaintiff but decided the question of limitation against the plaintiff and dismissed her suit.

As regards the question of *res judicata* the District Munsif's reasoning was that the causes of action in the two suits were different and, therefore, there was no *res judicata*. The lower Appellate Court did not go into the question of *res judicata* but decided the suit solely on the question of limitation holding that either Article 65, or Article 115 of the Limitation Act (three years period) applied and that Article 116, relied on by the plaintiff and providing a period of six years, did not apply. I do not think it necessary to go into the question of limitation, as I am satisfied that the District Munsif is wrong in his decision on the point of *res judicata* and the plaintiff's suit must fail on the decision against her on that point. The first suit was brought on the transaction of mortgage between the two parties entered into in 1908. The present suit was also based on that same transaction, namely, on the alleged obligation of the defendant created by law under the same transaction. The cases in *Mahabir Pershad Singh v. Macnaghten* (1),

(1) 16 C. 682 (P. C.); 16 I. A. 107; 13 Ind. Jur. 133; 5 Sar. P. C. J. 345; 8 Ind. Dec. (N. S.) 451.



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*Vinayak v. Dattatraya* (2), *Rukhminibai v. Venkatesh* (3), *Satyabadi Behara v. Harabati* (4), clearly establish, in my opinion, that where a transaction of mortgage has become fully ripened, so that the rights and liabilities of the parties can be dealt with, by the Court before which the suit is brought in respect of that transaction, whether the suit is for foreclosure by the mortgagee or for sale by the mortgagee, or, in the alternative, for foreclosure or sale by the mortgagee, or for redemption by the mortgagor, all questions (including even claims for rent due on transactions inseparably connected with the mortgage) relating to the taking of accounts between the mortgagor and the mortgagee ought to be decided in one and the same and in the very first suit, and no second suit can be brought by either party, for any claim arising out of that same transaction of mortgage. I shall only quote a few sentences from two of these decisions. In *Vinayak v. Dattatraya* (2), it is said: "Now, the question is one which arises directly out of the mortgage transaction, which was the subject matter of the litigation in the former suit. But the decree in a suit for redemption must be such as to enable the Court to do complete justice;...and, 'as far as it is possible, the Court endeavours to make a complete decree that shall embrace the whole subject and determine upon the rights of all the parties interested in the estate'...So in this case the claim on which we are now asked to adjudicate is one that could and ought to have been advanced in the former suit. Without a determination on it, there was not a complete adjustment of the rights of the parties.....Where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted

part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.....The comprehensive character of suits relating to mortgages and the obligation incumbent on litigants to see that the decrees in them covers all their rights has been repeatedly recognised by the Courts."

Mr. L. A. Govindaraghava Aiyar attempted to distinguish this and some other cases on the ground that the first suit in those cases was a suit for redemption and not for sale and that there was a distinction between those two classes of suits, because Order XXXIV, rule 9, of the Code of Civil Procedure gives the mortgagor the right to recover moneys due by the mortgagee on taking of accounts as between the mortgagor and the mortgagee, only in a suit for redemption. I am unable to accept this distinction as based on any intelligible principle. The fact that Order XXXIV, rule 9, expressly gives the plaintiff in a redemption suit the right to recover money due by the mortgagee, does not at all imply that if the mortgagor happens to be a defendant in a suit for foreclosure or for sale (or either in the alternative) he could not and ought not to claim the moneys due to him by the mortgagee plaintiff and the Court is not entitled to give him such a decree. On the other hand, in the case in *Satyabadi Behara v. Harabati* (4), the decision says at page 233: "The provisions of the Transfer of Property Act, which we have already analysed, plainly indicate, that in a redemption suit, the whole of the accounts between the mortgagor and the mortgagee must be taken. As was observed by Mr. Justice Poulter in *Doolie Ohand v. Omda Khanum* (5) the essence of foreclosure and redemption suits is, that in such suits, each party is entitled to enforce his rights; a plaintiff claiming foreclosure is bound, upon the accounts being taken, if the balance is against him, to pay that balance;...unless this were

(2) 26 B 661 at p. 667; 4 Bom. L. R. 492.

(3) 31 B. 527; 9 Bom. L. R. 954.

(4) 81 C. 222; 5 C. L. J. 102.

(5) 6 C. 877; 7 O. L. R. 375; 3 Ind. Dec. (N. S.) 20.

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so there would be a multiplicity of suits ; to avoid this, it is necessary under a decree for foreclosure or redemption, that the accounts between the parties should be settled and discharged; if the balance is against any party, he must pay it." This is a well established principle of jurisprudence on which Order XXIV, rule 9 is based and it is not confined to cases where the mortgagor sues as plaintiff for redemption, but it applies to all suits in which accounts as between the mortgagor and the mortgagee have to be taken once for all. I do not think it necessary to go in detail into the questions of legal set-off and equitable set-off elaborately argued on both sides. No doubt, in a case of strict legal set-off the defendant is not bound to put forward his counter claim and a separate suit by him, will not be barred. But if he did put forward such a counter-claim by way of legal set-off and if the whole of that counter-claim was within the competence of the Court to decide, he cannot afterwards sue for any portion of that claim, if he did not get a decree for that portion in the first suit, in which he put forward that counter-claim. The cases in which the counter-claim is beyond the competence of the Court in the first suit, for example, where the first suit was brought in a Small Cause Court which could not exercise jurisdiction over the counter-claim, are irrelevant in the consideration of the point in dispute. As regards an equitable set-off, it arises out of the same transaction in most cases and it not only might but ought to be made the basis of a counter-claim in the first suit itself. The argument based on the language of Order VIII, rule 6 (2), that because it is stated that the written statement pleading a legal set off shall have the same effect as the plaint in a cross-suit, therefore, the Legislature impliedly said, that the Court in which an equitable set off is pleaded cannot give the same effect to that claim, as if it was a plaint in a cross-suit is based on a fallacy similar to that which I have already referred to, when considering the argument based on the language of Order XXIV, rule 9. These statutory provisions are based on general principles and the express recognition of those general principles in particular statutory provisions dealing with the particular cases cannot be treated as a direction to the Court to discard

those principles in other cases. Then, some argument was based on a meticulous examination of the language of section 11, Civil Procedure Code. As I am clear that the counter-claim in the former suit is a cross-suit, not only allowed by the law, but required by the law to be prosecuted as a counter-claim by the defendant at the risk of her being debarred from setting it up afterwards, there is nothing in this contention. Even if section 11 did not strictly apply, the principle of *res judicata* is one based upon much wider considerations of general jurisprudence than are covered by section 11 and the authorities, which I have already referred to, clearly indicate that those principles, even if section 11 did not strictly apply, prohibit the second suit in cases like the present. I should not, however, be understood as doubting that section 11 itself, even construed strictly, applies to this case.

In the result, I dismiss the second appeal with costs.

SPENCER, J.—I agree that this suit is barred by *res judicata*. In *Mahabir Pershad Singh v. Macnaghten* (1), there was a suit by the mortgagees and when that suit was brought, the mortgagees owed some amounts to the mortgagors for rent, which the mortgagees did not pay. When the mortgagees got a decree for the amount, and after the mortgaged property had been sold, the mortgagors brought a suit to have the sale set aside by getting the rents which had accrued in their favour set-off against the amount due under the mortgage. Their Lordships of the Privy Council observed that the proper occasion for enforcing this equity of set-off would have been in defence of the mortgage suit, and, therefore, the plea was one which ought to have been made a ground of defence in the former suit, between the same parties, and the plaintiffs who were appealing were debarred from putting forward their claim in a separate suit. Now, in the case before us, it appears that in the prior suit, Original Suit No. 225 of 1915 on the file of the Additional District Mansif's Court of Sivaganga, the present plaintiff was there found entitled to at least Rs. 1,072 against the amount of Rs. 634, found to be due to the present defendant, who was plaintiff in that suit and consequently the suit was dismissed. So this is a stronger case than that in *Mahabir Pershad Singh v.*

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*Macnaghten* (1), because not only might this plea have been raised in the former suit, but it actually was raised and the suit was dismissed in consequence. Under Order XX, rule 19, of the Civil Procedure Code, the decree in that suit might have stated what amount was due to the plaintiff and what amount was due to the defendant and either party might have been allowed to recover what was due to each. In that suit, the present plaintiff was content to have the suit dismissed; she apparently waived her claim to the balance that was due to her and she cannot now sustain the present separate suit for a relief which she might have got in the former suit.

I agree that the second appeal should be dismissed with costs.

M. C. P.

Appeal dismissed.

### PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

December 16, 1920.

Present:—Lord Moulton, Lord Phillimore,  
Sir John Edge, Mr. Ameer Ali and  
Sir Lawrence Jenkins.

THE SECRETARY OF STATE FOR  
INDIA IN COUNCIL—APPELLANT

versus

SRINIVASA CHARARI AND OTHERS—  
RESPONDENTS.

*Inam—Enfranchisement of Inam grants, effect of—Minerals, right to, whether passes—Madras Enfranchised Inams Act (IV of 1862)—Madras Inams Act (VIII of 1869)—Title-deeds granted by Inam Commissioner, effect of—Grant, construction of.*

An inam grant may be no more than an assignment of revenue, and even where it is or includes a grant of land, what interest in the land passes must depend on the language of the instrument and the circumstances of the case. [p. 232, col. 2]

Without apt words such a grant does not pass the right to minerals. [p. 232, col. 2.]

Title-deeds issued by the Inam Commissioner in Madras can confer no higher title than was originally granted; they cannot vest in the Inamdars a subject-matter not already belonging to them. [p. 233, col. 2.]

The fact that the Madras Government in its standing orders at one time disclaimed the mineral rights in enfranchised inam lands does not preclude the Secretary of State from claiming those rights. [p. 233, col. 2.]

Appeal from a decree of the Madras High Court, dated the August 7, 1916, reported as 39 Ind. Cas. 337, dismissing an appeal from the Letters Patent from a decree of a Divisional Bench of the said High Court,

FACTS.—The sole question in this appeal was whether the respondents had the right to minerals in the village included in their grant.

The facts of the case will be found in the report of the earlier proceedings contained in 39 Ind. Cas. 337; 40 Mad. 266.

On this appeal

Mr. Dunne, K. C., and Mr. E. B. Raikes, for the Appellant, submitted that the minerals were never granted to respondents' predecessors. It was clear from the *Parsana*, which was the best evidence of the original grant, that Government had a reversionary right. The Inam Register shows that the assessment was fixed from the point of view of cultivation. A *jodi* or quit rent was charged. Subsequently, in 1865, documents were issued to respondents' predecessors confirming the inams to them in freehold but these enlarged the estate only and not the property: their tenure was made better but the subject matter of the tenure remained the same. Whatever may have been the case before, since Madras Act VIII of 1869, it is clear that nothing done under the Inam Commissioner could vest in the inamdars a subject-matter not already belonging to them. It was not till 1905 that respondents began to lease out this land for mining: and, though they make out a case by prescription, both Courts have held that they have no prescriptive right to the minerals. A grant of a tenure at a fixed rent, even if the tenure is permanent, heritable and transferable, does not carry a right to the minerals in the absence of express evidence to that effect.

*Sashi Bushan Misra v. Jyoti Prashad Singh Deo* (1); *Raghunath Roy Marwari v. Raja of Jheria* (2).

Counsel also cited *Hari Narayan Singh v. Sriram Ohakravarti* (3), *Durga Prashad Singh*

(1) 40 Ind. Cas. 189; 44 I. A. 46 at p. 50; 1 P. L. W. 361; 21 O. W. N. 877; 15 A. L. J. 209; 32 M. L. J. 245; (1917) M. W. N. 228; 25 O. L. J. 265; 21 M. L. T. 308; 19 Bom. L. R. 416; 6 L. W. 2; 44 C. 585 (P. O.).

(2) 50 Ind. Cas. 819; 46 I. A. 159 at p. 169; 17 A. L. J. 567; 36 M. L. J. 660 1 U. P. L. R. (P. O.) 43; 23 O. W. N. 914; 26 M. L. T. 76; 30 O. L. J. 160; 21 Bom. L. R. 895; 10 L. W. 347; 47 C. 95 (P. O.).

(3) 6 Ind. Cas. 785; 37 I. A. 136; 14 O. W. N. 746; 11 O. L. J. 674; 7 A. L. J. 678; 20 M. L. J. 569; 12 Bom. L. R. 405; 8 M. L. T. 51; (1910) M. W. N. 309; 37 C. 728 (P. O.).



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*v. Brojo Nath Bose* (4) and *Girdhari Singh v. Megh Lal Pandey* (5)

[SIR JOHN EDGE.—The principle of all these cases is that a grantee must show express words in his grant conveying the minerals].

The High Court judgment is based on the assumption that the holding of an *inamdar* is the same as that of a *Zamindar*, but they are widely different: before 1865 an *inamdar* could not even alienate.

Mr. De Gruyther, K. O. (with him Mr. Kenworthy Brown), for the Respondents.—As to ownership of minerals, *inamdars* are on the same footing as *Zamindars*.

I am in the position of a proprietor of *lakhiraj*, not an *inamdar* in the sense of a grantee of the royal share of revenue. We were entered in the Register kept under Madras Regulation XXXI of 1802, section 15. That register relates to persons who were holding land exempt from revenue: it had nothing to do with tenants. It was a register made under the Permanent Settlement. That register shows I am a landed proprietor: as such I have the mineral rights.

[LORD PHILLIMORE.—If you are a landed proprietor under a particular title, we shall have to construe the document conferring that title.]

We filed our documents showing we were proprietors before the *Inam* Commissioner which recognised them and said the land would be our absolute property. We have a parliamentary title: what the Act of 1869 took away is what could not pass: our claim is based on the title deeds not the two Acts. On the original grant there was a grant of the land: the burden of qualifying it is on the other side.

The whole subject of coal mines in Bengal is dealt with in *Durga Prashad Singh v. Brojo Nath Bose* (4) and the conclusion is that Government cannot claim revenue from them unless reserved.

Mr. Kenworthy Brown followed.—Till re-

(4) 15 Ind. Cas. 219; 39 I. A. 133; 16 O. W. N. 482; (1921) M. W. N. 25; 11 M. L. T. 337; 9 A. L. J. 46; 15 C. L. J. 461; 14 Bom. L. R. 445; 23 M. L. J. 26; 39 C. 696 (P. C.).

(5) 42 Ind. Cas. 651; 44 I. A. 246; 22 M. L. T. 358; 15 A. L. J. 851; 8 M. L. J. 687; 3 P. L. W. 169; 26 C. L. J. 154; (1917) M. W. N. 232; 22 O. W. N. 201; 7 L. W. 90; 20 Bom. L. R. 64; 45 C. 37 (P. C.).

sently, the Madras Government took the view that *inamdars* had the right to minerals; Orders of Board of Revenue, 1880, Volume I, page 31. Government also paid compensation for the stone in land acquisition proceedings.

Mr. Dunne in reply.—The mere fact that Government as a matter of expediency did not claim cannot affect their rights. In no case, even in Bengal, has the question been determined between Government and the *Zamindar*, the cases are all cases between *Zamindars* and tenure holders.

In *Durga Prashad Singh v. Brojo Nath Bose* (4) Government was not a party.

The respondent's present case that he is a *lakhirajdar* under a Regulation XXXI of 1802 is new—neither pleaded nor proved. In their case they rest their title on the *parwana* there mentioned. But the very register they refer to shows payment of *jodi*.

#### JUDGMENT.

SIR LAWRENCE JENKINS.—The suit out of which the present appeal arises was brought by the *Shrotriendars* of the village Kulloor in the Madras Presidency, in order to establish their unfettered right to quarry stone in the lands of the village without payment of any royalty in respect thereof. Their claim has succeeded in all the Indian Courts, and the present appeal has been preferred from an appellate decree of the Madras High Court, dated the 7th March 1916, by the defendant, the suit, the Secretary of State for India in Council.

The title alleged by the plaintiffs in their plaint is a grant about 160 years ago of the village as *inam* to their predecessors-in-title by the Government that existed prior to the British Government. The plaint then alleges undisputed enjoyment, an admission of their title at the time of the *inam* settlement of the village, the acquisition of a prescriptive right, and proceedings under the Land Acquisition Act.

On the strength of this grant, and these subsequent events, they claimed a decree "establishing the full rights of the plaintiffs, the *shrotriendars* of the said village," to the rocks and hills within its boundaries. The defendant, by his written statement, did not dispute that there was a grant of the village, but he traversed the statement

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that there was any conveyance of the right of the State to the minerals in the village. He also contested the other matters on which the plaintiffs relied.

In these circumstances, the suit came on for settlement of issues, and it was ordered that the following issues should be tried:—

"1. Was there an outright grant of Kulloor village as *inam* to the plaintiffs' predecessors-in-title by the Government prior to the British Rule as alleged, and did the grant include the right in regard to minerals also in the village? And is this grant, if true, binding on the defendants?"

"2. Was the exclusive right to take the minerals in the village free of taxation conferred expressly or by implication on the plaintiffs' predecessors-in-title at the time of the *inam* settlement; if this right had been conceded by the *Inam* Commissioner in excess of what had been allowed by the original grant, was it within the scope of the authority of the *Inam* Commissioner to have done so; if not, whether the action of the *Inam* Commissioner is binding on the defendant?"

There were other issues, but they need not now be considered.

The findings of the Courts on these issues, and their decrees, are in the plaintiffs' favour, and, in accordance with them, the appellate decree of the 7th March, 1916, was passed.

The burden of establishing the grant is on the plaintiffs, by whom it is asserted, and it is for them to show, that it contained terms apt to vest in their predecessors the quarries, and the full right to work them.

Though the grant is not disputed by the defendant, when it came to proving its terms at the trial, the plaintiffs were in this difficulty that the original grant could not be produced by them.

The defendant, however, produced a register containing an English translation of a *parwana* which purports to be a copy of a *parwana* written in 1750 (Exhibit 1). Its genuineness is conceded and the document was properly admitted in evidence by the Court of first instance as evidence of the terms of the original grant.

In the circumstances of this case, it is

the best evidence of those terms, and it is on the true construction of the terms so evidenced that the rights of the plaintiffs must depend. And, in so saying, their Lordships do not overlook what has been urged as to the effect of subsequent proceedings and conduct.

The document recites, (1) that the entire village Kulloor had been enjoyed for a length of time by way of *Shrotriem* for a yearly sum; (2) that it was so enjoyed according to the *sunnads* of former Princes; (3) that it was granted as a subsistence to Letohmi Narasimachary, *Zunardar*; and (4) that the original *sunnads* had been lost. It then records that the village was restored to the said *Zunardar*, and that the purpose of the restoration was that, having appropriated to his own use the produce of the seasons each year, the *Zunardar* might be assiduous in offering up prayers for the lasting prosperity of the Empire. The obligation was then imposed on him of paying regularly to the *Sirkar*, the established amount of the *Shrotriem*. It was a condition of this restoration that the village had been enjoyed according to the *mamool sh-edamed*.

Can then the plaintiffs successfully claim that under these terms the full right to the quarries and mineral passed to them?

Their Lordships think not. The grant was of a village in *inam*, and the rules of English Law as to real property in England can afford no guidance as to what passed. A grant of this description may be no more than an assignment of revenue, and even where it is or includes a grant of land, what interest in the land passed must depend on the language of the instrument and the circumstances of each case. There is nothing here to suggest that the original grant contained words sometimes employed in Indian documents, where it is the intention that the *inam* grant of a village should create such an interest in land as would vest the minerals in the grantee. Nor does the language suggest that any further benefit to the grantee was contemplated or intended than such as might be derived from the ordinary use of the land for the purpose of cultivation. It was not a complete transfer for value of all that was in the grantor; the interest

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bestowed was merely something carved out of his larger interest which still remained in him as a reversion: the grantor was the ruling power, the grantee a Brahmin whose assiduous prayers were engaged: a *joti* was reserved and the purpose of the grant was to ensure the subsistence of the grantee by the appropriation to his use of "the produce of the seasons each year."

The interest thus created was inalienable and heritable only by lineal heirs, so that on any occasion of forfeiture or extinction of lineal heirs the grantor or some one deriving title under him would come in by virtue of the reversion which had not been transferred. It does not accord with the scheme of such a grant that any person taking under it should have the power to consume its subject-matter by quarrying operations, even if an interest in land was created.

But, then, it is urged that subsequent events show that the *shrotriendars* acquired in one way or another an interest in the land of the village that entitles them to work the quarries without any obligation to make any payment to the Government. In support of this argument their Lordships' attention has been drawn to many matters and, in particular, to the title-deeds of the A series of Exhibits, the extract from the *inam* register (Exhibit J), the Regulations, Acts and Standing Orders relating to *inams* and a land acquisition proceeding.

Had these materials stood alone, they might well have been urged as suggesting an inference that the original grant was in terms that supported the plaintiffs' claim as to what passed under it. But in the clearer light afforded by Exhibit I they lose their evidentiary value and leave the terms as shown by that exhibit in no degree obscured.

No doubt, words are to be found which are in a sense appropriate to the plaintiffs' claim but they are used in a context to which they do not belong. Thus, to speak of "freehold" in the connection in which it appears, is merely a piece of inapt drafting, and cannot be regarded as a correct description of the plaintiffs' rights in this village.

Even in this litigation there is the same incorrect use of words used, as where the payment demanded by the Government is

spoken of as assessment, whereas the demand is for a payment in the nature of royalty for the use and consumption of that which belongs to the Government.

Inaccuracies of this class can in no way assist the plaintiffs.

Apart from the contention that these materials furnish evidence of the terms of the grant, it is contended that a title was thereby created in the *Shrotriendars* to the quarries. But it was rightly decided by the final Appellate Bench of the High Court that the title-deed of the *Inam* Commissioners conferred no higher title than was originally granted. There is language in the Act of 1862 that might possibly be read as having the effect for which the plaintiffs contend, but this was corrected by Act VIII of 1869, and it is now clear that, though a larger interest was created, nothing done under the *Inam* Commission could vest in the *inamdars* a subject-matter not already belonging to them.

The land acquisition proceedings do not carry matters any further, for even without any title to the quarries it may well have been thought expedient, especially in the view then held, to proceed under the Act for the purpose of acquiring such interest as the *shrotriendars* might have in the surface. And at most these proceedings can amount to no more than action taken under a misapprehension of the Government's legal rights, and this could not make the law one way or the other, nor could it affect the Government's title.

As affecting the quarries none of these matters had any creative or disenthaling force.

It must be conceded that expressions which are ambiguous and to some extent compromising, are used, and the reason for this is not far to seek.

The Government of Madras have not always adhered to the view they now hold. Thus, in the Standing Orders (Edition 1890), it is declared that "the State lays no claim to minerals in enfranchised *inam* lands." But this view was changed, and in the Edition of 1907 it is laid down that "claims should be made to the State's share in all mineral produce in lands held on *inam* tenure" of the description there given.



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Authorities dealing with the relative rights of a Zamindar in Bengal and those holding by subordinate tenure from him were brought to their Lordships' notice, and were claimed by the appellant as conclusive in his favour. They refrain, however, from discussing them as this case turns on the true construction of the particular grant which is the foundation of the plaintiffs' claim in this suit.

Their Lordships, therefore, hold that this appeal should be allowed. The ordinary consequence would be that the costs here and in the Indian Courts should be thrown on the unsuccessful respondents. But there are circumstances in this case which induce their Lordships to depart from this rule. The value of the subject-matter in litigation is far below the appealable value, and it was as a matter of favour that the defendant was permitted to appeal, as this apparently was regarded as a case of general importance. Moreover, the respondents' resistance to the Government's demand was not unreasonable in view of the latter's earlier attitude in reference to minerals.

Their Lordships, therefore, think that there should be no order as to the costs either here or below.

Their Lordships accordingly will humbly advise His Majesty to allow this appeal, and to dismiss the suit. There will be no order as to the costs of this appeal or of the lower Courts, except that each side must bear its own.

*Appeal allowed.*

Solicitor for the Appellant.—The Solicitor, India Office.

Solicitor for the Respondent.—Mr. Douglas Grant.

# COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND CIVIL APPEAL No. 74 OF 1919-20.

April 14, 1920.

*Present:*—Mr. Porter, J. M.

Raja PERTAB BAHADUR SINGH—  
APPELLANT

*versus*

RAM DAS AND OTHERS—RESPONDENTS.  
*Gift, deed of—Attestation—Proof, nature of.*

In order to prove a deed of gift the production of a witness who identified the donor and also the attesting witnesses when the deed was being registered, and who was known personally to the Sub-Registrar, together with an entry in favour of the donee in the village records in succession to the donor, is a sufficient compliance with the provisions of the law.

Second appeal from the order of the Commissioner, Fyzabad Division, dated the 31st of October 1919, in the case of ejectment.

JUDGMENT.—The first ground of appeal has not been argued in this Court, and the genuineness of the *shankalapnama* has not been questioned.

The point argued by the Counsel, namely, the respondents did not claim under proprietary rights by virtue of the *shankalapnama* and that consequently their claim must fail as being based on a transfer of an untransferable right, is not mentioned in the grounds of appeal. And clearly respondents' claim from the first has been that they are transferees from holders of an under-proprietary (*shankalap*) right.

The second ground of appeal is that the deed of gift has not been proved. The witness produced is the man who identified the donor when the deed was being registered and who signed at the back of the document. The attesting witnesses, Ram Saeht Shukul and Chauharja Singh, also signed at the time of registration. They were identified by Nagaishar Ram, the witness produced in Court, who was personally known to the Sub-Registrar. The donees were entered in the village records in succession to Sheobalak, and I think that there has been sufficient compliance with the provisions of the law. The point does not seem to have been argued before the lower Appellate Court when a defect, if one exists, could have been cured.

At first Settlement, Gobardhan, father of Sheobalak, and in whose favour the *shankalapnama* was granted, held 19 plots the equivalent of 18 new plots now in suit. For the rest, the names of other tenants are recorded. But at the recent Settlement, his son Sheobalak's name re appears for all 40 plots. I agree that this fact, and the fact that the rent Rs. 44 is the same as in the *shankalapnama*, warrants the inference that the names of other tenants recorded

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at first Settlement, were those of sub-tenants.

Certain numbers in suit are omitted from the deed of gift. There are Nos. 559, 571, 616, 627, 662, 665, 681, 682 and 688. These numbers were all in Sheobalak's names at the recent Settlement. The body of the gift-deed conveyed to the donee every description of property which the donor held in the village. It is evident, however, that the bottom of the deed has been torn away by accident, and it is a fair assumption that the missing numbers may have been entered in portion.

I agree with the lower Appellate Court that respondent has shown *prima facie* a title to under-proprietary rights in all plots in suit.

Appeal dismissed with costs.

*Appeal dismissed.*

# MADRAS HIGH COURT.

CIVIL APPEAL NO. 152 OF 1919.

January 28, 1920.

Present:—Sir Abdur Rahim, Kt.,

Officiating Chief Justice, and

Mr. Justice Phillips.

MAHAMED ALI SHERIFF SAHEB

AND OTHERS—PLAINTIFFS—

—APPELLANTS

*versus*

BUDHARAJU VENKATAPATHI RAJU

AND OTHERS—DEFENDANTS NOS. 1, 3, 4

AND 5—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 55 (2)—Covenant for title—Defective title—Defect known to vendee, effect of—Conveyance, previous transactions recited in, effect of—Vendee, dispossession of—Damages, suit for—Limitation, terminus a quo—Limitation Act (IX of 1908), Sch. I, Arts 97, 116.*

The effect of a covenant for title implied by section 55 (2) of the Transfer of Property Act can only be got rid of by the vendor indicating by clear and unambiguous expressions that he does not mean to guarantee that he has good title to the property and is entitled to convey the same. Mere knowledge on the part of the vendee of a defect in the title of the vendor would not by itself defeat the vendee's right on the basis of such a covenant. [p. 236, col. 2; p. 237, col. 1.]

The recital in a deed of conveyance of previous transactions which form the links in the chain of the vendor's title, has not the effect in law of warning the vendee that the vendor has a title liable to be defeated because of some hidden defect so as to exempt the vendor from all liability. [p. 236, col. 1.]

Where owing to a defect in the title of a vendor to convey, the vendee is dispossessed in execution of a decree obtained against him setting aside the conveyance, the starting point of limitation for a suit by the vendee for damages for breach of covenant, is the date of the original decree in execution of which he is dispossessed. The fact that there is an appeal and second appeal in the suit would not postpone the *terminus a quo* to the date of the appellate decree, because an original decree is not suspended by the presentation of an appeal, nor is its operation interrupted where the decree on appeal is one of dismissal. [p. 237, col. 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Rajahmundry, in Original Suit No. 9 of 1918.

Mr. P. Somasundram, for the Appellants.

Mr. V. Ramadoss (with him Mr. K. Venkatarama Raju), for the Respondents.

**JUDGMENT.**—Upon the construction of Exhibit A, which is a deed of sale in favour of the 1st plaintiff (1st appellant), by the father of defendants Nos. 1 to 3, the Subordinate Judge came to the conclusion that it did not contain any express warranty of title and that the warranty implied by section 55, clause (2), of the Transfer of Property Act was negatived by a specific contract to the contrary embodied in Exhibit A. Exhibit A, recites: "it has been settled previously to dispose of by sale to you for Rs. 2,800 my right, title and interest in the marginally noted 30 acres, 59 cents of land." Then it sets out the title of the vendor beginning with a deed of sale of 16th March 1875 executed by D. Suryanarayana Raju's wife Venkataramaniah *alias* Ramaniah in favour of Chinnakondaraju and next the sale dated 21st February 1878 by Chinnakondaraju to one Jagannadharaju who sold the property to the vendor under Exhibit A by a deed, dated 30th August 1878. It goes on to state that the vendee and others had been in possession of the land under a *cumulo* granted by the vendor and that "you (the vendee) shall henceforward be enjoying the same hereditarily and with right of alienation by gift, sale or otherwise as you please. Removing the hindrances to this arising from my agnates or King or neighbour, I shall see that the sale is given effect to in your favour without any obstruction."

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We understand that the phrase, "free of obstruction arising from agnates, King, neighbour or others," is the usual covenant for title used in deeds of sale in Telugu Districts. But it is pointed out that if that phrase imports a general covenant for title we must hold that the omission of the word "others" was deliberate and meant to qualify that covenant. It is not possible to accept this contention unless the phrase was used as an absolute covenant for title; it is difficult to understand what else could have been meant by providing against obstruction from vendor's agnates, the vendor being a male or from his neighbour. In our opinion, the omission of the word "others" can make no difference in this connection. And this is made quite clear from the next clause: "I shall see that the sale is given effect to in your favour without any obstruction."

The argument which found favour with the lower Court was based on the fact that the previous deeds of sale of this land, including the one by Suryanarayana Raju's widow, are specifically recited and also on the statement in Exhibit A that the "right, title and interest" of the vendor in the land was intended to be sold. As regards the last, that must be construed with reference to the subject-matter of the conveyance. What the vendor clearly wanted to convey was the fee simple of the land to which he claimed to be entitled, and the phrase 'right, title and interest' does not mean 'right, title and interest, if any,' and the phrase could not be taken to protect a vendor who, it turns out, had no saleable interest at all in the property. The recital of the previous transactions which formed the links in the chain of the vendor's title has not the effect in law of warning the vendee that the vendor had no title or that he had a title liable to be defeated because of some hidden defect so as to exempt the vendor from all liability. We think Exhibit A contains an express covenant for title. Even supposing that it does not, still a contract on the part of the seller would be imported by virtue of section 55, clause (2), of the Transfer of Property Act to the effect that the interest which he professed to transfer to the buyer subsisted and that he had power to transfer the same. We have already indicated that, upon the terms of the document, the Subordinate Judge was wrong

in holding that a contract to the contrary could be gathered from the terms of Exhibit A within the meaning of section 55.

The law is well settled that the effect of a covenant for title is not to be got rid of except by the vendor indicating to the purchaser by use of clear and unambiguous expressions that he did not mean to guarantee that he had a good title to the property and was entitled to convey the same. It will be sufficient, in this connection, to refer to the case of *Seaton v. Mapp* (1) where, at page 862, Knight Bruce, V. C., says: "When the vendor sells property under stipulations which are against common right, and places the purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness; if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself," and to the case of *Page v. Mullan Railway Co.* (2) where it is stated: "If a vendor does not intend that his covenant for title shall extend to defects disclosed to the purchaser, whether on the face of the deed or *aliunde*, the vendor must take care not to word his covenant so as in terms to cover such defects, or he must insert some clause in the deed clearly explaining and controlling his covenant. This is in accordance with the ordinary rules of construction and with fair dealing..... There is no authority for not giving effect to the clear and express words of a vendor's covenant for title simply because a defect covered by them was disclosed by a recital in the conveyance." The same rule of law is laid down in *Raga Aiyangar v. Samachariar* (3) and *Digambar Das v. Nishulala Deb* (4).

Reliance was placed by the learned Vakil for the respondent on a judgment of Subramania Aiyer and Davis, JJ., in *Subramania Aiyer v. Samintha Ayyar* (5). We

(1) (1843) 63 E. R. 857; 2 Coll. 556; 70 R. R. 324.

(2) (1874) 1 Ch. 11 at p. 20; 63 L. J. Ch. 123; 7 R. 24; 70 L. T. 14; 42 W. R. 116.

(3) 22 Ind. Cas. 42; 1 L. W. 8; (1914) M. W. N. 57.

(4) 8 Ind. Cas. 91; 15 C. W. N. 655 at p. 659.

(5) 21 M. 69; 7 M. L. J. 819; 7 Ind. Dec. (N. S.) 405.



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do not find that the law is laid down differently there. All that is laid down is that an express covenant will do away with the effect of all the implied ones and that the insertion of any express covenant on the part of the grantor would qualify and retrain the force and operation of an implied covenant within the import and effect of an express covenant. In that case it was held that there was a special contract by which the vendor bound himself to pay a fixed sum of money by way of damages and that the plaintiff, therefore, was not entitled to any other rights which the general law, but for this contract, would have given him. It must be taken to be well established that mere knowledge on the part of the vendee of a defect in the title of the vendor would not by itself defeat the vendor's right on the basis of a covenant implied by section 55, clause (2). See *Subaraya Reddiar v. Rajagopala Reddiar* (6), *Thekkemannengath Raman v. Kakkestori Pathiyot Manakkal* (7) and *Vellayappa Rowthen v. Buva Rowthen* (8).

The next question argued before us is one of limitation and the facts which gave rise to it are as follows:—The sale to the appellant, as already stated, was on the 5th May 1896. The reversioners to the estate of Suryanarayanaraju to whom this property belonged and whose widow made the sale on which the present vendor's title is based obtained a decree on 30th March 1911 setting aside the widow's sale. They obtained possession on 29th November 1911. An appeal having been filed from that decree by the present plaintiff the decree of the first Court was upheld by the High Court on the 7th October 1914. The present suit was instituted on the 6th October 1917. The learned Subordinate Judge overruled the plea of limitation, firstly, on the ground that Article 97, which lays down three years for a suit for money paid upon an existing consideration which afterwards failed, from the date of the failure applied and, following the decision of this Court in *Rajagopalan v. Tirupananthal*

*Thambiran* (9), he held that time would be counted from the date of the decision of the High Court, that is, 7th October 1914, so far as Article 97 is concerned, according to a very recent decision of the Privy Council reported as *Hukum Ohand Boid v. Pirthichand Lal Chowdhury* (10), time would run from the judgment of the first Court and would not be postponed till the decision of the Appellate Court. Sir Lawrence Jenkins, who delivered the judgment of the Board, says at page 678\*: "Both Courts have held that the failure of consideration was at the date of the first Court's decree. Their Lordships feel no doubt that as between these two decrees this is the correct view, for whatever may be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by presentation of an appeal, nor is its operation interrupted where the decree on appeal is one of dismissal." The ruling of this Court relied on by the Subordinate Judge and other rulings to that effect must, therefore, to this extent, be held not to be good law. But we think that the Subordinate Judge was right in applying Article 116, which allows six years for a suit for compensation for the breach of the contract in writing registered from the date of the breach. In this case there is not only an express covenant for title but also one for quiet enjoyment and that latter covenant must be taken to have been broken when the plaintiff was dispossessed and possession was given to the reversioners i. e., (on the 29th November 1911). In the case before the Judicial Committee above referred to it was also contended that the period of limitation should be taken to have begun to run when the plaintiff's possession was lost. But they held that the quality of possession acquired by the purchaser in that case (it was apparently merely formal and not actual possession) was such as to exclude the idea that the starting point was to be sought in the disturbance of possession. But that could not be predicated of the possession of the present plaintiffs, who were in actual

(6) 28 Ind. Cas. 570; (1914) M. W. N. 376; 38 M. 887; 15 M. T. 240.

(7) 27 Ind. Cas. 989; 28 M. L. J. 184; 2 L. W. 433.

(8) 29 Ind. Cas. 747.

(9) 17 M. L. J. 149; 30 M. 316.

(10) 50 Ind. Cas. 444; 46 C. 670; 17 A. L. J. 514; 56 M. L. J. 567; 23 C. W. N. 721; 21 Bom. L. R. 632; (1919) M. W. N. 258; 30 C. L. J. 71; 46 M. L. T. 131; 10 L. W. 416; 46 L. A. 52 (P. C.).

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possession and enjoyment of the property until dispossessed in execution of the decree obtained by the reversioners.

It has been held in some cases that, where a deed of sale is found to be void *ab initio*, the cause of action for breach of covenant for title arises on the date of sale, see *Venkatanarasimhulu v. Peramma* (11)], if the suit is one covered by Article 62. But in this case it could not be said that the cause of action for compensation for breach of covenant for quiet enjoyment arose on the date of sale. The sale was not void *ab initio* but only voidable at the instance of the reversioners. The covenant for quiet possession could not be said to have been broken until the date of disturbance of the plaintiff's possession.

The appeal must be allowed and the plaintiffs will have a decree for damages which will be assessed as follows:—Rs. 2,800 the price which the first plaintiff paid for the property *plus* interest on that amount at 6 per cent. from the date of dispossession, namely, 29th November 1911 *plus* the amount of mesne profits which they had to pay under the decree in the reversioners suit, *viz.*, Rs. 1,071 and also costs paid by them under that decree amounting to Rs. 1,272 10-0. The plaintiffs will have their costs from the respondents both in this and in the lower Court.

M. C. P.

*Appeal allowed.*

(11) 18 M. 173; 5 M. L. J. 32; 6 Ind. Dec. (N. S.) 470.

COURT OF THE BOARD OF REVENUE,  
UNITED PROVINCES.

SECOND CIVIL APPEAL No. 98 OF 1918 19.

November 12, 1919.

Present:—Mr. Ferard, S. M., and  
Mr. Harrison, J. M.

RAM SARAN—APPELLANT

*versus*

TULSHI AND OTHERS—RESPONDENTS.

*Agra Tenancy Act (II of 1901), s. 34—Trespasser—  
Suit to eject trespasser as tenant, maintainability of.*

Where a landlord chooses to treat a trespasser as a tenant and sues for ejectment, he is quite entitled to do so and section 34 of the Agra Tenancy Act applies to such a case.

Second appeal from the order of the Commissioner, Meerut Division, dated the 8th of May 1919, in a case of ejectment.

## JUDGMENT.

HARRISON, J. M.,—(November 5, 1919).—In this case the defendants-respondents were apparently in possession of the whole plot No. 852 which, however, belongs to the proprietors of three different *khata*s of the *khewat*. *Khata* No. 2 belongs to *mahal* Ram Saran of which the plaintiff appellant is the *lambardar*. It appears from the *patwari*'s evidence that there was some boundary dispute between the owners of *khata* No. 2 and the other *khata*s interested in this plot and ultimately a portion measuring 7 *biswas* was marked off as the share belonging to *khata* No. 2. The defendants-respondents had been in possession of the whole plot No. 852 apparently as *khudkasht* and when this new boundary marking off these 7 *biswas* was erected, they ceased, of course, to hold the land as *khudkasht*, for it remained their own property no longer. The appellant, *lambardar* of the other *khata*, then sued to eject them with reference to section 34 of the Agra Tenancy Act choosing to treat them as tenants. The Assistant Collector decreed the claim but the Commissioner reversed the decision on the ground that the relation of landlord and tenant did not exist between the parties. It seems true that this is clearly a case to which section 34 applies and it has been repeatedly held that if the land-holder chooses to treat a trespasser as a tenant and sues for ejectment, he is quite entitled to do so. For this reason, I consider that the Commissioner's decision is

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wrong in law, and I would allow the appeal and restore the order of the Assistant Collector with costs to the appellant in all Courts.

FERRARD, S. M.—I agree.

*Appeal allowed.*

# MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL No. 17 OF 1919.

March 23, 1920.

*Present:*—Sir John Wallie, Kt.,  
Chief Justice, and Mr Justice Krishnan.

NANA TAWKER—PLAINTIFF No. 1

—APPELLANT

*versus*

BHAVANI BOYEE AND ANOTHER—

PLAINTIFF No. 2—DEFENDANT No. 2

—RESPONDENTS.

*Nidhi, deposit in—Depositor nominating person to receive deposit—Nomination, whether can be enforced as Will.*

T. made a deposit in a Nidhi, and in accordance with its Articles of Association nominated N as the person entitled to receive the money after his death. T. died and N. brought the present suit to recover the amount of the deposit :

*Held*, that the nomination could not be enforced as a Will as it was not attested by two witnesses, and that N. had acquired no interest in the deposit. [p. 241, col. 1.]

Appeal against the decree of the City Civil Court, Madras, in Original Suit No. 306 of 1918.

FACTS appear from the judgment.

Mr. T. R. Venkata Rama Sastriar (with him Messrs. T. Sunlara Row, Konnusawmy Aiyar, and Narainswamy Aiyar), for the Appellant.—The plaintiffs are entitled to the deposit amount by virtue of their having been nominated as payees by the deceased depositor. The very object of nomination and of changing the nominee at the pleasure of the depositor, is, under the rules of the Nidhi, to enable them to know beforehand to whom they should pay the money. Such provision exists in the case of Friendly Societies and Insurance Companies where the nominees were held entitled to the moneys. See *Ashby v. Costin* (1), *Bennet v. Slater* (2),

*Davies, In re; Davies v. Davies* (3) and *Florina Marties v. Pinto* (4). In *Florina Marties v. Pinto* (4) there are observations to the effect that even where the nomination is ambulatory in character and the nominator has discretion to change his nominees, where the Society undertakes to pay a particular person, that person is entitled to the money.

Though the plaintiff's claim cannot be supported on the basis of a Will or a trust, it is sustainable in enforcement of a contract between the deceased Naganatha Tawker and the Nidhi that the deposit should be re-paid to the plaintiffs on Naganatha's death. The nomination would otherwise be a meaningless superfluity. The fact that the nominees were strangers to the contract does not affect the question, as the contract was for their benefit. *Iswaram Pillai v. Taregan* (5).

Mr. A. Krishnaswami Aiyar (with him Messrs. Nanabhoy Davey, A. V. Seshaya and M. Patanjali Sastri), for the Respondents.—The nomination is one of the formalities to be observed in fixed deposit applications to funds and Nidhis. It cannot operate or be enforceable as a Will. Plaintiff's right could be sustained only if they could produce a Will of the late Naganatha Tawker executed with due formalities. Even if the nomination could be treated as a Will it is unenforceable without Probate.

There is no question that the Nidhi is liable in any fiduciary capacity to account to the plaintiffs. No trust was created and none can be implied. The cases relied on by the other side bear on the construction of the Friendly Societies Act. In *Ashby v. Costin* (1) the Friendly Society could, under their rules, distribute the insurance money among the relations of the deceased. In *Florina Marties v. Pinto* (4), there was a special contract between the deceased and his nominee for consideration paid by the latter. In these Friendly Societies the money was not treated as the absolute property of the subscriber. Here, the deceased had absolute dominion over the property. He could renew or withdraw it without any consent by the Nidhi.

(1) (1888) 21 Q. B. D. 401; 57 L. J. Q. B. 491; 59 L. T. 224; 87 W. R. 40; 33 J. P. 69.

(2) (1899) 1 Q. B. 45; 68 L. J. Q. B. 45; 79 L. T. 324; 47 W. R. 52; 15 T. L. R. 25.

(3) (1892) 3 Ch. 63; 61 L. J. Ch. 595; 67 L. T. 548; 41 W. R. 13.

(4) 42 Ind. Cas. 677; 83 M. L. J. 476.

(5) 23 Ind. Cas. 951; 88 M. 753; 26 M. L. J. 127.



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The nomination could not be treated as a contract with the Nidhi. There is nothing to show that the Nidhi undertook to pay the money to the plaintiffs. The deposit receipt, Exhibit II, contains no reference to it. The receipt is 'not transferable' forbidding assignment. Rule 36 deals only with change of nominees.

Even if the nomination is a contract plaintiffs were not parties to it and could not enforce it. See *Shankar Vishwanath Wagh v. Umabai Sadashiv Wagle* (6).

#### JUDGMENT.

WALLIS, C. J.—The deceased, T. Naganatha Tawker, on the 14th May 1913 applied by letter, Exhibit II, to the Nidhi, which is the first defendant in the case, and requested them to receive payment of Rs 200 for twelve months on fixed deposit. The application, which was made in a printed form provided by the Nidhi, contained certain particulars to be filled in by the depositor including the following :

"Name of the person entitled to receive the deposit paid by me after me, relationship, profession or occupation". Against this he entered the names of the present plaintiffs. "T. Nana Tawker, elder brother's son, T. Kripasunker Tawker, grandson." He then received from the Nidhi the fixed deposit receipt in the usual form, Exhibit I, which provided that interest would cease at the end of the twelve months, when the receipt should be sent for renewal of payment bearing a one anna stamp.

Article 36 of the Articles of Association of the Nidhi which was registered under the Indian Companies Act may be translated as follows: "If any accident should happen to one of the signatories in order to transfer the share, etc., to which he is entitled he must write giving specific details as to the person to be entitled to receive the money after his death or his heirs may receive it....Should any one desire to alter the names of the said persons it can be done on payment of a fee of annas two". It is stated by the learned Judge that the depositor was a member or subscriber of Nidhi, and this has not been questioned before us. Consequently, the Articles of Association were binding as between him

and the company. It was also admitted, as stated by the learned Judge, that the nomination in Exhibit II must be taken to have been made pursuant to Article 36.

On these facts the learned Judge has held that the right to receive the deposit is in the second defendant, the heir of the deceased, and not in the plaintiffs, the nominees under Exhibit II.

Mr. T. R. Venkatarama Sastri in support of the appellant's claim relied on *Ashby v. Oostin* (1), *Davies, In re, Davies v. Davies* (3), and *Bennet v. Slater* (2) *Florina Marties v. Pinto* (4). *Bennet v. Slater* (2) was a decision on the construction of section 15 of the Friendly Societies Act, 1875, and is of no assistance. In *Ashby v. Oostin* (1) the action was in respect of the insurance money which had been paid to the defendant by an unregistered Friendly Society to which the deceased belonged. The rules empowered the Society to distribute the insurance money among the relatives specified in such proportions as they should think fit, unless the deceased had otherwise bequeathed it and if the deceased left no such surviving relatives and had not made a Will they were only liable for his funeral expenses. Cave, J., held that, on the death of the subscriber, the Society, by the terms of the contract, were entitled to deal with the money in the manner provided in the rules. The decision in *Florina Marties v. Pinto* (4) was a similar case. In *Davies, In re; Davies v. Davies* (3), again, the case related to the insurance money payable under a policy entered into with an unregistered Friendly Society. Under these rules, the insurance money was payable to the nominee of the policy-holder and, in default of nomination, to his assignee and, in default of assignment, to his widow, and, if he left no widow, to his children living at his death in equal shares. This, again, was treated by North, J., as a contract with the society that the insurance money should be applied on the member's death in this way and as having authorised them to divide it among his daughters in the event which happened. Both these cases proceeded on the footing that, under the contract, the insurance money was not the absolute property of the subscriber. North, J., observing in the latter case that he had a contingent interest which would

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have become absolute on the happening of a certain event which, however, did not happen. It is, in my opinion, unnecessary to consider these decisions in the present case because here the fixed deposit all along formed part of the subscriber's estate, and was repayable to him at the end of each period of twelve months unless renewed. The case is just the same as if the Bank of Madras or any other Bank which takes fixed deposits were to require the appellant, as in this case, to fill in a form containing the name of the person to whom it was to be paid after the depositor's death. In such a case it might be said to be a term of the contract entered into between the parties that, if the fixed deposit became payable after the depositor's death, it should not go under the ordinary law of succession to his legal representative and, as regards the beneficial surplus, to the next of kin of the beneficiaries under his Will, but to some one else. The law, however, is that, in the absence of a Will, the next of kin are entitled to succeed and if any one desires that any portion of his estate should go to any one else, his only course is to make a Will in the proscribed form. The nomination in the present case cannot be enforced as a Will as it is not attested by two witnesses and Probate has not been obtained as required by the Hindu Wills Act in the case of Wills executed in a Presidency Town. Therefore, no effect can be given to it. This view is in accordance with a decision of the Irish Courts in *Towers v. Hogan* (7). A nomination of this kind, in the language of Lord Cozens-Hardy in *Williams, In re, Williams v. Ball* (8), "seems to be, if anything, in the nature of a testamentary instrument" and must, therefore, fail for want of due execution. There can be little doubt that there, as in the present case, the object was to avoid the trouble and expense of taking out Probate or Letters of Administration, but the method adopted is one which the law cannot recognize. The appeal fails and is dismissed with costs.

KRISHNAN, J.—This is an appeal from the decree of the City Civil Court in Original Suit No. 306 of 1918 dismissing the plaint

iff's suit. The facts of the case are undisputed. The first defendant is a Nidhi or Fund carrying on business in Madras and is registered under the Indian Companies Act. One Naganatha Tawker, a share-holder in it, deposited a sum of Rs. 200 in the Nidhi in May 1913 as a fixed deposit for a year under receipt, Exhibit I. That receipt is in the following terms:

"Received from T. Naganatha Tawker Rs. 200 only as a deposit repayable 12 months after date with interest at the rate of  $7\frac{1}{2}$  per cent. per annum.

"N. B.—Interest will cease at the expiration of the above period of 12 months when this receipt must be sent in for payment or renewal endorsed by the depositor."

It also adds "not transferable". This is the usual form of fixed deposit receipt that Banks and Funds issue. When making this deposit, Naganatha Tawker put in an application to the Fund for the purpose on a printed form as prescribed by the rules of the Fund. It is filed as Exhibit II. One column in it was headed "name of the person entitled to receive the deposit paid by me, after me, his relationship and profession or occupation"; under that heading Naganatha Tawker had filled up the names of the two plaintiffs.

Naganatha Tawker died sometime in 1915 without renewing the deposit or withdrawing the money. In this suit plaintiffs claim the money as the nominees in Exhibit II against Naganatha Tawker's heir at law, his daughter, the second defendant. The learned City Civil Judge held that the nomination gave the plaintiffs no right to recover the money and dismissed their suit and hence the appeal.

It is clear on the facts, and it is not denied, that the right to the deposit money continued to be in the depositor till his death and that he was entitled to deal with it or to withdraw it as he pleased. No consent of the Fund was necessary to enable him to exercise full dominion over the amount after the period of the fixed deposit was over. It was also open to him under rule 36 of the Articles of Association of the Fund to change his nominees as he pleased on paying merely a registering fee of 2 annas to the Fund, though he did not do so in the present case. In these circumstances, it was conceded by Mr. Venkatarama Sastriar

(7) (1889) 28 L. R. Ir. 53.

(8) (1917) 1 Ch. 1; 83 L. J. Ch. 33; 115 L. T. 63; 61 S. J. 42.

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for the appellant, that he could not support his client's claim on the basis of an assignment or of a trust. The retention of dominion over the money by Naganatha Tawker is altogether inconsistent with either position. See *Warriner v. Rogers* (9) as to trusts. The arrangement as one intended to take effect after the death of Mr. Tawker is clearly in the nature of a testamentary disposition and could have been well supported as a Will if the formalities required by law for a Will had been complied with. As Exhibit II was executed in Madras, the Hindu Wills Act will apply to it and if it is to be treated as a Will, it should have been attested by two witnesses at least but unfortunately for the plaintiffs it is only attested by one. It, therefore, fails as a Will, and even as a valid Will there is the farther difficulty in their way that no Probate or Letters of Administration has been obtained to enable them to maintain a suit on it.

Mr. Venkatarama Sastriar, therefore, conceded that he could not support his client's case on the basis of a Will either, but, as I understood him, he contended that it was a part of the contract of deposit between Naganatha Tawker and the fund that the latter should re-pay the money to the plaintiffs in the event of the former's death without having withdrawn it or changed, the names of his nominees and, as that event has happened, the plaintiffs, as such nominees, became entitled to the money as against the heir-at-law of Naganatha Tawker. For this argument he has first to establish that the Fund had undertaken to pay the nominees as alleged; or, in other words, the payment to the nominees was a part of the contract between Naganatha Tawker and the Fund. I am not satisfied that this has been proved. The receipt, Exhibit I, which contains the terms under which the deposit was made makes no reference to payment to nominees. In fact, it expressly provides for the depositor to endorse and return it for payment or renewal and excludes by the words "not transferable" any assignee claiming the money. We have not been referred to any rule in the Articles of Association of the Fund requiring the deposit

to be repaid to the nominees on the depositor's death. Rule 36 merely deals with the change of names of the nominees or heirs and rule 37 has reference only to share monies and not to any deposit. Therefore, no term can be imported into the contract of deposit as implied by the rules, to re-pay to the nominees. No doubt, the deposit was made in pursuance of the application, Exhibit II, but there is nothing in Exhibit II to show that the Fund was bound to pay or undertook to pay the nominees or that the statement in it was anything more than a mere representation by Naganatha Tawker to the Fund as to who he wished to be treated as the heir to this money on his death, which the Fund may or may not act upon as they choose. Even if it is treated as a direction or mandate to the Fund to pay to the nominees, it will still fall short of a contract and the fact that it was open to Naganatha Tawker to change his nominees at any time as he pleased without the concurrence of the Fund and to withdraw the money if he chose is rather in favour of the contention that there was in reality no contract as to payment to the nominees. If the contract is not proved the first plaintiff's argument based on the existence of such a contract must fail. Treated as a mandate, it was of no effect as it became revoked by Naganatha Tawker's death. See *Williams, In re, Williams v. Ball* (8),

But even if we take it that the nomination of the plaintiffs was sufficient in law to make the payment to them of the deposit money on Tawker's death a part of the contract between him and the Fund, I think we should still hold that the plaintiffs, who were no parties to that contract, obtained thereby no right to the money. To hold otherwise will be, it seems to me, to allow a testamentary disposition of property to be made in the form of a contract and thereby enable parties to dispense with the formalities of the Hindu Wills Act and the necessity to take out Probate or Letters of Administration to the estate of the deceased and lead practically to a repeal of that Act for the agreement to pay to the nominees did not admittedly come into operation till Tawker's death. A somewhat similar attempt was made in the case of *Towers v. Hogan* (7) where a person invested monies in a Fund, and

(9) (1873) 16 Eq. 340; 42 L. J. Ch. 581; 28 L. T. 663; 21 W. R. 766.



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wrote a letter to another asking him to distribute it to certain persons in a certain manner after his death, this was done statedly for the purpose of saving the trouble and expense of taking out Administration. The learned Judges in the first Irish Court held that the letter had no legal effect to pass the property to those persons and they observe that to hold otherwise will lead to the Statute of Wills being practically repealed. In the case of *William, In re, Williams v. Ball* (8) already cited, where a policy-holder made an endorsement on the policy authorising his housekeeper to draw the insurance money in case he predeceased her, the Court of Appeal held that she had no right to the money. Lord Cozens-Hardy, M. R., says in his judgment: "it seems to me to be extremely difficult to say that this document, which did not confer on the assignee any power or right during the assignor's lifetime, was an assignment of the policy or anything else than an attempt to give her an interest at his death in the event of his predeceasing her. If that be so, ... the assignee's claim cannot be supported on any ground," the testamentary disposition failing as not being properly carried on. In the case of *Cleaver v. Mutual Reserve Fund Life Association* (10) it was held that on a policy taken out by the husband for the benefit of his wife and so stated in the policy itself the wife obtained no interest in it apart from the Married Women's Property Act. That case was no doubt complicated by the wife having murdered the husband but that did not affect this part of the case. Lord Esher, M. R., says on page 152: "I think that, apart from the Statute, no interest would have passed to the wife by reason merely of being named in the Policy." Lord Justice Fry observes, on page 151: "Independently of the Married Women's Property Act, 1882, the effect of this transaction was, in my opinion, to create a contract by the defendants with James Maybrick (the husband) that the defendants would, in the event which has occurred, pay Florence Maybrick (the wife) £2,000 assured, it would be broken by non payment to her; but the cause of action resulting from such breach would vest in the executors of the assured, and not in the

(10) (1892) 1 Q. B. 147; 61 L. J. Q. B. 128; 66 L. T. 220; 40 W. R. 230; 56 J. P. 180.

payee. She was, independently of the Statute, a stranger to the contract." This case was cited at length and followed in *Oriental Government Security Life Assurance Company Limited v. Vantelu Ammiraju* (11) in which it was held by this Court that, where the assured does not, in his lifetime, create any trust in respect of the insurance money under a policy for the benefit of the wife and children they get no interest and that the money forms part of the assured estate and is recoverable by his legal representatives. This case was no doubt overruled by the Full Bench in *Pokkunuri Balamba v. Krishnayya* (12) but only on the question whether section 6 of the Married Women's Property Act, III of 1874, applied to a Hindu's wife and children or not, the Full Bench holding that it did. This question, however, does not arise for our consideration in this case, but on the point before us, speaking of the case in *Pokkunuri Balamba v. Krishnayya* (12), White, O. J., says: on page 506\* "If the view taken by the learned Judges as to Married Women's Property Act was right, I should agree with their conclusion that no cause of action arose to the beneficiaries and that the policy moneys formed part of the estate of the assured, notwithstanding that, under the contract, the money was payable to the beneficiaries in default of trustees."

A similar view was taken in Bombay in *Shankar Vishvanath Wagh v. Unabai Sadasiv Wagle* (6). It was held in that case that, though the policy was a contract expressed to be for the benefit of the wife, nevertheless she got no interest in the insurance money thereby as she was a stranger to the contract.

Mr. Venkatarama Sastriar has, however, drawn our attention to the ruling in *Florina Marties v. Pinto* (4) and the cases cited in it as in favour of his argument. But on examining that case it will be found that the decision was based on the ground that there was an agreement for consideration paid between the policy-holder and the nominee that the bonus should belong to the latter. This agreement is referred to a second time by the learned Judge in distinguishing the case before him from the insurance policy cases above.

(11) 10 Ind. Cas. 263; 35 M. 162; (1911) 1 M. W. N. 276; 9 M. L. T. 451.

(12) 20 Ind. Cas. 934; 37 M. 483; 25 M. L. J. 65; (1913) M. V. N. 647; 14 M. L. T. 363.

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mentioned which were cited to him. He says: "In a case like this, where the nominee by agreement with the nominator was entitled to the money, there can be no question that as between the estate of the nominator and the nominee the latter is entitled to it." That is a position that does not exist in the present case; in fact, the nominees here did not know of their nomination by Tawker till sometime after the latter's death. The decision is, therefore, clearly distinguishable from the present case. But Mr. Venkatarama Sastriar has relied on the dictum of the learned Judge where he says, referring to the English cases which I shall presently consider "In all these cases the principle adopted was that if, under the contract between the member and the Society, the Society undertakes to pay a particular person, that person is entitled to the money, though the member may have the power to select any person he chooses and though the nomination may be ambulatory in character so as to enable the member at his entire discretion to change the nomination or even to make the Fund his own by merely observing the formalities prescribed by the rules." With all respect to the learned Judge, it seems to me that this dictum is not borne out by the cases cited and is inconsistent with the view expressed in the cases I have referred to above and I am unable to follow it. Turning now to the cases cited, it will be seen that in the case of *Ashby v. Costin* (1) Cave, J., based his judgment on the fact that the money in question was not the money of the deceased at any time though payable out of a Fund to which he and others contributed. He might have made it part of his assets by Will but he did not do so. The learned Judge points out that the Society had full discretion, in the circumstances that happened, to determine which of the relatives of the deceased should get the allowance and in what proportion. It was, in these circumstances, that the administrator's suit against the sister who had been selected by the Fund for payment was dismissed, as manifestly he would have no rights in the money paid to her. That case is entirely distinguishable from the case before us inasmuch as here the money belonged to Tawker and continued to be his till his death and

there was no payment by the Fund to any one. The next two cases of *Davies, In re, Davies v. Davies* (3) and *Bennet v. Slater* (2) were, as observed by the learned Judge himself, cases of Societies registered under the Friendly Societies Act. The latter case proceeded purely on a construction of section 15 of the Act of 1875 and there is no general principle stated in it which is applicable here. In the former case the facts were that the testator, Mr. Davies, did not deal with the policy money in his Will. But under the rules of the Society which were incorporated in the policy and formed part of the contract the money was payable to the plaintiffs, his daughters, and not to the defendant, his son's widow. North, J., meeting an argument that the contract with the Fund was against public policy as withdrawing the money from his creditors and that it was perfectly legal and that, "as against persons who claim under the Will, the contract must be effectual." This has to be read with the context and it must be remembered the case was one to which the Friendly Societies Act applied. There is no decision in it that, apart from the Act, the daughters were exclusively entitled to the money and there was no question of any nominees taking. I do not think, therefore, that these cases in any way support the dictum in *Florina Marties v. Pinto* (4), or are authorities against the view I am inclined to take.

Our attention was also drawn to several cases dealing with the general question whether a person who is a stranger to a contract can enforce it at all and, if so, in what circumstances. That is a question on which judicial opinion has differed: See *Mannath Veetil Itti Panku Menon v. Dharman Achan* (13). The general rule is that a stranger to a contract cannot take any rights under it and cannot enforce it. The exceptions are stated by Tyabji, J., in the case in *Iswaram Pillai v. Taregan* (5), where the authorities are considered and the question is discussed at length. I do not, therefore, propose to consider the authorities cited in detail. None of the exceptions stated seems to me to apply to the present case. There is no charge or trust created here and the only possible suggestion that can be made is that the contract was for the

(13) 43 Ind. Cas. 625; 41 M. 488; 22 M. L. T. 543; (1920) M.W.N. 29; 31 M.L.J. 193; 8 L. W. 118 (F. B.)

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benefit of the plaintiffs. That, however, is not so, as the deposit was not made for their benefit but for the depositor himself as he retained the right to draw out the money. As pointed out by Tyabji, J., following the opinion of Bowen, L. J., in *Gandy v. Gandy* (14), "It is only if the true intent and effect of a contract is to give to third parties a beneficial right under it, that is to say, to give them a right to have the covenants in the contract performed—and this can only happen, as pointed out by Sir George Jessel in *Kempess Engineering Co., In re* (15),—'when the parties have no power of coming to a new agreement the next day, releasing the old one,' then the stranger may be allowed in a Court of Equity to enforce his rights under the contract; but that the whole application of this doctrine depends on its being made out that upon the true construction of the contract such a beneficial right is given." Lord Justice Cotton says in the same case: "If the contract, although in form it is with A, is intended to secure a benefit to B, so that B, is entitled to say he has a beneficial right as *c'estui que trust* under that contract then B, would in a Court of Equity be allowed to insist upon and enforce the contract." Accepting the exceptions thus engrafted on this general rule, they do not cover the present case.

I, therefore consider, for the reasons above-stated, that, by their nomination, plaintiffs obtained no interest in the deposit money and that their suit was rightly dismissed and I agree, therefore, that the appeal fails and must be dismissed with costs.

M. C. P.

*Appeal dismissed.*

(14) (1885) 30 Ch. D. 57; 54 L. J. Ch. 1154; 53 L. T. 208; 33 W. R. 803.

(15) (1880) 16 Ch. D. 125; 43 L. T. 742; 29 W. R. 342.

# COURT OF THE BOARD OF REVENUE UNITED PROVINCES.

SECOND CIVIL APPEAL No. 117 OF 1918-19.

March 23, 1920.

Present:—Mr. Hopkins, S. M., Mr. Harrison, J. M., and Mr. Porter, J. M.

HARSARAN DAS—APPELLANT

*versus*DEBI SINGH *alias* DEBI SAHAI—

RESPONDENT.

*Agra Tenancy Act (II of 1901), s. 10—Ex-proprietary tenant, right of, to surrender holding.*

There is nothing to prevent an ex-proprietary tenant from surrendering his holding, but if he does not do so, he cannot contract himself out of the provisions of section 10 of the Agra Tenancy Act.

Second appeal from the order of the Commissioner, Meerut Division, dated the 20th of August 1919, in a case of ejectment.

## JUDGMENT.

HARRISON, J. M. (*February 12, 1920.*)—This is a second appeal by the Zamindar in an ejectment suit.

The facts are that one Bhagwan Sahai mortgaged his property with possession to the appellant on the 3rd of January 1911. Two days afterwards, Bhagwan Sahai executed a deed of relinquishment of his *sir* lands. On the 1st of July following, his son Debi Singh executed a *kabuliyat* for these same *sir* lands as an ordinary tenant for seven years. Bhagwan Sahai was still alive when this *kabuliyat* was executed. In 1913, there were proceedings for correction of the papers (that is two years later) and Bhagwan Sahai himself freely admitted the relinquishment and Debi Singh admitted himself to be holding under the *kabuliyat*. The Assistant Collector ordered the *sir* entry to be expunged and the tenancy of Debi Singh to be recorded. Nothing more was heard of the matter until the revision of records in 1916 when an attempt was made to get the name of Balak Ram, a brother of Debi Singh, recorded as a joint tenant with Debi Singh. Debi Singh, however, protested and the Assistant Record Officer cut out Balak Ram's name and left the holding in the name of Debi Singh alone. As the term of the lease was about to expire, the mortgagee landholder sued for ejectment and it was only then that another brother of Debi Singh and Debi Singh himself contended that ex proprietary rights had accrued. The Commissioner has held (disagreeing with the Assistant Collector) in favour of the tenant, on the ground that the family, including Bhagwan Sahai and his sons, had never lost cultivating possession of the land in suit. It seems to me impossible, in the particular circumstances of this case, to support the Commissioner's finding. No doubt, as he remarks, the family had been, and still is, joint, but no sort of claim was ever made to ex proprietary rights in the beginning and even two years



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after the relinquishment. Debi Singh has obviously been hitherto holding out as the sole tenant of the land. Legally, I think the Zemindar has an indisputable case that the ex-proprietary right was fully extinguished.

I would, therefore, set aside the decree of the Commissioner and restore that of the Assistant Collector with costs to the plaintiff-appellant in both Appellate Courts.

HOPKINS, S. M. (March 19, 1920.)—I regret that I am unable to agree with my colleague in this case.

The execution by Bhagwan Sabai of a deed of relinquishment two days after his execution of the mortgage was clearly a transaction entered into to avoid the provisions of section 10 of the Tenancy Act. It was not accompanied or followed by actual relinquishment of the land. The lease in favour of Debi Singh, a member of the same family, six months later, was merely a continuation of the same transaction. The Commissioner has found as a fact that there has been no change in the cultivating possession of the holding. There has, therefore, been no effective relinquishment of the land. An ex-proprietary tenant cannot be prevented from surrendering his holding, but if he does not surrender it he cannot contract himself out of the provisions of section 10.

The present case seems to me precisely one of those which were condemned in forcible language by the Privy Council in *Moti Ohand v. Ikram Ullah Khan* (1).

PORTER, J. M.—The order of the Commissioner must, therefore, be upheld, and the appeal dismissed with costs.

*Appeal dismissed.*

(1) 39 Ind. Cas. 454; 39 A. 173; 15 A. L. J. 150; 5 L. W. 388; 2 M. L. T. 267; 32 M. L. J. 383; 21 C. W. N. 616; 19 Bom. L. R. 433; 26 C. L. J. 24; (1917) M. W. N. 453; 44 I. A. 54 (P. C.).

MADRAS HIGH COURT.  
CIVIL APPEAL No. 206 OF 1919.  
April 22, 1920.

Present :—Mr. Justice Sadasiva Aiyar  
and Mr. Justice Spencer.

RAMACHARI, MINOR, THROUGH HIS GUARDIAN  
C. P. SESHAYYAR AND ANOTHER  
—DEFENDANTS NOS. 1 AND 10  
—APPELLANTS

versus

SARASWATI AMMAL AND ANOTHER  
PLAINTIFF AND DEFENDANT NO. 2—  
RESPONDENTS.

*Hindu Law—Adoption by minor widow, validity of—Right of widow to dispute and claim against adoption—Estoppel—Suit by widow for herself and for co-widow impleaded as defendant—Decree for whole property, whether can be passed.*

An adoption by a minor widow who has not attained sufficient maturity of understanding to appreciate the nature of her act is invalid. [p. 248, col. 2.]

In such a case there is no personal estoppel preventing the widow from disputing the validity of the adoption and recovering her husband's properties from the adoptee unless the latter's position has been prejudiced. [p. 248, col. 2.]

*Dharam Kunwar v. Balwant Singh*, 15 Ind. Cas. 673; 34 A. 398; 16 C. W. N. 675; 9 A. L. J. 730; 14 Bom. L. R. 485; (1912) M. W. N. 641; 12 M. L. T. 95; 16 C. L. J. 60, 23 M. L. J. 200; 39 I. A. 142 (P. C.), distinguished.

Where a widow sued for the recovery of her husband's properties both for herself and her co-widow, impleading the latter as a defendant, the Court can pass a decree for the entire property if the co-widow assents to such a course during the trial. [p. 249, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, Madras, in Original Suit No. 22 of 1917.

FACTS appear from the judgment.

Messrs S. Erinitasa Aiyangar and K. Rajah Aiyar, for the Appellants.—The plaintiff having been a party to the adoption and acted on independent advice is personally estopped from impugning or claiming any rights under the invalid adoption.

The decree for the entire property was wrong. Only the plaintiff's half share should have been decreed. The second defendant expressly stated in the pleadings that she would file a separate suit for her share.

Mr. O. V. Anantakrishna Aiyar, (with him Mr. K. S. Jayarama Aiyar), for the Respondents.—The adoption was by widows under 12 years of immature understanding who could not understand the nature

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of their act. Such an adoption is invalid, *Kovvidi Sattiraju v. Patamsetti Venkataswami* (1), *Tayammaul v. Sashachalla Naiker* (2).

As to the estoppel, it would only arise when the plaintiff did anything to prejudice the adopted boy or when the status of the latter was so radically changed as to put him at a disadvantage. *Parvatibayamma v. Ramakrishna Rau* (3), *Vaithilinga Mudali v. Munigan* (4). Here the plaintiff did nothing. She never looked after the boy but was content to receive the stipulated maintenance after becoming a major.

As to the form of the decree, it gave plaintiff the relief which she claimed. Though the second defendant said in her written statement that she would recover her share in a separate suit she ultimately consented to the entire claim of the plaintiff being decreed.

## JUDGMENT.

SADASIVA AIYAR, J.—The defendants Nos. 1 and 2 are the appellants. The tenth defendant is the natural father of the 1st defendant. The plaintiff is the widow of a Sourasthra Brahmin, Sundararamier, who died in April 1906, when he was about 22 or 23 years old. The plaintiff was the second wife whom he had married, when she was a girl aged about 12 years. The marriage took place only 17 days before his death, though he had already another girl-wife, the second defendant, living. The tenth defendant is the elder brother of the plaintiff's husband. The plaintiff's husband seems to have been a wild young man who, as soon as he attained majority, about 1902, demanded partition from his elder brother and obtained his share of the ancestral property, worth about Rs. 50,000. Since then, he seems to have been addicted to strong drink (foreign liquors) and, as I said already, he died when he was comparatively young. The plaintiff's case is that the death was sudden and that it was caused by heavy drinking.

The case of the first defendant and his natural father, the tenth defendant, is that,

(1) 40 Ind. Cas. 518; 40 M. 925; 5 L. W. 603; 32 M. L. J. 119.

(2) 10 M. L. A. 429 at p. 433; 2 Sar. P. C. J. 139; 19 E. R. 1034.

(3) 18 M. 145; 5 M. L. J. 44; 6 Ind. Dec. (N. S.) 450.

(4) 15 Ind. Cas. 299; 37 M. 529; 23 M. L. J. 189; (1912) M. W. N. 1127.

while plaintiff's husband was doubtless addicted to drink, he also suffered from fever for about a week before his death and the direct cause of the death was the fever. It has, however, to be remarked that, though he was a rich man, no medical attendance worth the name seems to have been secured for his treatment during his alleged illness. He died at about 10 p. m. and the body was cremated next morning. Shortly before his cremation, the tenth defendant gave the first defendant in adoption to the plaintiff and to her co-widow. Both are girls of 12 who had not attained puberty, and the evidence is that, after the adoption, the funeral ceremonies of the deceased were performed by the tenth defendant for his natural son, the first defendant. Shortly afterwards, another adoption was alleged to have taken place of another boy, the son of a brother of the tenth defendant, (which brother, Venkatachallapatty, had been adopted away to an agnate). The first defendant was about a year old at his adoption and the other boy seven or eight years old. Quarrels arose soon after between the natural fathers of the two adopted boys, and in July 1906 the natural fathers, acting for their respective sons, divided the moveables and some other properties between themselves under the lists A and B. Then, in August 1907, the plaintiff's father and guardian gave notice to the tenth defendant demanding possession of the moveables of the plaintiff's husband which the tenth defendant was in possession of on behalf of the first defendant. This notice, of course, ignored the adoption of the first defendant.

Then, in October 1907, the plaintiff's father, who seems to have been a man of no property, (and who did not scruple to give his daughter as second wife to a dissipated young man while the first wife was living), executed the agreement, Exhibit I, on her behalf, the other party to the agreement being the tenth defendant acting on behalf of the first defendant. Under this agreement, plaintiff's father gave up, on behalf of the plaintiff, all right to question the adoption of the first defendant, on plaintiff being allowed a monthly allowance of Rs. 14 with a house to live in and with the use of certain vessels and jewels. That maintenance was received by him on behalf of the plaintiff till she attained majority, which was about 1912. Then she herself received that maintenance till April 1915. Then she was

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advised that she might repudiate the factum of adoption and she might also contend that, even if the adoption took place, it was legally invalid. So she brought this suit in pauper form in October 1910 on behalf of herself and her co-widow, the second defendant, for possession of most of the immoveable properties left by her husband excluding one dwelling house. (It is not clear why that dwelling house has been left out. It may be that, as suggested, the reason is that the house is in the possession of the plaintiff.) It is unnecessary to consider the case of the defendants other than Nos. 1, 2 and 10, as they do not claim any independent rights in the properties. I might also at once state that the other alleged adopted son and his natural father are not parties to this suit and are, of course, not bound by the decision in this case. There was some controversy in the lower Court as to whether the two boys were adopted at the same time, or whether one was adopted on the day of the cremation and the other the next day. I am, however, satisfied from the evidence that the first defendant was adopted at first. It is, however, unnecessary to pursue the subject, as, though the first defendant's adoption may not be invalid on the ground of the impropriety of two simultaneous adoptions, it is clearly invalid on two other grounds; namely, (1) that the widows who adopted the first defendant were minors who had not attained sufficient maturity of understanding; see *Korvidi Sattiraju v. Patamsetti Venkataswami* (1), and (2) that it has not been proved by any reliable evidence that the plaintiff's husband (whom no one expected to die suddenly, when he was quite a young man and who even contracted a second marriage 17 days before his death) gave oral authority to his girl wives to adopt a son after his death. The evidence on this point as to authority has been carefully discussed by the lower Court and I agree with its conclusion on that point. No doubt, there are admissions of the plaintiff's father and of the plaintiff as to the first defendant being the plaintiff's husband's adopted son, in the receipts executed for them, for the maintenance amounts received by them. That admission must, no doubt, be taken as an admission, both of the factum and of the validity of the adoption. In that view, the burden of proving that the adoption of plaintiff is not a valid adoption may be

said to lie on the plaintiff. We have, however, at this stage of the litigation, to arrive at a finding on that question on the evidence as a whole, and I entertain no doubt on the evidence that there was no authority given by the plaintiff's husband to make an adoption. Further, on the admitted fact the widows being girls of 12 or 13, the adoption is wholly invalid. An invalid adoption cannot be ratified by mere admissions and acquiescences.

The only remaining question is, whether there is a personal estoppel which prevents the plaintiff herself from disputing the validity of the adoption. The cases of *Parvatibayamma v. Ramakrishna Rau* (3) and *Vaithilinga Mudali v. Munigan* (4) make it clear that, unless the status of the alleged adopted boy has been so radically changed that he could not go back to his natural family, it is difficult to sustain the plea of estoppel by the conduct of the adopting party. It may be that the decision in *Parvatibayamma v. Ramakrishna Rau* (3) laid down the law in too broad language. (See Mayne, paragraph 209). Where the adopted mother herself made representations that she had authority to adopt and then adopted the boy, when she secured a wife for him according to her own inclinations and ideas, when she changed his status from that of a boy in a family of peasants to that of a son of an aristocratic Zemindar's family, and when the adopted boy incurred debts and changed his mode of life on the faith of representations (made to his natural father) as regards the alleged authority to adopt, those expenses having been incurred to defend his status against others, it may be that the adoptive mother herself would be personally estopped, as held by the Privy Council in *Dharam Kunwar v. Balwant Singh* (5), (though the observations as to estoppel in that case are *obiter dicta*.) But in the present case the plaintiff was a child-widow when she made the adoption. The boy was nominally adopted to his own paternal uncle. The girl (adoptive mother) never interfered with the estate and did not look after the boy at all and all that she did was that, after she became a major,

(5) 15 Ind. Cas. 673; 34 A. 899; 16 C. W. N. 175; 9 A. L. J. 780; 14 Bom. L. R. 495; (1912) M. W. N. 641; 12 M. L. T. 95; 16 C. L. J. 60; 23 M. L. J. 200; 39 I. A. 142 (P. C.).



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she received the maintenance amount, which her father had secured for her, when she was a minor. The money which she got as maintenance was her own money, if the adoption (as I hold) was invalid. There is no allegation in the written statement that the plaintiffs made any representations on the faith of which the adoption took place, or the first defendant has been prejudiced. I, therefore, agree with the lower Court that there is no question of estoppel. I might further state that, on the principle of the decision in *Seshappaya v. Venkatramana Upadya* (6), there can be no estoppel, where the other side knew the full facts. The first defendant's father knew all the facts and knew that the girls were only 12 years old when the adoption was made.

Finally, an argument was put forward that the plaintiff could sue only for a half share of the properties and not on behalf of the second defendant also, for the whole property. Some stray observations unconnected with the context were quoted from certain decisions in support of this contention. But I am satisfied that there is nothing in this contention. The Court has full power to give a decree on the facts found in favour of one or more of the parties who are entitled to such decree, provided they do not object to be ranged as plaintiffs. In the present case, the second defendant is willing to be made a co-plaintiff. Of course, the Court should not ordinarily give a decree for reliefs not asked for, without directing the plaint to be amended. In this case, the relief given by the decree does not go beyond the relief asked for in the plaint. No doubt, the second defendant said in her written statement that a separate suit has to be filed for obtaining possession of the half share due to her. But, as I said, whatever she might have said in the written statement, provided she now agrees to be co plaintiff with the plaintiff on record I see no objection to the upholding of the decree of the lower Court.

In the result, there will be an order to make the second defendant a co-plaintiff and the lower Court's decree will be confirmed with costs of the plaintiff payable by the appellants.

SPENCER, J.—I agree that, upon the evi-

dence in the case, there is no satisfactory proof, either that the deceased gave authority to the plaintiff to make an adoption or that she was of a sufficient capacity to understand the nature and consequence of her act or that she voluntarily took the boy in adoption. I think that if the deceased Sundaramier was conscious of his approaching decease, he would either have made the adoption himself of the son he desired to take in adoption, or he would have given some written authority to one or both of his wives to adopt a suitable boy after his death, and, in doing so, he would not have neglected to make some provision for his wives whose parents were present at his death-bed. The plaintiff, at the time of her husband's death, was a minor of the age of 12, as she did not attain majority till October 1911, and the death took place in April 1906. In order that an adoption should be valid, it is necessary that the adopting parent should have such intelligence as to appreciate the nature of the act and to take an intelligent part in its performance. [See *Tayammaul v. Sashachalla Naicker* (2)]. The alleged adoption followed so closely on the heels of the giving of the authority to adopt and the minor plaintiff was represented by her father and surrounded by relatives so that the transaction had all the appearance of being a concerted family arrangement. In this respect this case resembles the above case which went on appeal to the Privy Council.

I am also satisfied that there is no case of estoppel here. In order to make an estoppel it is necessary to show that the first defendant's position was in some way changed to his disadvantage in consequence of the adoption so as to render it inequitable that the adoptee should be restored to his place in the natural family [See *Vaithilinga Mudali v. Munigan* (4)]. It was pointed out in that case that an invalid adoption *per se* does not destroy the adoptee's rights in his natural family. The circumstances of the case in *Dharam Kunwar v. Balwant Singh* (5) were different. In that case the Privy Council found that the adopted son had undergone a change of social status which had so altered his mode of life as to make his return to the former condition a hardship. Also expenses had been incurred in the maintenance of the privileges of his position as a minor Rajah, and he had married in

(6) 5 Ind. Cas 732; 33 M. 459; 20 M. L. J. 732; (1910) M. W. N. 26.

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faith of the adoptive mother's word, and creditors had lent him money.

In the present case it is not explained in the written statement how the first defendant has been prejudiced by the plaintiff's conduct, and from the record it does not appear that she has done anything beyond receiving a small amount of maintenance out of the family property for her own support, when she would have been entitled to receive a far larger amount, if she had not made any adoption. I, therefore, consider that no estoppel arises out of the plaintiff's action in signing Exhibits IV and IIq to IIg which were receipts executed by her after she attained majority.

Before attaining majority she could not be estopped by anything done on her behalf which, as a minor, she was not competent to do for herself.

I agree that this appeal should be dismissed with costs.

M. C. P.

*Appeal dismissed.*

COURT OF THE BOARD OF REVENUE,  
UNITED PROVINCES.

PETITION No. 12 OF 1919-20.

April 8, 1920.

Present:—Mr. Hopkins, S. M., and  
Mr. Porter, J. M.

Raja SRI KRISHNA DUTTA DUBE—  
APPELLANT

*versus*

JAGESHAR UPADHIA—  
RESPONDENT.

*Agra Tenancy Act (II of 1901), s. 22—Occupancy holding—Successor of tenant—Admission of stranger to share in cultivation, effect of.*

The mere admission by the successor of an occupancy tenant of a person who is not a tenant to a share in cultivation does not operate to transfer to the latter any right in the tenancy.

Second appeal from the order of the Commissioner, Gorakhpur Division, dated the 8th of July 1919, in a case of ejectment.

JUDGMENT.

HOPKINS, S. M.—(April 5, 1920).—This was the occupancy holding of Bhagwan who

was succeeded by his son Harihar. Harihar was succeeded by his mother, Musammât Bhagwanti, wife of Bhagwan, and Jageshar, the present respondent. Bhagwan's sister's son joined her in the cultivation of the holding. It is undisputed that Jageshar and Musammât Bhagwanti have been in possession of the holding for more than 12 years. The question arises whether Harihar died before the Tenancy Act came into force, in which case his mother would have succeeded to the tenancy, or after that date, in which case she would be excluded from inheritance by section 22 and must be deemed to have been cultivating in her own right.

The Commissioner found, "there is no proper evidence that the death (of Harihar) did not occur during the currency of the present Act and I hold accordingly that, on her death, there being no section 22 heir a new tenancy by Bhagwanti and Jageshar arose which has now by lapse of time given occupancy right to the survivor Jageshar."

The Commissioner has overlooked the fact that Jageshar himself pleaded in his written statement that Harihar died in 1308 *Fasli*. Respondent points to the fact that in 1903 the appellant filed a suit for enhancement of rent in which the defendant was described as Harihar *qabiz* Bhagwanti but this description implies that Harihar was dead though still recorded as tenant. The question, in my opinion, is concluded against Jageshar by his own plea. Musammât Bhagwanti, therefore, succeeded to the tenancy on Harihar's death and the admission by her of Jageshar to a share in the cultivation could not operate to transfer to him any right in the tenancy [section 9, Act XII of 1881 and *Babu Banshidhar v. Musammât Rawantia* (1)].

I would allow the appeal with costs and restore the order of the Assistant Collector. An appearance has been made before me for Bhinak who was a rival claimant in the Trial Court, but he did not appeal to the Commissioner and has no *locus standi* in this Court.

PORTER, J. M.—(April 8, 1920).—I agree.  
*Appeal allowed.*

(1) Sel. Dec. No. 8 of 1907.

ADIT NARAYAN SINGH v. MAHABIR PRASAD TIWARI.

## PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

January 18, 1921.

Present:—Viscount Cave, Lord Sumner and  
Sir John Edge.

ADIT NARAYAN SINGH—APPELLANT

versus

MAHABIR PRASAD TIWARI—

RESPONDENT.

*Hindu Law—Mitakshara—Succession—Bandhus, rule of succession as between different classes of—Mother's paternal aunt's son, whether to be preferred to mother's sister's grandson—"Sons", whether include grandsons.*

In the *Mitakshara* system *bandhus* are of three kinds: related to the person himself, *atma bandhus*, to his father, *pitri bandhus*, or to his mother, *matri bandhus*. The right of succession among these three classes is governed by the propinquity of the class, no *pitri bandhu* succeeds until the class of *atma bandhus* is exhausted and no *matri bandhu* succeeds until the classes of *atma bandhus* and *pitri bandhus* are exhausted. [p. 254, col. 1.]

The rule is not dependent on individual propinquity or on the efficacy of offerings to a deceased person. A *bandhu* must, in order to be heritable in a female line, fall within the fifth degree from the common male ancestor, and must be so related to the deceased person that they were mutually *sapindas* of one another; but if these conditions are satisfied the rule takes effect. For instance, a mother's sister's grandson, being an *atma bandhu*, would succeed in preference to a mother's paternal aunt's son being a *matri bandhu*. [p. 254, cols. 1 & 2.]

The word "sons" in *Mitakshara*, II, 6 (1) includes "grandsons." [p. 254, col. 1.]

Appeal from a decree of the Patna High Court, (Chamier, C. J., and Jwala Prasad, J.), dated August 7, 1916, reported as 35 Ind. Cas. 687, affirming a decree of the Third Subordinate Judge, Patna.

FACTS of the case are sufficiently stated in their Lordships' judgment.

On this appeal

Mr. Dube, for the Appellant, submitted that appellant being in possession, it was for respondent, who sought to oust him, to prove conclusively that he had bought from the rightful heirs, i.e., that Hanuman's sons were entitled to succeed Dhanukdhari on Monakka Kuar's death. We say they were not, because of the existence at that time of two nearer heirs, 1. Jagdeo, 2. Rajendra. As to Jagdeo, the Courts below wrongly assumed that he was dead at that time: they ignored the evidence to the contrary.

[SIR JOHN EDGE.—Are there not concurrent findings that he was dead?]

I submit those findings are against the

evidence, which is all one way. It was for respondent to prove he was dead, not for us to show he was alive. But anyhow, Haribar's son, Rajendra, was alive, and he had a prior right to Hanuman's sons or indeed Hanuman himself. The whole subject of succession among *bandhus* is discussed in *Ramchandra Martand Waikar v. Vinayak Venkatesh Kothekar* (1). That case is conclusive that he is a heritable *bandhu* within the *Mitakshara*: he is only four degrees from the common ancestor, and in the *Mitakshara* you count up to seven degrees through males and five degrees through females.

The text of the *Mitakshara*, Chapter II, 6 (1) cited at page 208\* of that report, lays down that there are three classes of *bandhus*, viz., *atma bandhus*, *pitri bandhus* and *matri bandhus*. Hanuman was only a *matri bandhu*: he was the mother's father's sister's son of Dhanukdhari and that relative is named in the *Mitakshara* was a *matri bandhu*. On the other hand, all the authorities agree that Rajendra was an *atma bandhu*. You cannot go to the more distant line till you have exhausted the nearer: that has been laid down by the *Mitakshara* itself at the passage cited, and is also the decision of this Board in *Muthusami Mudaliar v. Simambedu Muthukumaraswami Mudaliar* (2). In that case the loser was a *pitri bandhu*.

The same view has been taken by the Madras High Court in *Krishna Ayyangar v. Venkatarama Ayyangar* (3), where it is laid down that "the nearest line excludes the more remote."

The Bombay High Court have held the same under the *Mayukha*, which on this point has in terms adopted the text of the *Mitakshara*: *Chamanlal v. Ganes Motichand* (4).

In a later Bombay case, on similar grounds, a mother's sister's grandson has been preferred to the paternal grandfather's sister's son's daughter: *Bai Vili v. Bai Probhulakshmi* (5).

(1) 25 Ind. Cas. 290; 41 I. A. 290; 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 10 N. L. R. 112; 16 M. L. T. 447; (1914) M. W. N. 835; 16 Bom. L. R. 863; 12 A. L. J. 1281; 20 C. L. J. 573; 42 C. 384 (P. O.).

(2) 23 I. A. 83; 19 M. 405 (P. O.); 6 M. L. J. 113; 7 Sar. P. C. J. 451; 6 Ind. Dec. (N. S.) 987.

(3) 29 M. 115.

(4) 28 B. 453 at p. 457; 6 Bom. L. R. 460.

(5) 9 Bom. L. R. 1129.

\*Page of 41 I. A.—[Ed.]



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It is true that Rajendra is not specified as an *atma bandhu*, in the Mitakshara text: only the mother's sister's son is mentioned, and he is the mother's sister's son's son. But the enumeration of *bandhus* as heirs in the Mitakshara is not exhaustive.

*Muthusami Mudaliar's case* (2), and in a similar context "son" has been held to include grand-son.

*Buddhi Singh v. Lattu Singh* (6).

Rajendra is shown as an *atma bandhu* in the table in Dr. Bhattacharyya's Commentaries on Hindu Law, 2nd Edition, 1893, pages 455, 450; there he is No. 23: but that table is in some respects inconsistent with the Mitakshara as it places in front of him two who are really only *matri bandhus*.

[LORD SOMNER.—Do you contest that Hanuman's offerings would be more beneficial than Rajendra's?]

No.

[LORD SOMNER.—Do you contest that that is a test of deciding who is to succeed?]

Yes: it is a test only as between members of the same class. That was laid down by the Madras High Court in *Muttusami v. Muthukumarasami* (7), which came on appeal before this Board in *Muthusami Mudaliar v. Simambedu Muthukumaraswami Mudaliar* (2).

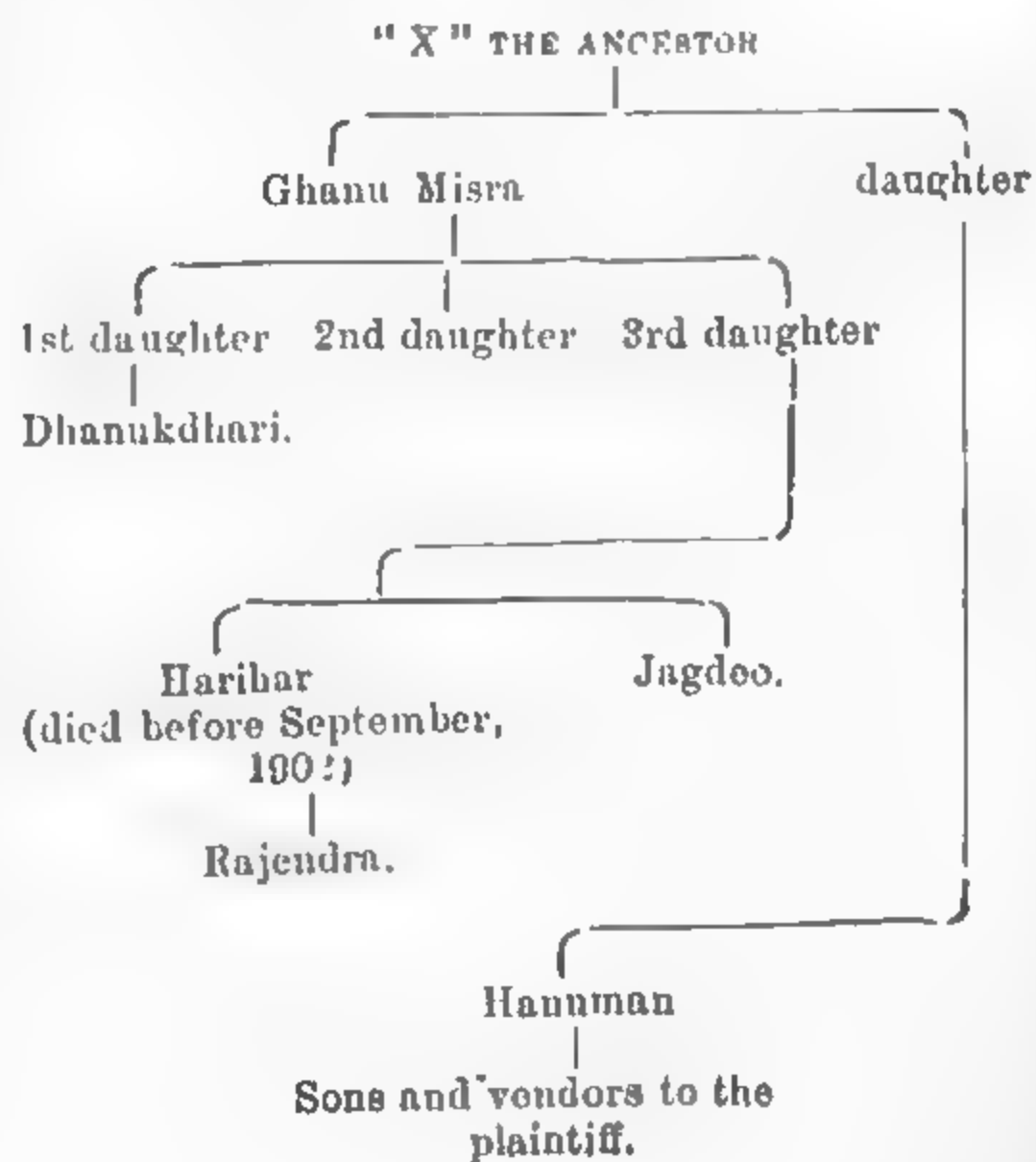
The respondent did not appear.

### JUDGMENT.

SIR JOHN EDGE.—The suit in which this appeal has arisen was brought on the 22nd April 1911 by Mahabir Prasad Tiwari, who is the respondent to this appeal, against Adit Narayan Singh, who is the appellant here, and others, who were not necessary parties. It is a suit for the possession of Mauza Bariapur, in the District of Patna. The Mauza is in the possession of the defendant-appellant under a usufructuary mortgage for Rs. 200 which was granted to him on the 1st September 1902 by Monakka Kuar, the widow of Dhanukdhari, who was a separated Hindu of a family governed by the law of the Mitakshara, and at his death

was proprietor of the Mauza. He died about 1863 without issue. His widow, Monakka Kuar, died on the 13th September 1902. She had power as a Hindu widow to grant the usufructuary mortgage. The heir of Dhanukdhari at his death or his successor-in-title was, when this suit was brought, entitled to possession of the Mauza on payment to the defendant-appellant of the Rs. 200 mortgage-money. The plaintiff on the 1st September 1908 purchased such right, title and interest as Devaki Nandan Tiwari and his brothers had in the Mauza. They were the sons of Hanuman, who was living when Monakka Kuar died, but had died before the purchase. The question of title on which this suit depends is, whether Hanuman was at the time when Monakka Kuar died, the heir of her deceased husband Dhanukdhari. If Hanuman was not then the heir of Dhanukdhari, no title to the Mauza passed to the plaintiff by the purchase from his sons, and it is established in this suit that the plaintiff had no other title. As the defendant-appellant was in possession it was for the plaintiff to prove a title to the possession of the Mauza.

The case for the defendant-appellant was that, on the death of Monakka Kuar, the heir of Dhanukdhari was not Hanuman, and was either Jagdeo or Rajendra. The following short pedigree will show the relationship of Dhanukdhari, Jagdeo, Rajendra and Hanuman to each other:—



(6) 30 Ind. Cas. 529; 42 I. A. 208; 29 M. L. J. 434; 2 L. W. 597; 13 A. L. J. 1007; 18 M. L. T. 409; 17 Bom. L. R. 1922; 20 C. W. N. 1; 22 C. L. J. 481; (1915) M. W. N. 772; 37 A. 604 (P. C.).

(7) 16 M. 23; 2 M. L. J. 296; 5 Ind. Dec. (N. S.) 724.

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The Trial Judge considered that it was not proved that Jagdeo was living when Monakka Kuar died. It was for the plaintiff to prove that Jagdeo had died in the lifetime of Monakka Kuar. The High Court found that Jagdeo had died before Monakka Kuar. Having regard to these findings, their Lordships assume that Jagdeo had died before Monakka Kuar.

The pedigree shows that Rajendra is the mother's sister's grand-son of Dhanukdhari and that Hanuman was Dhanukdhari's mother's paternal aunt's son. Rajendra and Hanuman were *bhinna gotra sapinda bandhus* of Dhanukdhari.

The Trial Judge found that Hanuman was, on the death of Monakka Kuar, the heir of Dhanukdhari, and made a decree in favour of the plaintiff for possession of the Marja on payment to the defendant appellant of the Rs. 200 mortgage-money. From that decree the defendant-appellant appealed to the High Court at Patna. The High Court, in its view of the law of the Mitakshara, came to the conclusion that on the death of Monakka Kuar the heir of Dhanukdhari was Hanuman, and was not Rajendra, and by its decree dismissed the appeal. From that decree of the High Court this appeal has been brought.

There has been much discussion and much divergence of opinion in India as to how the right of succession amongst *bandhus* subject to the law of the Mitakshara is to be ascertained; the subject was by no means an easy one, but their Lordships consider that it has now, to a large extent, been settled by decisions of the Board.

According to the text of Manu, which is the foundation of the rules of inheritance of the Hindus, "the property of a near *sapinda* shall be that of a near *sapinda*." Vijnaneswara in his Commentary, which is known as the Mitakshara, in giving the rules for the succession of cognate kindred, *bandhus*, in Chapter II, section 6, as translated by Colebrooke, said:—

"1.—On failure of *gentiles* (*gotrajas*) the cognates (*bandhus*) are heirs. Cognates (*bandhus*) are of three kinds; related to the person himself (*atma bandhu*), to his father (*pitri bandhu*), or to his mother (*matri bandhu*), as is declared by the following text: "The sons of his own father's sister, the sons of his own mother's sister, and the sons

of his own maternal uncle must be considered as his own cognate kindred (*atma bandhus*). The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle must be deemed his father's cognate kindred (*pitri bandhus*). The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncles must be reckoned his mother's cognate kindred (*matri bandhus*)." "

"2.—Here, by reason of near affinity, the cognate kindred of the deceased himself (his *atma bandhus*) are his successors in the first instance; on failure of them, his father's cognate kindred (*pitri bandhus*); or if there be none, his mother's cognate kindred (*matri bandhus*). This must be the order of succession here intended."

With reference to these texts from the Mitakshara which are above quoted, the Board in *Muthusami Mudaliar v. Simambedu Muthukumaraswami Mudaliar* (2) held that:—

"To whatever extent rules of succession may have been founded on religious observances, or may now be explained by them, it is clear that fixed rules of law for succession have been established for ages, and equally clear that the Mitakshara professes to express such rules in the quoted text. Taking it to mean what it says, the question is whether its omission to mention a maternal uncle signifies that he is excluded from the first class of *bandhus*, or whether the writer is not rather classifying by sample without attempting to specify every member of each class.

"Their Lordships are of opinion that, even if the quoted text (section 6 of Chapter II) stood alone, the only admissible construction would be the latter one; for no rational ground can be assigned for excluding the maternal uncle of the deceased while his more remotely allied sons are admitted to succeed. But in fact the text does not stand alone, and whatever difficulty might at one time have been felt in applying it, it has now been removed by judicial decision.

"In the case *Gridari Lall Roy v. Government of Bengal* (8) the person claiming

(8) 12 M. L. A. 445; 10 W. R. P. C. 81; 1 B. L. R. P. C. 44; 2 Suth. P. O. J. 159; 2 Sar. P. C. J. 382; 20 E. L. 403; 3 Mad. Jur. 386; 1 Ind. Dec. (N. S.) 28.

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to be heir was the maternal uncle of the deceased's father. The High Court of Calcutta decided against his claim on the ground that he was omitted from the quoted text. On appeal, this Board referred to a passage in the Mitakshara which is not translated by Colebrooke, but which was translated and used for the purpose of that suit. In that passage, which deals with the property of a trader dying abroad, his maternal uncle is included among *bandhus* capable of succeeding, though the order of succession is not there stated. The Board also referred to a passage of the Viromitrodaya as a work of high authority at Benares, and properly receivable to explain things left doubtful by the Mitakshara. That passage states that maternal uncles are to be comprehended in the quoted text; noting how objectionable it would be to exclude them while admitting their sons. This Board held that a grand-uncle fell within the same reasoning, and upheld the plaintiff's title."

Having regard to this decision, it appears to be clear that in families governed by the law of the Mitakshara the right of succession amongst the three classes of *bandhus* mentioned in the text is governed by the propinquity of the class; and accordingly that a *pitri bandhu* does not succeed until the class of *atma bandhus* is exhausted and a *matri bandhu* does not succeed until the classes of *atma bandhus* and *pitri bandhus* are exhausted. In the present case Hanuman was a *matri bandhu*, the son of a mother's paternal aunt, being expressly included in that class. Harihar, as a son of a mother's sister, was an *atma bandhu*; and the question to be determined is whether his son, Rajendra, was also included in that class. In their Lordships' opinion he was. The word "sons" in a similar context has been construed in a generic sense and has been held to include a grandson [*Buddha Singh v. Lattu Singh* (6)] and, in any case, the grandson of a mother's sister falls within the general description of an *atma bandhu*, a person related to the propositus himself, and is not to be excluded only because he is not mentioned among the illustrations in the text of the Mitakshara. A similar view was taken in *Krishna Ayyangar v. Venkatarama Ayyangar* (3) where a father's

sister's daughter's son was held to be an *atma bandhu* and to have priority over the paternal grand-father's sister's son and in *Bai Visli v. Bai Prabhalakshmi* (5) where a mother's sister's grand-son was preferred to the paternal grand-father's sister's son's daughter.

The learned Judges of the High Court appear to have been influenced in arriving at their decision of the appeal to their Court in this suit by opinions which they expressed in their judgments to the effect that Hanuman could have made efficacious offerings to the maternal great grand father and the maternal great great grand-father of Dhanukdari and that Rajendra could make no offerings to any ancestor of Dhanukdhari. It is not necessary for the decision of this appeal that their Lordships should express any opinion as to the right, if any, of Hanuman and Rajendra, respectively, to make efficacious offerings to any ancestor of Dhanukdhari, as Rajendra is of the class of *atma bandhu*, and Hanuman was of the class of *matri bandhu*, and the rule of succession as between them is the rule of the Mitakshara which has been cited above. That rule is preferring the nearer to the more remote class of *bandhus*, is not dependent on individual propinquity or on the efficacy of offerings to a deceased person. Of course, a *bandhu* must, in order to be heritable in a female line, fall within the fifth degree from the common male ancestor and must be so related to the deceased person that they were mutually *sapindas* of one another, that is to say, where the Mitakshara applies, persons connected by particles of one body (see *Ramchandra Martand Waikar v. Vinayak Venkatesh Kothekar* (1); but if these conditions are satisfied that rule takes effect. What the rule of succession under the Mitakshara may be as between *bandhus* of the same class, it is not necessary to decide.

In this case Rajendra is an *atma bandhu* and is within the fifth degree of descent from Ghanu Misra. Rajendra and Dhanukdhari were mutually *sapindas* of each other, within the meaning of that term as used in the preceding paragraph, and Rajendra was the heir of Dhanukdhari on the death of Monakka Kuar. Hanuman was a *matri bandhu* and consequently was not



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entitled as heir on the death of Monakka Kuar as Rajendra was then living.

Their Lordships will humbly advise His Majesty that this appeal should be allowed with costs, and that the decrees of the Courts below should be set aside and the suit dismissed with costs.

*Appeal allowed.*

Solicitor for the Appellant.—Mr. W. Horo Davey. *Ex parte.*

# COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REFERENCE No. 131 OF 1919-20.

April 6, 1920.

*Present:*—Mr. Porter, J. M.

MAHARAJ—APPLICANT

*versus*

ABDULLA—RESPONDENT.

*Jurisdiction of Civil and Revenue Courts—Additional sum agreed to be paid by tenant, suit for, cognisance of.*

A suit to recover any additional sum which a tenant agrees to pay for his use and occupation of land is cognizable by a Civil and not a Rent Court.

Reference made by the Commissioner, Benares Division.

**JUDGMENT.**—I do not think there is sufficient cause for interference on revision in this case. The rent payable in 1324 F was Rs. 33. This was paid by 30th September 1917, and an acquittance in full was given. There were no arrears of rent due, when the agreement of October 1st, 1917, was made. Only arrears of rent can be recovered under the Tenancy Act, and if the tenant subsequently agreed to pay an additional sum for his use and occupation of the land in 1324 F. that might be recoverable in a Civil but not in Rent Court.

It also appears doubtful how far an agreement for enhancement of rent can be given retrospective effect. The tenant might, e. g., in a conceivable case, lose the benefit of section 47.

I would, therefore, reject the application for revision.

*Application rejected.*

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# MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 597 OF 1918.

March 24, 1920.

*Present:*—Mr. Justice Spencer and

Mr. Justice Krishnan.

NEELAMANI PATNAIK MUSSADI

—PLAINTIFF—APPELLANT

*versus*

SUKADUVA BEHARA AND OTHERS—

DEFENDANTS—RESPONDENTS.

*Mortgage—Assignment—Payment to mortgagee without notice of assignment, effect of—Mortgagee not in possession of mortgage-deed at time of payment, effect of—Notice, constructive—Registration Act (XVI of 1908), s. 17 (b)—Receipt, unregistered in discharge of mortgage debt, admissibility of.*

A payment made by a mortgagor to the mortgagee without notice of a prior assignment of the mortgage is, in the absence of collusion, binding on the assignee, even where by an arrangement between the mortgagor and mortgagee under which the latter agreed to receive a certain sum in full settlement of the mortgage-debt, the payment amounts to a discharge of the mortgage-debt. [p. 527, col. 1.]

No inference of constructive notice of the assignment by a mortgagee of the mortgage can be drawn against the mortgagor by the mere absence of the mortgage-deed from the possession of the mortgagee at the time of receiving payment of the mortgage-debt. [p. 257, col. 1.]

A document which merely evidences the receipt of a sum of money in full discharge of a mortgage-debt, the payment of the balance of interest being excused, is not affected by section 17 b of the Registration Act, and, even if unregistered, is admissible in evidence. [p. 257, cols. 1 & 2.]

Second appeal against the decree of the District Court, Ganjam at Berhampore, in Appeal Suit No. 358 of 1916, preferred against the decree of the Court of the Additional District Munsif, Berhampore, in Original Suit No. 209 of 1916.

This second appeal came on for hearing on the 2nd October 1919, before their Lordships, Spencer and Krishnan, JJ.

**FACTS.**—The question was whether a plea of discharge could be pleaded as against the transferee of a mortgage right the alleged discharge having been made after the transfer to the representatives of the transferor, provided that the mortgagors had no notice.

Mr. Z. S. Narayana Aiyangar for Mr. O. S. Venkatchariar, for the Appellant.—A mortgage is not an actionable claim and hence no notice is required on transfer. It is an interest in immoveable property. See sections 3 and 58 of the Transfer of Property Act. The Law of England is different where it is

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regarded as a 'chose in action.' See Ghose, Volume I, page 340. *Jones v. Gibbons* (1). In *Subramania Aiyar v. Subramania Pattar* (2) a set off available against the mortgagee was not allowed against his assignee. See also *Chundooru Lakshmana Setty v. Duggisetty Chenchuramayya* (3). In the case of sub mortgages, a different rule prevails. See *Poosaria Ohinnaswamy v. Kattamoori Venkata Rama Krishnayya* (4). But the bona fides of the payment has to be proved. See as to the transfer of an actionable claim, *Ismail Mollah v. Jadu Nath* (5).

In the present case, the mortgage-deed was with the assignee. Hence the mortgagors had constructive notice of the assignment. See *Maxfield v. Burton* (6), *Oliver v. Hinton* (7).

Mr. P. Nagabhushanam, for the Respondents.—It is always open to a creditor to remit the whole or part of the debt due to him. The payment proved in the present case has been accepted as full satisfaction of the debt due under the mortgage. I submit that the principle of *Norrish v. Marshall* (8) applies. See *Namagiri Lakshmi Ammal v. Srinivasa Aiyangar* (9), *Chundooru Lakshmana v. Setty Duggisetty Chenchuramayya* (3). See also *Papala Ohakrapani v. Lachumiachi* (10). See also XXI Halsbury, p. 179. The receipt is evidence of the discharge of the debt due under the mortgage. Registration thereof is unnecessary as what it purports to discharge is only the debt and not the security. See *Seshayya v. Subbamma* (11), *Uppalakandi Kunhi Kutti Ali Haji v. Kunnam Mithal Kottapraath Abdul Rahiman* (12).

Mr. Narayan Aiyangar in reply.—There is a distinction between discharge by payment and discharge by agreement. *Srinivasaswami Aiyangar v.*

- (1) (1804) 82 E. R. 659; 9 Ves. 407; 7 R. R. 247.
- (2) 34 Ind. Cas. 859; 40 M. 683; (1916) 1 M. W. N. 851; 30 M. L. J. 615.
- (3) 44 Ind. Cas. 132; 34 M. L. J. 79; 7 L. W. 229; (1918) M. W. N. 262.
- (4) 37 Ind. Cas. 778; 4 L. W. 502; (1917) M. W. N. 111.
- (5) 10 Ind. Cas. 510; 13 C. L. J. 641.
- (6) (1873) 17 Eq. 15; 43 L. J. Ch. 46; 29 L. T. 571; 22 W. R. 149.
- (7) (1899) 2 Ch. 264; 69 L. J. Ch. 583; 81 L. T. 212; 48 W. R. 2; 15 T. L. R. 450.
- (8) (1821) 56 E. R. 977; 5 Madd. 475; 53 R. R. 36.
- (9) 27 Ind. Cas. 269.
- (10) 45 Ind. Cas. 769; 35 M. L. J. 309; (1918) M. W. N. 248; 28 M. L. T. 800.
- (11) 8 M. L. J. 269.
- (12) 19 M. 288; 6 Ind. Dec. (N. S.) 906.

*Athmarama Aiyar* (13). In the latter case I submit that the receipt is inadmissible in evidence. Farther, under section 17 of the Registration Act, where a receipt extinguishes a mortgage it has to be registered.

JUDGMENT.—We must accept in second appeal the findings of fact of the learned District Judge that the mortgagors made the payment they pleaded to the mortgagee, and that they did so without notice of the prior assignment of the mortgage to the plaintiff. We think the learned Judge is right in holding that on the above findings plaintiff was bound by the payment so made.

The English Law on the point is quite clear. In Halsbury's Laws of England, Volume XXI, page 179, paragraph 334 it is stated "that the mortgagor is entitled to make payments to the mortgagee, whether of principal or interest, and to have credit for them as against the transferee after the transfer until he has received notice of it". And several English cases, including *Bickerton v. Walker* (14) and *Dixon v. Winch* (15), are quoted.

There does not seem to be any good reason why that rule, which is founded on principles of equity, should not be followed in this country. It is true that, after the amendment of the definition of the term "actionable claim" by Act II of 1900 so as to exclude mortgage-debts, section 130 of the Transfer of Property Act (Act IV of 1882) does not apply to mortgage-debts, and the statutory provision in it that the payment to a transferor will be valid against a transferee save when the debtor is a party to the transfer, or has received notice thereof does not apply *ex proprio vigore*. But this rule itself is based on the equitable principle referred to and recognised in the English cases, and it subsists apart from the section itself. We think, therefore, the principle is applicable to payments by mortgagors though the section does not.

It is true that notice is not necessary for the validity of the assignment of a

- (13) 2 Ind. Cas. 612; 32 M. 281; 19 M. L. J. 280; 5 M. L. T. 84.
- (14) (1885) 31 Ch. D. 151 at p. 153; 55 L. J. Ch. 227; 53 L. T. 731; 34 W. R. 141.
- (15) (1900) 1 Ch. 736; 69 L. J. Ch. 465; 82 L. T. 437; 48 W. R. 612; 16 T. L. R. 276.

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mortgage. *Govindov v. Ravi* (16). But that is not the question before us. No doubt, "where a mortgage is transferred without the privity of the mortgagor, the transferee takes subject to the state of account between mortgagor, and mortgagee at the date of the transfer" as observed by Oczens Hardy, J., in *Dixon v. Winch* (15) above referred to. See *Turner v. Smith* (17). But that observation also has no reference to the present question.

No Indian case has been cited to us on the exact question before us. But Dr. Ghose in his book on the Law of Mortgages in India, Volume I, page 530, observes: "It is also well settled that a payment made by the mortgagor to the mortgagee after, but without notice of, a transfer must, in the absence of collusion, be allowed to the mortgagor as against the transferee." We accept this as a correct statement of the law, so far as it goes.

It was then argued that the mortgagors were guilty of negligence as they did not make proper enquiries of the transferor about the absence of the mortgage deed from his possession. The learned Judge, however, finds that the mortgagors did make enquiries and they were given an explanation which they believed. We see no reason to suppose that the mortgagors acted negligently in these circumstances and no inference of constructive notice of plaintiff's assignment can be drawn against them.

The next question raised is, that the mortgagors can get credit only for what they actually paid though that payment was accepted by the mortgagee in full settlement of the debt due, and not for the whole mortgage-debt. As the mortgagors were entitled to deal with their mortgagee as if no assignment took place when they had no notice of the transfer, we think that the arrangement set up must be held to be binding on the transferee.

It is next argued that Exhibit I, which evidences the payment pleaded by the mortgagors, is inadmissible in evidence, as it is unregistered and as it purports, according to the plaintiff's Vakil, to extinguish the mortgage. On a reference to Exhibit I we find it to be merely a receipt for money actually

(16) 12 B. 33; 6 Ind. Dec. (N. S.) 507.  
(17) (1901) 1 Ch. 213 at p. 219; 70 L. J. Ch. 144; 83 L. T. 704; 49 W. R. 186; 17 T. L. R. 143.

paid, which was taken in full discharge of the mortgage debt, the payment of the balance of interest due being excused. There is nothing in the document to show that the mortgage-interest was expressly extinguished by it; it is only a discharge of a mortgage-debt. We think there is a clear distinction between the discharge of a debt and the extinguishment of a mortgage-interest though one may be the result of the other. Where a receipt, in terms, only discharges the debt, it cannot be brought under section 17 (b) of the Registration Act (Act XVI of 1908). In this particular this case is distinguishable from the case of *Namagiri Lakshmi Ammal v. Srinivasa Aiyangar* (9), where there was an agreement to cancel and return the mortgage-deed. In *Mallappa v. Matim Nogu Ohetty* (18) also cited, there was only an oral agreement to take a smaller sum for the mortgage, amount and the question raised was quite different from the one before us. In the case of *Chundogru Lakshman Setty v. Duggisetty Chenchuramkoyya* (3), also, the agreement was not merely to receive the Rs. 3,000 in full settlement but also to return the documents, that is, the mortgage-deed and the title-deeds. There was, therefore, in it a proposal to extinguish the mortgage-interest.

All the points raised against the mortgagors, respondents Nos. 1 to 10, thus fail. It is finally urged that a decree for money should be given to the plaintiff against the representatives of the original mortgagee, who is found to have received the mortgage-money from the mortgagors after the transfer to the plaintiff, as the money had and received for his use. In view of the findings come to by the learned District Judge, we think the question whether any relief, and, if so, what relief, should be given to the plaintiff against those representatives should have been considered. The fact that they were exonerated in the first Court, and that the plaintiff filed no appeal or memorandum of objections against such exoneration in the Appellate Court, will not stand in the way of plaintiff being given relief now under Order XLI, rule 33, Civil Procedure Code. As there is no finding by the lower Appellate Court on the point, we must call for a finding on it and allow fresh evidence, as the point, though in a

(18) 45 Ind. Cas. 158; 41 M. 41; 8 L. W. 522; (1918) M. W. N. 719; 85 M. L. J. 555; 24 M. L. T. 400.



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manner raised in Issue No. V, does not seem to have been properly tried. Finding in two months; objections, seven days.

In compliance with the order contained in the above judgment the District Judge of Ganjam at Berhampore submitted the following

#### FINDING.

In this appeal, I have been called upon by the High Court to receive fresh evidence and to submit a finding on the question whether plaintiff was entitled to any and what relief against the representatives of the deceased 12th defendant.

It was urged that the amount claimed from the legal representatives was in the nature of an *Avyavalarika* debt, inasmuch as 12th defendant was guilty of fraud in receiving payment after assigning the mortgage-bond. The decision in *Hanmant Kashinath Joshi v. Ganesh Annaji* (19), is against any such contention. It was also contended that the claim was barred by limitation. But P. W. No. 1 has stated that he became aware of the receipt of the money by 12th defendant, only when the written statements were filed.

My finding, therefore, is that the son of the deceased 12th defendant, viz., the 19th defendant in this case, would only be liable for Rs. 350 received by his father under Exhibit I, on 30th November 1911, and that the other legal representatives, viz., defendants Nos. 15 to 18, are not liable.

This second appeal came on for final hearing after the return of the finding of the lower Appellate Court.

JUDGMENT.—As against the 19th defendant, the son of 12th defendant, the deceased assignor of the plaintiff, the plaintiff's suit for money had and received is barred under Article 62, Limitation Act *Sriramulu v. Ohinna Venkatasami* (20)]. We do not pronounce on any other cause of action that the plaintiff may have against this defendant.

The second appeal is dismissed with costs of respondents Nos. 1 to 10.

M. C. P.

*Appeal dismissed.*

(19) Ind. Cas. 612; 43 B. 612; 2. Bom. L. R. 435.  
(20) 25 M. 286.

## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVISION No. 7 OF 1918-19.

November 13, 1919.

Present :—Mr. Ferard, S. M.  
and Mr. Harrison, J. M.

AMIR HUSAIN—APPLICANT

versus

ALLAHDIA AND OTHERS—RESPONDENTS.

*Agra Tenancy Act (II of 1901), s. 58—Ejectment—Person occupying land without payment of rent—Occupancy rights, accrual of.*

A person who occupies land on sufferance without payment of any rent does not acquire occupancy rights as a tenant and is liable to ejectment as soon as the land-holder withdraws his sufferance.

Revision of the order of the Commissioner, Meerut Division, dated the 21st of August 1918, in a case of ejectment.

#### JUDGMENT.

HARRISON, J. M.—(November 7, 1919).—This is an application for revision in an ejectment suit. The defendants have apparently held the land for over 20 years and they claimed occupancy rights. There was no proof, however, that they had ever paid rent and the Commissioner only noted that one respondent stated that he paid Rs. 3 rent. That, of course, is valueless. In the written statement in the first Court there was an issue on the question and a definite finding that no rent was fixed. But it will be observed that they claimed to be tenants and to have occupancy rights.

The Commissioner felt that they must have had the consent of the former Zemindars to occupy and held that the respondents were not required to prove payment of rent. I cannot accept this view, especially having regard to *Babu Sat Narain Prasad v. Kam Kumar* (1) and *Murlu Parshad v. Lal Mani Pandey* (2). These seem to me to fit the case exactly and I hold that the Commissioner has acted with material irregularity in ignoring Selected Decisions of the Board which were clearly in point. I would, therefore, set aside the decrees of the lower Courts and would decree ejectment with costs to applicant in all Courts and Rs. 25 Pleader's fees in this Court.

FERARD, S. M.—(November 13, 1919).—I agree. Respondents can only be regarded as occupying on suffer-  
(1) Sol. Dec. No. 3 of 1910.  
(2) Sol. Dec. No. 10 of 1918.

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ance. Their occupation does not go back far enough to warrant an assumption, without proof on their part, of an original rent-free grant. As they have not been paying rent, they have not acquired the occupancy right as tenants and are liable to ejectment as soon as the land-holder withdraws his sufferance.

*Appeal allowed.*

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1395 OF 1920.

January 13, 1921.

Present:—Mr. Justice Chevis.

KANSHI RAM—DEFENDANT—  
APPELLANT

versus

KARAM NARAIN AND ANOTHER—PLAINTIFFS  
—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 102, O. XLIII, r. 1 (w), O. XLVII, r. 7—Small Cause suit of value below Rs. 500—Decree passed on review—Appeal, whether lies.*

The appeal allowed under Order XLIII, rule 1 (w) of the Civil Procedure Code is an appeal from the order granting the application for review and not an appeal from the final decree passed in the suit, such an appeal must be limited to the grounds mentioned in rule 7 of Order XLVII of the Code. [p. 259, col. 2.]

It would be absurd to allow a second appeal on the merits against a decree passed in a small cause suit of value less than Rs. 500 merely because the decree is one which has been passed on review. [p. 259, col. 2.]

Second appeal from the decree of the Senior Subordinate Judge, Shabpur at Sargodha, dated the 24th February 1920, reversing that of the Mansif, First Class, Sargodha, dated the 20th January 1919.

Dr. Nand Lal, for the Appellant.

Lala Ram Chand Mochanda, for the Respondents.

**JUDGMENT.**—The plaintiffs in this case sued for Rs. 443-0-6. The first Court dismissed the suit but left the parties to bear their own costs. The plaintiffs appealed to the Senior Subordinate Judge who, on the 31st of May 1919, dismissed the appeal with costs, holding that the plaintiffs'

suit was time-barred. The plaintiffs presented an application for review, which was granted, and the Senior Subordinate Judge gave a decree for Rs. 175 and Rs. 80 interest, total Rs. 255, basing this decision on a statement, dated the 3rd October 1918, made by the defendant Kanshi Ram to the effect that, if two items of Rs. 200 and Rs. 150 had not been credited to the plaintiffs in Gobind Ram's *khata*, he was ready to pay. The Senior Subordinate Judge held that only half of these items had been allowed in Gobind Ram's account, and that the defendant, according to the undertaking, must pay the remaining half. The defendant Kanshi Ram appeals to this Court. The appeal has been presented and registered as a second appeal, but as the suit is a Small Cause suit and under Rs. 500 in value, no second appeal lies. But under Order XLIII, rule 1 (w) an appeal does lie from the order granting the application for review. The appeal, however, must be limited to the grounds mentioned in Order XLVII, rule 7. My authority for saying this is *Hari Charan Sahu v. Baran Khan* (1). It seems to me obvious that it would be absurd to allow a second appeal on the merits against a decree passed in a Small Cause suit of value less than Rs. 500 merely because the decree is one which has been passed in review; and I note, too, that the appeal allowed under Order XLIII, rule 1 (w) is only an appeal from the order granting the application for review, and not an appeal from the final decree passed in the suit.

It is not shown to me that the provisions of Order XLVII, rule 2 or rule 4, have been infringed; so the only question remaining is whether the application for review was presented after the expiration of the prescribed period of limitation.

The decree which the plaintiff sought to have reviewed was passed on the 31st May 1919 and the application for review was presented only on the 7th October.

The period of limitation prescribed by law for an application for review of judgment is 90 days. Counting from the 31st May 1919, the 90 days would expire on the 29th

(1) 25 Ind. Cas. 903; 41 C. 746.

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August 1919. Section 12 of the Limitation Act lays down that, in computing the period of limitation prescribed for an application for review of judgment, the time requisite for obtaining a copy of the decree sought to be reviewed and also the time requisite for obtaining a copy of the judgment on which it is founded shall be excluded. Dr. Nand Lal urges that an application for review may be presented without copy of judgment. But a man may require copy in order to take advice as to what course of action he should next take. And I cannot refuse to observe the clear provisions of section 12. In the present case I find that the plaintiffs applied for a copy of the judgment and obtained it and presented it to Court on the 5th of October. The endorsement on the back of the copy shows that it was complete and ready for delivery on the 23rd June 1919. The endorsement does not show precisely on what date the copy was applied for as the day of the month is not given but only the month itself, namely, June 1919. It is, however, manifest that at least one day must be allowed for obtaining the copy. So this brings us up to the 30th August 1919. That day was a last Saturday in the month, on which day the Courts are always closed. The next day was Sunday and then began the September vacation. The Courts are closed during the whole of September. The first six days of October were *Muharram* holidays, and the Court re-opened on the 7th October. Section 4 of the Limitation Act lays down that where the period of limitation expires on a day when the Court is closed, the application may be made on the day that the Court re-opens. I find, therefore, that the application for review was not time-barred.

In conclusion, I note that Dr. Nand Lal asks me to interfere on the revision side, as no appeal lies on the merits from the final decree passed in the suit. I see, however, no sufficient reason to suppose that the order passed on review is not an equitable one, and I consider that there is no good ground for proceeding on the revision side.

The appeal fails and is dismissed with costs.

*Appeal dismissed.*

COURT OF THE BOARD OF REVENUE,  
UNITED PROVINCES.

SECOND APPEAL No. 128 of 1918-19.

February 15, 1920.

Present:—Mr. Ferard, S. M. and  
Mr. Harrison, J. M.

BHAGWATI MISIR—APPELLANT

versus

JHALAI CHAMAR—RESPONDENT.

*Agra Tenancy Act (II of 1901), s. 47—Enhanced rent, agreement to pay—Agreement unregistered, effect of.*

An agreement to pay enhanced rent which is not registered as required by section 47 of the Agra Tenancy Act is invalid, and cannot be pleaded in answer to a suit for ejectment.

Second appeal from the order of the Commissioner, Gorakhpur Division, dated the 21st of June 1919, in a case of ejectment.

## JUDGMENT.

FERARD, S. M.—(February 8, 1920).—The plaintiff appellant is landlord. Both the lower Courts have found that he is in possession and is actual rent-collector. He sues to eject Jhalai Chamar, defendant-respondent, his 10 years' non-occupancy tenant. He admits a stamped but unregistered agreement between himself and the defendant respondent under which the latter agreed to pay enhanced rent of Rs. 2 8 0 instead of Rs. 2, and he agreed not to eject him except for arrears of rent on penalty of a certain grain compensation if ejectment should take place.

The agreement was not valid as one for enhancement of rent, as section 47, Tenancy Act, which, under *Kaizyab Khan v. Nizam ud-din* (1), is equally binding on both parties, should have been registered.

It was also not valid as a lease for an indefinite period, as, under section 17 (d), Registration Act, such leases require registration.

The only question is whether estoppel operates and this is what the Commissioner evidently means when he says there is a personal bar which prevents plaintiff appellant from ejecting Jhalai, whose Pleader cites *Gulzari Lal v. Musammatt Furan Kunwar* (2) in support. I do not agree. The tenant cannot benefit by the evasion of the Law of Registration as laid down in section 47,

(1) Sel. Dec. No. 6 of 1911.

(2) Sel. Dec. 16 of 1913.



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Tenancy Act. As he failed to comply with the registration condition in that section, he was not and is not bound to pay more than Rs. 2 per annum as rent, but he cannot plead the invalid agreement as good ground for holding on.

I would allow the appeal, set aside the Commissioner's appellate order and restore that of the Assistant Collector with costs to appellant throughout.

HARRISON, J. M.—(February 15, 1920).—  
I agree.

*Appeal allowed.*

ALLAHABAD HIGH COURT.  
SECOND CIVIL APPEAL No. 965 OF 1917.

May 26, 1920.

Present:—Mr. Justice Ryves and  
Mr. Justice Gokul Prasad.

GANESH PRASAD—PLAINTIFF—  
APPELLANT

*versus*

SHIB SINGH AND OTHERS—DEFENDANTS  
—RESPONDENTS.

*Adverse possession—Landlord and tenant—Ex-proprietary tenant, possession of, whether adverse to Zemindar.*

The possession of an ex-proprietary tenant can never be adverse to the zemindar, who is entitled to a declaration that he is the owner, but he is not entitled to possession so long as the tenancy subsists. [p. 262, col. 1.]

Second appeal from a decree of the District Judge, Bareilly, dated the 26th April 1917, confirming the decree of the Additional City Munsif, dated the 13th January 1917.

Messrs. L. M. Banerji and Parva Lal, for the Appellant.

Mr. S. P. Ghosh, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of the following circumstances. In 1884 the defendants sold their Zemindari in a certain village with two groves situate therein to the predecessor in title of the plaintiff. It is alleged that in the year 1914 the defendants ejected the plaintiff's

lessee from one of the groves, whereupon certain proceedings were taken in the Criminal Courts which ultimately ended in the acquittal of the defendants. It is not denied that, so far as the other grove is concerned, the defendants have ever since the sale of 1884 continued in possession thereof. The plaintiff's allegation is that, in the year 1916, the defendants again attempted to take possession and hence he brought the present suit for a declaration that he is the owner of the grove No. 174 and that the defendants have no right to, and possession over, it. In the alternative, the plaintiff prayed for possession if the defendants dispossessed him during the pendency of the suit. The defence was, as usual, a denial of all the statements in the plaint, the contention put forward in the additional pleas being, first that the sale deed of 1884 related to the Zemindari only and did not effect the groves; and, secondly, that even if the plots on which the groves stood be considered to have been included in the Zemindari sold, the contesting defendants were ex-proprietary tenants. It was further contended that as the plaintiff or his predecessor in title had not been in possession of the grove in suit within the twelve years preceding the institution of the present suit, the claim was barred by the rule of twelve years limitation. Other pleas were raised but we are not concerned with them. The Munsif in a very perfunctory judgment decided the first issue against the plaintiff; the first issue being:—"Was the father of the plaintiff the purchaser of the grove in suit and, if so, did the defendants retain the rights of ex-proprietary tenants as to it?" It is curious to find no decision whatever of the real question as to whether the sale deed of 1884 passed the groves to the plaintiff's predecessor in title. He assumes that the groves were sold and then refers to the entries in the revenue papers showing that the defendants were entered therein as ex-proprietary tenants. The same unsatisfactory state of affairs is to be found in his decision on the second issue as to whether or not the plaintiff or his predecessor in title had been in possession of the grove in suit and if the claim was barred by limitation.

However, he came to the conclusion that the suit was so barred. On appeal the lower Appellate Court has found, first, that the predecessors in title of the defendants sold

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this grove and another grove to the plaintiff's predecessor-in-title by virtue of the sale deed of 1884. He also found that the defendants were in possession as ex-proprietary tenants of the plaintiff and were so entered in the revenue papers continuously since 1308 *Fashi*, and that this entry has existed ever since the last Settlement. The conclusion to which he arrived after this finding was, "that the defendants have been in possession as ex-proprietary tenants of the land in suit adversely to the plaintiff..... at least since the time of Settlement which was much more than twelve years before the institution of the suit." It is difficult to understand what the word "adversely" in this part of the judgment means. If the learned Judge meant to say that this assertion of ex-proprietary rights was adverse to the Zemindar's right to immediate possession, one might be able to follow it, but in that case we think that, of necessity, a declaration should have been given to the plaintiff that he was, as Zemindar, the owner of this grove. On the other hand, if the learned Judge meant that, because the defendants had acquired a right adverse to that of the Zemindar, it would be a contradiction in terms because a tenant's possession could never be adverse to his own landlord. We take the first meaning to be which the learned Judge probably intended, and in that case, on the findings of fact arrived at by the lower Appellate Court, we think, on the authority of *Balmukund v. Dalu* (1), that this is a proper case in which the plaintiff is entitled to a declaration that he is the owner of the grove in dispute but he is not entitled to immediate possession over it so long as the ex-proprietary tenancy of the defendants subsists. As the plaintiff has failed to substantiate that the defendants are trespassers pure and simple and the relief we are granting to him is simply to avoid further litigation, we think that the plaintiff is not entitled to his costs but must pay the costs of the defendants-respondents throughout. In the result, the decrees of both the Courts below are modified and in lieu thereof we substitute a decree in favour of the plaintiff as stated above.

Decree modified.

(1) 25 A. 498; A. W. N. (1903) 112 (F. B.).

COURT OF THE BOARD OF REVENUE,  
UNITED PROVINCES.

Revision No 16 of 1919 20.

March 8, 1920.

Present : —Mr. Hopkins, S. M. and,

Mr. Harrison, J. M.

RORU—APPLICANT

versus

NIADAR MAL—RESPONDENT.

*Agra Tenancy Act (II of 1901), s. 177—Jurisdiction, question of, not decided—Appeal, forum of.*

An appeal under section 177 of the Agra Tenancy Act does not lie to the District Judge in a case in which no question of jurisdiction is in effect decided and in which it is not necessary to have any specific issue on that question.

Revision of the order of the Commissioner, Meerut Division, dated the 2nd of April 1919, in a case of ejectment.

## JUDGMENT.

HARRISON, J. M.—(February 14, 1920).—This is an application for revision in a case in which the Commissioner, Mr. Raw, dismissed the first appeal of the appellant on the ground that the Assistant Collector had decided a question of jurisdiction and that the appeal, if any, lay in the Court of the District Judge.

In the first place, when the Commissioner held as he did, it was his duty to return the memorandum of appeal to the appellant for presentation to the proper Court.

In the second place, I am of opinion that there was no real question of jurisdiction involved. The defense of the appellant in the Assistant Collector's Court practically amounted to this that the land from which it was sought to eject him was grove land from which he could not be ejected in a suit under section 58 of the Tenancy Act as a tenant from year to year. All that the first Court really had to decide in this connection was whether the land in suit was technically "land" within the definition of the Agra Tenancy Act; and it would have been more appropriate to put the issue in that form rather than the form actually adopted, namely, "is the suit cognisable by this Court?" The whole tenor of the written statement was to the effect that the holding being grove, the defendant was not liable to ejectment. As a matter of fact, the Assistant Collector found that the land was a *beri* orchard which, under the rulings of the Board, is not ordinarily subject to the

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restrictions governing grove land. I would hold, therefore, that no question of jurisdiction was in effect decided and that it was not necessary to have any specific issue on the question of jurisdiction and, consequently, in my opinion, the appeal did not lie under section 177 of the Tenancy Act to the District Judge but was properly filed in the Court of the Commissioner.

I would, therefore, set aside the Commissioner's appellate order and direct the present Commissioner to re-admit the appeal and dispose of it on the merits. In the circumstances, the parties may bear their own costs of this application.

HOPKINS, S. M.—(March 8, 1920).—I agree.

Order set aside.

### SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS Nos. 2 AND 3 OF 1919.  
March 18, 1920.

Present:—Mr. Fawcett, J. C., and  
Mr. Kennedy, A. J. C.

LALSING MULSING—APPELLANT

versus

GIRDHARIDAS AND ANOTHER—  
RESPONDENTS.

*Hindu Law—Stridhan—Succession—Step-son, whether can succeed—Appeal—Contention not raised in memo. of appeal, whether can be entertained at hearing.*

The High Court will not entertain a contention at the hearing of an appeal which is not contained in the memo. of appeal and which was not brought to the notice of the lower Court. [p 263, col. 2.]

Under the Maynka and Mitakshara systems of Hindu Law succession to *stridhan* is confined to the issue of the female who has the *stridhan*, consequently a step-son has no legal claim to *stridhan* property. [p. 264, col. 1.]

Appeal against the decision of the District Judge, Sukkur.

Mr. Tahiram Maniram, for the Appellant.

Mr. Srikrishendas H. Lula, for the Respondents.

### JUDGMENT.

F. W. C. T., J. C.—These two appeals have been heard together. They arise out of certain transactions connected with one Gangabai, of whom the appellant Lalsing

is the step-son and the main respondent Girdharidas a nephew by his marriage with Gangabai's sister's daughter. Gangabai had a deposit account with Girdharidas, father Sobhrai, which she used to draw. She also got money from Sobhrai on *hundi*s that were executed first by her husband, Mulsing and then by her step-son, Lalsing. The plaintiff, Lalsing, brought a suit claiming a certain sum as balance due on the deposit account and there was a cross-suit by Girdharidas claiming a sum of Rs. 800 from Lalsing on the strength of a *hundi* executed by him. The accounts which Sobhrai had kept were produced and have been examined by the two lower Courts.

Mr. Tahiram for the appellant says that there is no clear finding showing that Gangabai's withdrawals on the *hundi*s were not also debited in her deposit account, and that the decree against him on the strength of the *hundi* is, therefore, open to objection. There are, no doubt, in the judgments some sentences which afford, at any rate, some basis for contending that the two accounts may have been connected. But, on the other hand, we have clear findings of both the lower Courts that the *hundi* account was entirely separate and distinct from the deposit account, and it is difficult to believe that if there was any real basis for the suggestion that the *hundi* had been twice debited and that there had been a mixture of the two accounts in the way suggested, that this would not have been brought to the notice of the lower Court and discussed in the judgment. Moreover, the memorandum of appeal contains no such contention and the appellant is not entitled to be heard upon this objection. I do not, therefore, think that in second appeal we should go into this question and delay the settlement of this litigation on account of a mere suggestion of this kind.

Coming to the other points that have been taken in the appeals the main one is, whether the appellant, Lalsing, is, in any way, entitled to claim the amount due as balance, on Gangabai's deposit account from the respondents. Mr. Tahiram's contention is that this money constituted non-technical *stridhan* of Gangabai, which, under the Maynka Law, will descend in the first place to her sons. Alternatively, he says that if it is technical *stridhan*, it will



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under the category of gifts from the husband which, under the same law, descends in the first place to the sons and unmarried daughters taking together in equal shares. The District Judge has held that, even supposing that the Mayuka Law applies and that the property was *stridhan* descending to Gangabai's sons, yet the plaintiff-appellant is excluded because he is only a step-son and not a natural son of Gangabai. Mr. Tabilram admits that he can cite no direct authority showing that 'sons' in the case now under consideration includes step-sons, and there are certainly authorities, namely, *Bhimacharya v. Ramacharya* (1), *Mathura Naikin v. Eru Naikin* (2), *Gangadar Bogla v. Hira Lal Pogla* (3) which go against any such view. It seems to me that, in determining the succession to *stridhan*, both the Mayuka and the Mitakshara contemplate clearly the issue of the female who has *stridhan*, and, in the absence of any clear authority to the contrary, I can see no sufficient ground for saying that 'sons' in these two cases include step-sons. I, therefore, agree with the view taken by the District Judge that the appellant has no legal claim in respect of the deposit account, and it is, therefore, unnecessary to decide to what class of *stridhan* the property belongs, and whether the Mayuka or the Mitakshara should be recognized as prevailing in Sind.

Mr. Tabilram has contended that, as Gangabai's son Sandersing was a co-plaintiff and is a party to this appeal, a decree should be given in regard to his right as representing this son of Gangabai. It appears, however, from the plaint in Suit No. 470 of 1917 that he was then described as 17 years and it does not appear that a guardian has been appointed for him under the Guardians and Wards Act. He is presumably, therefore, now a major. It is also stated by the Pleader for the respondents that Sandersing has dissociated himself from the plaintiff's claim, and though he has in one of these appeals been joined as respondent, he has not appeared either in person or by a Pleader.

Accordingly, I do not think that the appellant is entitled to any relief on this ground.

I would, therefore, dismiss both these appeals with costs.

KENNEDY, A. J. O.—I agree.

*Appeal dismissed.*

# COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL No. 20 OF 1919-20.

April 21, 1920.

Present:—Mr. Hopkins, S. M. and  
Mr. Porter, J. M.

DATTU SINGH—APPELLANT

*versus*

RAM DAS—RESPONDENT

*Landlord and tenant—Ejectment—Joint holding—  
Partition proceedings pending—One proprietor,  
whether can sue for ejectment.*

It is not open to one of two recorded proprietors of a holding in respect of which proceedings in partition are pending to maintain a suit against a tenant for ejectment.

Second appeal from the order of the Commissioner, Gorakhpur Division, dated the 25th of July 1919, in a case of ejectment.

## JUDGMENT.

HOPKINS, S. M.—(April 13, 1920).—The appellant resists ejectment on the ground that the respondent, Ram Das, was not competent to file the suit alone. The land in suit is situated in *khata khunt* No. 1, the recorded proprietors of which are Ram Das and Ajudhya Prasad. Ram Das and Ajudhya Prasad, on 30th October 1905, executed an agreement of partition under which the holding in suit was allotted to Ram Das. No effect was, however, given to that agreement in the revenue papers. Ram Das admitted in the witness-box that he had made three applications for correction of the papers which were all dismissed. On the 18th December 1917, the present suit having been filed on 25th September 1917, Ram Das brought a suit against Ajudhya Prasad in the Civil Court to enforce

(1) 3 Ind. Cas. 750; 33 B. 452; 11 Bom. L. R. 654.

(2) 4 B. 545 at p. 558; 2 Ind. Dec. (N. S.) 871.

(3) 34 Ind. Cas. 10; 43 O. 944; 20 O. W. N. 489; 23 C. L. J. 272.

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the agreement of the 30th October 1905 on the ground that Ajudhya Prasad had resiled from it. That suit was decided on the 7th May 1919, under a compromise by which the parties agreed to abide by the agreement of 13th October 1905. Proceedings for partition in the Revenue Courts are, according to the evidence of Ajudhya Prasad, now pending. It is perfectly clear from this recital that the *khata* to which the holding in suit appertains was, at the time of the institution of the suit, joint and that there had been no effective division of it. The Commissioner's finding on the point is, "there is good evidence that the parties to the partition are in separate possession and appellant (Ram Das) is accordingly entitled to proceed alone."

So far from there being good evidence that the parties to the partition are in separate possession, the only evidence on the subject which I can find is that of Ram Das himself, which is nullified by his own admissions.

The Commissioner's finding is not based upon any judicial consideration of the evidence. I would accept the appeal with costs and, setting aside the decree of the Commissioner, would restore that of the Assistant Collector.

I call the attention of the Commissioner to the fact that the records of other Courts, including one of the Civil Court, have been summoned wholesale in this case. This practice has been frequently condemned. Parties should produce certified copies of documents or judgments on which they rely and should not be allowed to summon whole records.

PORTER, J. M.—(April 21, 1920).—I agree with the proposed order.

*Appeal accepted.*

## LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 2260  
OF 1920.

January 19, 1921.

Present:—Mr. Justice Chevis.

WAZIR BAKHSH—JUDGMENT-DEBTOR—  
APPELLANT

versus

HARI RAM—DECREE HOLDER, AND NUR  
DIN AND OTHERS—JUDGMENT DEBTORS—

RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Arts. 181, 182—  
Execution of decree—Application against judgment-  
debtor, whether saves limitation as against surety—  
Limitation applicable.*

During the pendency of an appeal by a judgment-debtor, W stood surety for the payment of the decretal amount. The appeal was dismissed and the decree-holder applied for execution of the decree. In this application he specified the names of the judgment-debtor and the surety, but sought execution only as against the property of the judgment-debtor. More than three years after the date of this application, the decree-holder applied to execute the decree as against the surety:

*Held*, 1. that the limitation applicable to the application was that laid down in Article 182 of Schedule I to the Limitation Act; [p 266, col. 1.]

(2) that the previous application did not operate to save limitation as against the surety inasmuch as no step was sought to be taken under that application as against the surety; [p 266, col. 2, p. 267, col. 1.]

(3) that, therefore, the present application was barred by time [p. 266, col. 2.]

Miscellaneous second appeal from the decree of the District Judge, Gujranwala, dated the 19th July 1920, reversing that of the Munsif, First Class, Gujrat, dated the 31st March 1920.

Mr. *Badr-ud Din Kureshi*, for the Appellant.

Mr. *Mukund Lal Puri*, for the Respondents.

JUDGMENT.—In this case Hari Ram, on the 31st October 1913, obtained a decree against Umar Baksh. The latter lodged an appeal and, while the appeal was pending, Wazir Baksh stood surety for payment of the decretal amount. The appeal was dismissed. The date of dismissal is not clear, but it was sometime in the year 1916. On the 27th February 1917 the decree holder put in an application for execution of the decree. In column 9 of this application he gave the names of both the judgment-debtor and the surety as the persons against whom the decree was to be executed, but in column 10, which is the column showing the mode in which execution is sought, he asked merely for attachment of the property of

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the judgment-debtor. Notice issued to the judgment-debtor but not to the surety. On the 12th March 1917 the decree-holder put in a receipt for Rs. 16-8-0 realised from the judgment debtor and stated that the case might be consigned to the record room. This was accordingly done.

Now, on the 7th January 1920 he applied for execution against the surety. The first Court dismissed the application as time-barred, relying on *Narayan v. Timmaya* (1), and holding that the application of the 27th February 1917 was not an application for any steps to be taken against the surety. The learned District Judge, on appeal, held that the application of 1917 must be regarded as an application presented against both the judgment-debtor and the surety. The District Judge, therefore, decided that the present application was within time. The surety appeals to this Court.

On behalf of the decree-holder it has been urged before me that a decree-holder is not bound to specify in column 10 all the steps which he wants taken in execution of his decree and that had the decree-holder, during the course of the execution proceedings in 1917, made a further application to the Court to take steps against the surety, such an application for execution would have been regarded as dating back to the beginning of the execution proceedings, i. e., 27th February 1917. This is probably correct, but the fact remains that the decree-holder did not make any application throughout the former execution proceedings against the surety, and I cannot see that the mere inclusion of his name in column 9 can be regarded as an indication that the decree-holder wanted to execute the decree at that time against the surety, seeing that in column 10 he clearly specified the steps that he wanted taken, viz., the attachment of the property of the judgment-debtor, and never subsequently throughout those proceedings made any additional application. Counsel for the respondents has referred me to *Syud Mahomed v. Syud Abedoolah* (2) as an authority for the proposition that an application not made in the form prescribed by the Civil Procedure Code still counts as an application for the purpose of saving limitation. But the application of February

1917 was made in the form prescribed by the Civil Procedure Code, and I do not see how the ruling quoted helps me in my decision in the present case. In *Mathura Prosad v. Anurago Koer* (3) an application for execution was returned for amendment and not re-presented until after limitation for execution had expired; it was held that the original presentation was sufficient to save limitation. This ruling also seems to me to have no bearing on my decision in the present case. Counsel for the respondents next refers me to *Ramachandra Naidu v. Tirupathi Naidu* (4), which lays down that an application for execution will save limitation even though the relief asked may be one which is not allowed by the terms of the decree. This ruling, again, seems to me irrelevant to the present case. In *Samia Fillai v. Ohockalinga Ohettiar* (5) an application for execution named by mistake the deceased judgment-debtor as the person against whom the decree was sought to be executed, and it was held that this was sufficient to save time as against his legal representatives. This ruling, also, seems to me irrelevant to the present case, which is not one of any person having been named by mistake. In my opinion, although the name of the surety was shown in column 9 in the proceedings of 1917, no steps can be said to have been asked for against the surety in those proceedings, and I consider that those proceedings do not save limitation so far as the surety is concerned. The ruling *Narayan v. Timmaya* (1) is applicable to the present case, and, following that ruling, I consider that the present application for execution against the surety is time-barred.

The learned Counsel for the respondents argues that, according to the terms of the surety-bond, the decree could not be executed against the surety until after steps against the judgment debtor had failed. He urges, therefore, that limitation should not be counted from the date of the decree or even from the date of any previous application. In fact, he argues that Article 181 and not Article 182 of the First Schedule to the Limitation Act is applicable to the present case. I can only say that the application is obviously one for execution

(1) 31 B. 50; 8 Bom. L. R. 867.

(2) 12 C. L. R. 279.

(3) 5 Ind. Cas. 579; 14 C. W. N. 491.

(4) 85 Ind. Cas. 614; (1916) 2 M. W. N. 128.

(5) 17 M. 76; 4 M. L. J. 8; 6 Ind. Dec. (N. S.) 52.



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of a decree. The decree was certainly not passed against the surety, but, by reason of section 145, Civil Procedure Code, it can be executed against him, and so the decree-holder has applied for execution of the decree as against the surety. The limitation for such an application is laid down by Article 182 of the First Schedule to the Limitation Act, and the decree-holder cannot break away from that Article.

I accept the appeal and, reversing the decision of the learned District Judge, I restore that of the first Court, dismissing the application for execution against the surety. The decree-holder must pay costs in the District Court and in this Court.

*Appeal accepted.*

## LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 649 OF 1920.

January 20, 1921.

*Present* :—Mr. Justice LeRoussignol.

HARJI MAL—PLAINTIFF—PETITIONER

versus

ABDUL HALIM—DEFENDANT—RESPONDENT.

*Minor—Suit against minor on pro-note—Burden of proof of minority—Evidence Act (I of 1872), s. 115.*

Where a defendant, in answer to a claim on a pro-note, sets up the plea of minority, the burden lies on him of establishing it.

A minor who obtains a loan on the representation that he is of age, is estopped from pleading his infancy as a defence to a suit on the loan.

Petition, under section 25 of Act IX of 1887, for revision of the decree of the Judge, Small Cause Court, Lahore, dated the 12th July 1920.

Mr. Jai Gopal Sethi, for the Petitioner.

Khalifa Shuja ul-Din, for the Respondent.

**JUDGMENT.**—In this suit on a pro note the defendant put forward the plea of infancy and the Court below, placing on plaintiff the onus of proving that at the date of the contract the defendant was of full age, held that the onus had not been discharged. It also held that if the onus had been on the defendant the proof of minority would have been insufficient. In my opinion, the contract was, on the face of it, valid, and his infancy was a fact within the special knowledge of defendant and, therefore, the onus of proving it lay upon him. He has not proved his infancy at the date of contract.

Moreover, on his own showing he could not have been more than six weeks short of t

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age of 18 years at the date of contract; on that date he gave the plaintiff's assignor reason to believe he was of age, and consequently he is estopped under section 115, Evidence Act, from pleading his infancy.

On the question of consideration, however, I do not think the plaintiff should succeed.

There is evidence that no money passed and was not to pass unless a post was secured for the defendant. The actual lender of the money was not called by the plaintiff, and the fact that the pro note was transferred to the plaintiff, who is a clerk and not a money lender, arouses further suspicion as to the passing of consideration.

For these reasons, I refuse to interfere but leave parties to bear their own costs.

*Order accordingly.*

## MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 10 OF 1919.

April 8, 1920.

*Present* :—Mr. Justice Oldfield and

Mr. Justice Seshagiri Aiyar.

MAHOMED ABDUL KADIR MARKAYAR,  
MINOR, BY GUARDIAN MAHOMED KASIM  
MARKAYAR—DEFENDANT—APPELLANT

versus

SAMI PANDIA TEVAR AND OTHERS—  
PLAINTIFFS—RESPONDENTS.

*Limitation Act (IX of 1908), s. 1, Art. 182 (2)—Execution of decree—Order returning to Court of appeal for presentation to proper Court, with a view to "Appellate Court"—Statutory provision.*

An order directing the return of a memorandum of appeal for presentation to the proper Court is not a "final order", nor is the Court making the order "the Appellate Court," within the meaning of Article 182 (2) of Schedule I to the Limitation Act, and the decree-holder is not in such a case entitled to sue for interest on the decree for execution.

Appeal against the order of the District Court, Ramnad, at Madurai, in Appeal Suit No. 345 of 1918, preferred against the order of the Subordinate Judge, Ramnad, in Execution Petition No. 350 of 1916 (Original Suit No. 18 of 1900).

Messrs. C. V. Ananthakrishna Aiyar and R. S. Venkatchala Iyer, for the Appellants.

The Hon'ble Mr. K. Srinivasa Aiyangar Advocate General and Messrs. K. P. Laxshmana Rao and R. Kesava Aiyangar, for the Respondents.

## JUDGMENT.

PERD, J.—The first question raised is

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this appeal is whether the plaintiffs, mortgagors, are entitled to execute their decree, one for redemption, by asking the Court to sell the mortgaged property. It is *prima facie* concluded in their favour by *Gwinla Taragan v. Veeran* (1), since we have been shown no case in which that decision has been doubted, and one Civil Miscellaneous Appeal No. 99 of 1915, in which it has been followed, and since Mr. Anantha Krishna Iyer for defendants declined to argue against its correctness. He has relied only on the fact that the decree provides for a sale at the instance only of the mortgagee. But that appears to have been the case also in the decision referred to. This objection to the order under appeal must, therefore, be disallowed.

The more important contention before us is, however, that the plaintiff's application for execution was made too late; and certainly it was so, unless time ran, as they contend, from the date, 10th February 1915, on which an order was passed by this Court returning their memorandum of appeal against the decree for presentation to the District Court, as the proper Court to entertain it. Was the High Court, in these circumstances, "the Appellate Court" and was this its "final order" within the meaning of Article 182 of Schedule I of the Limitation Act.

This Court's order in no degree decided the appeal; and its final character has been supported mainly by comparison of its effect, with that of the withdrawal of the appeal, reference to which as a starting point was introduced into the Article by its amendment in 1908. But this argument is unsustainable, if, as in *Peria Kovil Ramanuia Peria Jeeyangar v. Lakshmi Dow* (2), and *Faiz ur Rahman v. Shah Muhammad Khan* (3), which were reproduced in the amendment, there is, besides the withdrawal, an order dismissing the appeal as withdrawn. Further, there is an order of the Appellate Court, such as the Article contemplates directly. And it may be doubted whether there can be cases of withdrawal without such an order. For the procedure for withdrawal of a suit with leave to sue again under Order XXIII corresponds with nothing in the specification of the powers of the

Appellate Court in section 107, Civil Procedure Code. But it is useless to consider further the applicability of the reference in the Article to withdrawal, or the analogy between it and the order in question at present when, in my opinion, plaintiffs must fail, because this Court was not the Appellate Court, inasmuch as the proceedings before it were not within its jurisdiction.

In *Akshoy Kumar Nundi v. Ohunder Mohun Chathati* (4) it was held that an appeal is presented, for the purpose of the Limitation Act, when it is presented to the proper Court and in the present case in which this Court returned the appeal memorandum for want of jurisdiction, there was no legally constituted appeal and no final order by the Appellate Court. It is suggested that the order of return was final so far as this Court was concerned, and that it was the order of the Appellate Court because this Court has appellate powers, a distinction being attempted between failures of jurisdiction on territorial grounds and on the pecuniary grounds referred to in this Court's order. I am unable to follow that distinction and it was supported by no authority. The remainder of the argument is inconsistent with reference to 'the' not 'an' Appellate Court in the Article and its best support was the reference to *Krishnasami v. Kanakasabai* (5) and the cases therein cited. But the principle for which plaintiffs contend was referred to only *obiter* in this Court's decision and was applied in *Matra Mondal v. Hari Mohun Mullick* (6) and *Nidhi Lal v. Maszar Hussain* (7) to proceedings actually completed in the wrong Court, through mistake and without objection and was authorised by the reference in the various Civil Courts Acts concerned to the jurisdiction in question as concurrent. Here we are concerned with the more general principle that no party shall be allowed to obtain a longer period of limitation, on the ground of his own mistake, and no attempt has been or, indeed, could fairly be made to invoke section 14 or any other provision of the Limitation Act, by which exceptions to it are recognised as authorising plaintiff's contention. As there was no final order of

(4) 16 O. 250; 8 Ind. Dec. (N. S.) 165.

(5) 14 M. 183; 1 M. L. J. 234; 5 Ind. Dec. (N. S.) 130.

(6) 17 O. 155; 8 Ind. Dec. (N. S.) 642.

(7) 7 A. 230; A. W. N. (1895) 1; 4 Ind. Dec. (N. S.) 452.

(1) 12 Ind. Cas. 432; 36 M. 32; 21 M. L. J. 941; 10 M. L. T. 322; (1911) 2 M. W. N. 823.

(2) 10 M. 1; 16 M. L. J. 393; 1 M. L. T. 233.

(3) 80 A. 885; 5 A. L. J. 583; A. W. N. (1908) 161.

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the Appellate Court, time cannot be calculated from one, and the application was, therefore, cut of time and should have been dismissed.

The appeal is allowed, the lower Appellate Court's order being set aside and that of the Subordinate Judge being restored with costs throughout.

SESHAGIRI AIYAR, J.—The decree under execution is one for redemption and was passed on the 19th March 1898. The time fixed for payment expired before the new Civil Procedure Code came into force. An appeal was preferred to the High Court within the time limited by law. It was returned on the 10th February 1915 for representation to the proper Court, as the High Court was of opinion that the appeal lay to the District Court and not to itself. The present application for execution was made on the 21st September 1916 for sale of the mortgaged property.

Two objections were taken to it. The first was that, under the decree, the mortgagor is not entitled to apply for sale. The second is that the application was barred by limitation. The District Judge overruled both these objections.

The first point is covered by *Govinda Taragan v. Veeran* (1). In that case the learned Judges were of opinion that although express power was given by section 93 of the Transfer of Property Act, only to the mortgagee to apply for sale, the mortgagor has also an inherent right to apply for a similar order. This decision was followed in Civil Miscellaneous Appeal No 99 of 1915 to which my learned brother was a party. Speaking for myself, I should have required more argument to convince me of the correctness of the view taken in these two decisions and would have suggested a reference to the Full Bench, if our decision depended upon the first point alone. Notwithstanding the argument addressed to us by the learned Advocate General regarding the procedure adopted in England by which power is reserved to the mortgagor to apply for sale where a decree for redemption is passed, I am not convinced that we should read into section 93 of the Transfer of Property Act or into Order XXXIV, rules 7 and 8 such a power. However, as the conclusion which I have come to is not dependent upon the view I take on the first point, and as Mr. Anantha-

krishna Aiyar, who appeared for the appellant, did not ask us to dissent from the view in *Govinda Taragan v. Veeran* (1), but only attempted to distinguish that case from the present, I do not propose to say anything more about it.

The second question is practically bare of authority. The point for determination is, that where an appeal is presented to a Court to which appeals do not ordinarily lie and that Court ultimately passes an order returning the appeal for presentation to the proper Court, whether such an order is within Article 182 (2) of the 3rd column of the First Schedule of the Indian Limitation Act. That clause runs thus: "Where there has been an appeal, the date of the final decree or order of the Appellate Court or the withdrawal of the appeal." The words "or the withdrawal of the appeal" were inserted by the Amending Act of 1905. Is the order of the High Court returning the plaint for presentation to the proper Court, an order of the Appellate Court or can it be regarded as a withdrawal of the appeal?

Under the Civil Courts Act, III of 1873, section 13, the Legislature has prescribed which shall be the Appellate Court and the circumstances under which appeals from one Court can lie taken to another.

In conformity with that Act, in the present case the view of the High Court was that the subject-matter of the Original Suit was above Rs. 2,500 and below Rs. 5,000 in value and that, consequently, an appeal lay to the District Court and not to the High Court. The language of the second clause of Article 182 which I have quoted refers to the Appellate Court. In my opinion, that language means that the Appellate Court should be the proper Appellate Court, not any Appellate Court which a party *bona fide* or otherwise has chosen to file an appeal in. The learned Advocate General, who appeared for the respondent, contended that the High Court has a general power of hearing appeals from the Subordinate Courts. It is true that, by virtue of section 24 of the Civil Procedure Code, the High Court can withdraw any appeal in any of the Subordinate Courts and hear it itself but the disposal of an appeal in the exercise of the powers given by section 24 would not constitute the High Court the Appellate Court as contemplated by clause



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(2) of Article 182 of the Limitation Act.

It was also contended before us that all appellate authorities must be regarded as possessing fundamental jurisdiction to hear appeals. The argument was as was held in *Krishnasami v. Kanakasabai* (5) as there is a general power in a Subordinate Judge or District Judge to hear suits which originally, a District Munsif alone can try; similarly, there is a general power in the High Court to hear the appeals, which would be heard only by a District Judge or a Subordinate Judge.

The language of section 24, which contemplates an order of transfer, does not indicate the existence of such a general power. The right of appeal is the creature of the Statute, and the right to resort to particular grades of the tribunals, is equally a statutory right and not a common law right. It is because of the powers of supervision which are vested in the High Court under the Charter Act and by the Letters Patent Act that the Legislature has enacted, under section 24 of the Code of Civil Procedure, that the High Court can withdraw to its own file appeals pending in the lower Courts. Moreover, section 15 of the Code of Civil Procedure provides that every suit shall be instituted in the Court of the lowest grade competent to try it. In my opinion, this provision is applicable to appeals also.

Section 26 of the Code provides that an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decision of such Court. I take it that the authorisation herein referred to is what is contained in the Civil Courts Act of each of the Presidencies. Apart from authority, therefore, on the construction of the above sections and on general principles of jurisprudence, I am of opinion that clause (2) of Article 182 should be interpreted as referring to the Appellate Court which ordinarily is empowered to hear appeals from the Subordinate Courts. If we make a departure from this rule, there is nothing to prevent a suitor from claiming that the time during which an appeal has been pending in a Revenue Court in which he has wrongly filed an appeal should be deducted in computing the period of limitation.

In this connection, I am not clear that, even if the High Court can be regarded as the Appellate Court within the meaning of that expression in clause (2) of Article 182, the order directing the return of the plaint for presentation to the proper Court is within the same clause. I attach no importance to the fact that the order itself was not complied with, as the appeal was never presented to the Subordinate Judge. As at present advised, I am of opinion that the order contemplated is one which disposes of the appeal on the merits in some form, and not simply one which intimates to the party that the appeal should be filed elsewhere. I may here refer to the decision of the Judicial Committee in *Batuk Nath v. Munni Dei* (8), where it was held that an order of the Privy Council dismissing an appeal for default of prosecution is not an order in Council, contemplated by Article 182. The reason for that dictum is that there was no adjudication on the merits. I confess that the introduction of the clause by the Amending Act "or withdrawal of the appeal" to some extent weakens this suggestion of mine, but in the case of a withdrawal—I take the withdrawal to be an unconditional one—there is an end to the litigation; but from the order returning the appeal for presentation to a proper Court, the same result does not necessarily follow. It is not a strained construction upon the second clause of Article 182 to say that the decree, order, or withdrawal contemplated must all have the effect of putting an end to the litigation. However that may be, as I am of opinion that the order in question was not passed by the Court contemplated in clause (2) the respondent is not entitled to claim that limitation starts against him only from the 10th February 1915 and not earlier. When we remember that, under the Indian Law, there is nothing to prevent a party entitled to a benefit under the decree from executing that decree, there is no necessity for reading into the Article words which are not to be found there. *Wair Mahlon v. Lulit Sing* (9) contains observations which, to some extent, support the

(5) 23 Ind. Cas. 614; 36 A. 254; 1 L. W. 729; 18 C. W. N. 740; 12 A. L. J. 595; 19 C. L. J. 574; 16 Bom. L. R. 360; 27 M. L. J. 1; 16 M. L. T. 1, (1914) (M. J. W. N. 437; 41 L. A. 104 (P. C.).

(9) 9 C. 100; 4 Ind. Dec. (N. S.) 718.

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respondent. The appeal in that case was certainly a competent one. I do not feel pressed by the *obiter dictum* contained in that judgment. *Akshoy Kumar Nundi v. Chunder Mohun Chathati* (4) is not entirely reconcilable with the observations in *Wazir Mahton v. Lulit Singh* (9) relied on by the District Judge. Very recently the Judicial Committee held that, where an application was presented *bona fide* to a Court which had no jurisdiction to execute a decree, the application was not one made to the proper Court in accordance with the law, within the meaning of these words in clause 5 of Article 182. The principle of that decision applies equally to the present case. *Vide Setrucherla v. Maharaja of Jeypore* (10).

For all these reasons, I am of opinion that the decision of the District Judge must be reversed and the execution application should be dismissed with costs.

*Appeal allowed.*

M. C. P.

(10) 51 Ind. Cas. 185; 42 M. 813, 10 L. W. 362; 17 A. L. J. 694; 7 M. L. J. 11; (1919) M. W. N. 702; 26 M. L. T. 127; 21 Bom. L. R. 914; 30 C. L. J. 209; 23 C. W. N. 1033; 46 I. A. 151 (P. C.).

## LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 3300 OF 1916.

January 19, 1921.

Present :— Mr. Justice Broadway

and Mr. Justice Abdul Raouf.

ABDUL RAZAK—PLAINTIFF—APPELLANT

versus

FAZAL ILAHI AND ANOTHER—DEFENDANTS  
—RESPONDENTS.

*Punjab Pre-emption Act (I of 1913), s. 10. Pre-emption, suit for, on ground of urgency:—Property transferred by pre-emptor to wife—Sale held to be valid as against creditors—Pre-emptor, whether creditor.*

Plaintiff sued to pre-empt the sale of a house on the ground that he was the owner of an adjoining house. It appeared that the latter house had been sold by the plaintiff to his wife by means of a registered conveyance and that the wife had effected a mortgage of the house. The sale in favour of the wife had, however, been held to be ineffectual against the creditors of the plaintiff. The plaintiff now contended that he was still the owner of the house and was entitled to pre-empt the sale of the house in dispute.

Held, (1) that the judgment holding that as between the plaintiff's wife and his creditors the sale in favour of the wife was ineffectual proved no more than that the sale in favour of the wife had been questioned by the plaintiff's creditors; [p. 272, col. 1.]

(2) that as between the plaintiff and his wife the latter was still the owner of the house; [p. 273, col. 1.]

(3) that, therefore, the plaintiff was not entitled to pre-empt the sale of the adjoining house on the ground of vicinage. [p. 273, col. 1.]

First appeal from the decrees of the Senior Subordinate Judge, Delhi, dated the 25th October 1916.

Mr. Aziz Ahmad, for the Hon'ble Mr. Fati Hassan, K. B., and Lala Mool Chand, R. S., for the Hon'ble Mr. Muhammad Shah, K. B., for the Appellant.

Lala Moti Sagar, R. S., for the Respondents.

JUDGMENT.—On the 20th April 1915, one Abdul Razak sold a house belonging to him to Sheikh Fazal Ilahi for Rs. 8,000. On the 18th April 1916 one Haji Abdul Razak, son of Haji Muhammad Baksh, instituted a suit for possession of the house sold by pre-emption. He alleged that the real price paid was Rs. 7,000, but that he was willing to pay the sum mentioned in the deed of sale, viz., Rs. 8,000. The house of the pre-emptor was said to adjoin that sold. *Inter alia*, it was pleaded by the vendee that the plaintiff had no right of pre-emption, inasmuch as the house on which he based his claim did not belong to him but to his wife. The Trial Court, after a consideration of this question, has come to the conclusion that this defence is correct and that the plaintiff was not the owner of the house adjoining that which has been sold. His suit having, therefore, been dismissed Haji Abdul Razak has come up to this Court in appeal and on his behalf we have heard Mr. Aziz Ahmad, while for the respondent Mr. Moti Sagar has addressed us.

The only question for our decision is, whether the house adjoining that sold belongs to the appellant or not. That at one time the appellant was the owner is not disputed. It is alleged, however, that on the 15th of June 1906 the appellant sold this house to his wife for a sum of Rs. 6,000. The consideration for the sale was Rs. 1,000, as part of the dower due to the wife and Rs. 5,000 to be paid by the wife to one Chhaban Lal, to whom the house had been

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mortgaged. On the 13th of February 1907, Chhaban Lal obtained a decree for Rs. 5,430 and costs with interest at five per cent. till realisation. On the 29th of June 1908, Chhaban Lal was paid Rs. 3,000, by Abul Haq, a brother of the appellant's wife, Musammat Allah Bandi. Musammat Allah Bandi, on the 1st of July 1908, executed a mortgage of half of the house in Abdul Haq's favour. Again, on the 5th of January 1909 Chhaban Lal was paid Rs. 3,200, the balance of his claim, by Abdul Haq, and Allah Bandi on the 8th of January 1908, mortgaged the other half of the house to her brother and her son in law, Zia-ud-Din. Subsequent to this, certain other creditors of the appellant attached this house in execution of a decree obtained in their favour. Musammat Allah Bandi filed objections to the attachment and sale, alleging that the house was hers, having been purchased by her from her husband as stated above. Her objections being disallowed, she brought a suit against the said attaching creditors in which she sought a declaration that this house, being her property, was not liable to attachment in execution of a decree passed against her husband. Her suit was finally dismissed by the Chief Court.

It appears that the appellant had dealings in Calcutta and he filed a petition in insolvency in Court at Alipore in 1909. In that petition he excluded specifically this house from his assets, stating that it belonged to his wife, Musammat Allah Bandi. For the appellant it has been argued by his learned Counsel that, in spite of this sale, which he characterises as fictitious, the ownership of the house remained with his client, and he drew our attention to the statement of the appellant and the appellant's wife in the Court below in which they both alleged that the house was now owned by the appellant. Mr. Aziz Ahmed sought to treat the judgment of the Chief Court as evidence in the case in support of the allegation that the sale to Musammat Allah Bandi was a mere paper transaction under which no property passed. We are, however, unable to regard this judgment as evidence of anything more than the fact that the ownership of Musammat Allah Bandi was challenged by a creditor of her husband's. The finding arrived at cannot be considered by us as evidence. In this view, we are supported by, *inter alia*,

*Guja Lal v. Fatt'h Lall* (1) and *Indar Singh v. Fater Singh* (2), with which decisions we are in agreement. Turning to the statements made in the Court below, we find that, in the first instance, on the 19th of July 1916, the appellant stated that he had executed a sale-deed in favour of his wife which had, however, been cancelled by the Chief Court and that, therefore, he was not bound by the deed. He further stated that his wife also admitted that the sale did not stand any longer. On the same day he made a further statement in which he said that, as the Chief Court cancelled the sale-deed, he became the owner. He also stated that the sale was really a fictitious one and had been effected in order to defraud Nasir Ahmed, the troublesome creditor, and admitted that his wife had subsequently mortgaged the house in favour of her brother which mortgage, however, was fictitious. The appellant was later examined as a witness on behalf of the defendant. He more or less repeated his former statements and admitted that in the insolvency petition filed by him at Alipore he had not entered this house as being part of his assets. He also admitted that his wife had mortgaged, though fictitiously, this house to Abdul Haq and stated that Abdul Haq had paid off Chhaban Lal (the former mortgagee). Musammat Allah Bandi, examined as a witness for the appellant, stated that the house in question belonged to her husband and that the sale and subsequent mortgages were mere fictitious transactions. In re-examination she was asked whether the sale-deed executed by her husband in her favour was fictitious or genuine. Instead of giving a definite answer to that question, she replied that the sale-deed had been cancelled by the Chief Court of Lahore. She was then asked to whom the house belonged from that time, i. e., the cancellation of the deed, and her reply was that it belonged to her husband. In the deed of sale relating to the house now sought to be pre-empted, one of the boundaries is given as the house now in question and as belonging to the appellant. This fact does not appear to us as of any great probative value. This is all the

(1) 6 O. 171 (F. B.); 6 O. L. R. 439; 2 Shome, L. R. 132; 3 Ind. Dec. (N. S.) 112.

(2) 59 Ind. Cas. 784; 1 L. 540.



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evidence on the record and having regard to the fact that the deed of sale had been duly registered in favour of *Musammāt Allah Bandi*, and that subsequent to that deed of sale *Musammāt Allah Bandi* had been mortgaging the said house the onus of proving the fictitious nature of the transaction clearly lay on the appellant.

After a careful consideration of the evidence on the record, viz, the statements of the appellant and of his wife, we are unable to find that the conclusion arrived at by the Trial Court is incorrect. In our opinion, the sale to *Musammāt Allah Bandi* was genuine, in so far that it was intended by the parties to convey the ownership of the house to *Musammāt Allah Bandi*, and the fact that the sale would have been ineffectual against any creditor of the husband who might be able to show that it had been made with a view to defeating his claims does not render the sale inoperative or void as against the parties to the sale deed. In this view of the case, the appeal fails and is dismissed with costs.

*Appeal dismissed.*

# SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SUIT No. 125 OF 1919.

September 29, 1919.

Present:—Mr. Raymond, A. J. C.

FIRM OF ASUDAMAL DWARKADAS

—PLAINTIFF

versus

FIRM OF CHOITHRAM GOPALDAS—

DEFENDANTS.

*Partnership, dissolution of—Receiver, appointment of—Suit against partners—Receiver, whether necessary party—Test.*

Where in a suit for dissolution of a partnership a Receiver is appointed for winding-up the business and recovering the outstandings, he is not a necessary party to a suit brought against the partnership by a third party. The test in such cases is, whether the object of the suit is to interfere with the possession of the Receiver or the jurisdiction of the Court appointing him, if it is not, he is not a necessary party to the suit. [p. 27, col. 2; p. 27, col. 1]

Mr. Drakshenias Lulla, for the Defendants.

Mesers, *Fatehchand* and *Bhugtani*, for the Defendants.

JUDGMENT.—This is a suit filed by the plaintiff, Asudamal-Dwarkadas, against the firm of Choithram Gopaldas consisting of more partners than one and carrying on business at Karachi by their partners, Gopaldas Choithram, Jethanand Wadhmal, Lunidaram Sobhraj and Naraindas Wadhu-ram. It is admitted that, in the Court of the First Class Subordinate Judge of Sukkur, one of the partners in this firm has filed a suit against the other partners in the firm for dissolution of partnership and a Receiver has been appointed for winding-up the business and recovering the outstandings. In the written statement filed in this Court by the defendants the point was taken that as a Receiver in respect of the defendants' firm has been already appointed he is a necessary party to this suit. Accordingly, with the consent of the parties, a preliminary issue was framed as follows:—

"Is the Receiver a necessary party to the suit, if so, is the leave of the Court essential before he is joined as a party?"

It appears to me that, so far as this suit is concerned, there is nothing to prevent the plaintiff, in the event of obtaining a decree, proceeding with it to execution without the necessity of the Receiver being on the record as a party to the suit. In *Jatindra Nath Chowdhury v. Sarfaraz Meah* (1) it was held that, where property in the hands of the Receiver is intended to be affected by the result of the litigation, the Receiver is a proper and a necessary party to such a suit. In the case of *Banku Eehary Dey v. Harendra Nath Mukherjee* (2) expression was given to the same remark and it was further said that, although the appointment of the Receiver does not of itself debar the creditor of the person over whose estate the Receiver is appointed from suing for his claim, yet if the object of the suit is to interfere with the possession of the Receiver or the jurisdiction of the Court appointing the Receiver, leave of the Court must be obtained and the Receiver made a party to the suit. In my opinion

(1) 6 Ind. Cas. 214; 14 C. W. N. 653.

(2) 5 Ind. Cas. 1; 15 C. W. N. 54.

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these observations supply the test to be adopted in cases whether the Receiver is or is not a necessary party to the suit. It is obvious that in the present case the object of the suit is not to interfere with the possession of the Receiver, nor would it in any way interfere with the jurisdiction of the Court appointing the Receiver. Under Order XXI, rule 50 a decree, if passed as in this case against the firm, may be executed either against the property of the partnership or against any of the persons, who have appeared in their own name or who is adjudged to be a partner in this case. There would, therefore, be nothing whatever to prevent the plaintiff from seeking to execute the decree against the individual defendants in this case without being compelled to attach the property in the hands of the Receiver. Therefore, the result of this litigation would not necessarily affect any part of the property in the hands of the Receiver.

Under these circumstances, in my opinion, the Receiver is not a necessary party and, therefore, the preliminary issue raised must be answered in the negative. The suit must be set down for framing issues on the 17th October 1919.

*Joinder of Receiver not necessary.*

### PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

January 20, 1921.

*Present* :—Viscount Cave, Lord Moulton, Lord Sumner and Sir John Edge.

SABITRI THAKURAIN—

APPELLANT

*versus*

SAVI AND ANOTHER—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), ss. 104, 117, 120, 121, 122, 128, 129, O. XLI, r. 10, O. XLIX, r. 3—Letters Patent (Cal.), cl. 15—Letters Patent Appeal from decree on Original Side—Rules applicable—Failure to furnish security, effect of—O. XLI, r. 10, whether mandatory.*

The Code of Civil Procedure, 1908, is framed on the scheme of providing generally for the mode in which the High Courts are to exercise their jurisdiction, whatever it may be, while specifically excepting

the powers relating to the exercise of Original Civil Jurisdiction, to which the Code is not to apply. It confers a general-rule making power saving only what is excepted in the body of the Code. [p. 280 col 1.]

The Orders and rules made under the Code apply to the High Courts, unless the body of the Code contains something inconsistent with them. They are applicable to the jurisdiction exercisable under the Letters Patent, except that they do not restrict the express Letters Patent Appeal. [p. 279, cols. 1 & 2.]

There is a distinction between rules which take away existing rights of appeal and rules which recognise those rights but regulate the procedure of the Court in which such appeals are pending. This distinction has been overlooked in *Sabhapathi Chetti v. Narayansami Chetti*, 25 M. 556; 11 M. L. J. 346 and in *Sesha Ayyar v. Nagarathna Lala*, 27 M. 121 at p. 123. [p. 279, col. 1.]

Order XLI, rule 10 applies to appeals brought under the Letters Patent. The words of that rule, directing the Court to reject an appeal when an order for security for costs is made and is not complied with during the period fixed, are mandatory and not permissive. [p. 278, col. 1.]

Appeal against an order of the Calcutta High Court (Sir Lawrence Jenkins, C. J., and Woodroffe, J.), dated the 23rd March 1915, refusing the appellant leave to continue *in forma pauperis* an appeal, under section 15 of the Letters Patent Act of 1865, against an order of Chandhri, J., and rejecting the said appeal.

FACTS of the case are fully stated in their Lordships' judgment.

On this appeal

Sir Erle Richards, K. O., (with him Dr. Majid), for the Appellant, submitted that the High Court were wrong in their view that if you wanted to appeal *in forma pauperis* you must do so when you lodge your memorandum of appeal: that, on the other hand, they had power to allow the continuance of the appeal *in forma pauperis*, even after it had been started in the ordinary way. They had based their order upon Order XLI, rule 10, but he submitted that neither the Code of Civil Procedure itself nor the Orders and rules made under it, were binding on the Court in appeals like this, under section 15 of the Letters Patent: alternatively, section 151 of the Code reserved the inherent power of the High Court to make such orders as may be necessary for the ends of justice.

The provisions of the Code as to security for costs do not apply to proceedings under the Letters Patent:

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*Sesha Ayyar v. Nagarathna Lala* (1),  
*Sabhopathi Chetti v. Narayansami Chetti* (2).

Section 549 of the old Code, referred to in these cases, corresponds to Order XLI, rule 10. These cases show that neither that Order nor any of the Orders and rules apply to appeals under the Letters Patent.

[SIR JOHN EDGE.—Do you say the High Court cannot require security for costs under the Letters Patent?]

They could require it under their inherent powers, but the rules of the Code do not apply.

The present appeal is not permissible at all under the Code. It is an appeal against an order not specified in section 104. That section cannot, however, be read as taking away our right of appeal under the Letters Patent.

[SIR JOHN EDGE referred to section 44 of the Letters Patent and observed that the provisions of the Letters Patent were subject to the Legislative powers of the Government of India.]

Those powers must be exercised by express terms.

There must be an inherent power in the High Court to allow our application, or you would shut out all cases where people become paupers after filing the memorandum of appeal, section 151 recognizes that power.

[LORD SUMNER.—Surely you must consider what Order XLIV says.]

Dr. Mauid followed. Part X of the Civil Procedure Code, sections 129—131, gives the High Court power to make rules for itself. The Civil Procedure Code is silent as to the continuance of an appeal *in forma pauperis*, so you must fall back on the general law, which permits of such continuance:

*Doe d. Ellis v. Owens* (3), *Thompson v. Calcutta Tramway Company Limited* (4), *Revji Patil v. Sakharam* (5).

Messrs. Kenworthy Brown and E. B. Raikes, for the Respondents, submitted that the Civil Procedure Code applied and made no provision for the continuance of an appeal *in forma pauperis*.

(1) 27 M. 121 at p. 123.

(2) 25 M. 555; 11 M. L. J. 346.

(3) (1842) 10 M. & W. 514 at p. 521; 2 Dowl. (N. S.) 428; 12 L. J. Ex. 53; 152 E. R. 574; 7 Jur. 91; 62 R. R. 691.

(4) 20 C. 319; 10 Ind. Dec. (N. S.) 216.

(5) 8 B. 615; 4 Ind. Dec. (N. S.) 787.

*Sesha Ayyar v. Nagarathna Lala* (1) (*supra*) related to the Code of 1882: section 104 of the new Code was different from the corresponding section of that Code (section 583) sections 116, 117, 121, 122, 123 and 128 of the new Code show that the Orders and rules made thereunder apply generally to the Chartered High Court: and Order XLIX, rule 3 places the matter, as regards Order XLI, rule 10, beyond doubt: it specifies that rule 35 of Order XLI shall not apply to a Chartered High Court in the exercise of its appellate jurisdiction, thus showing that the rest of that Order does apply. As to section 151 of the Code, it cannot be contended here that the interests of justice make it necessary to grant the application: the Trial Judge did not believe the evidence for appellant.

*Thompson v. Calcutta Tramway Company Limited* (4) (*supra*) merely followed *Nirmull Chandra Mookerjee v. Doyal Nath Bhattacharjee* (6) and was based on a supposed practice of the Court: the existing rules must, anyhow, be now regarded as settling the present position.

Mr. Richards, K. C., replied. The sections of the new Code reproduce those of the old one with merely verbal alterations here and there, so the case in *Sesha Ayyar v. Nagarathna Lala* (1) is unaffected by the change of Codes and is still good law.

## JUDGMENT.

LORD SUMNER.—The appellant in the present case presented a petition to the High Court at Calcutta on its Original Civil Side, in the exercise of its Testamentary and Intestate Jurisdiction, under the Probate and Administration Act, 1881, praying for administration, with a copy of his last Will annexed, to the property of her late husband. The grant was opposed by the present respondent, the manager of the deceased's property, who had applied to the Court of the District Judge of Bhagulpore for a grant of Probate under an earlier Will and entered a caveat to the widow's petition. Under the Will which she propounded she would be entitled to a life-interest in all the property of the deceased; under the earlier Will her interest was limited to a mere pittance.

The late husband of the appellant was

(6) 2 O. 130; 1 Ind. Dec. (N. S.) 370.



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a Brahman by caste and a man of considerable means. He is described as having been a man of progressive ideas but intemperate habits. For the first he was excommunicated by the members of his caste, and, owing to the second, he died an untimely death at his house at Garganibas, after a bout of conviviality which lasted about a week, leaving, as his widow alleges, the Will which she relied upon, bearing date about a fortnight before he died. On account of the excommunication of the deceased from his community, serious questions arose as to his cremation and *sradh* ceremonies and, during the widow's absence at Gaya for this purpose, the respondent, as she alleges, broke open the boxes belonging to the deceased and made away with this Will. Fortunately, a fair copy of it was forthcoming and she put it forward, relying upon the evidence of the attesting witnesses, two members of the Bhagalpore Bar.

The petition was heard by Chandhuri, J., who, after taking the evidence of the attesting witnesses and of the witnesses for the present respondent (two of whom are said to have been her late husband's boon companions and "inimically disposed to her because she stood in the way of her husband's leading a bad life and giving such pleasure parties"), rejected the evidence of the attesting witnesses and dismissed the petition.

From this decision Srimati Sabitri Thakurain appealed to the High Court in its appellate jurisdiction under section 15 of the Letters Patent of 1815. It was evident that, on the one hand, her own interest in the matter was very considerable and that, on the other, further litigation might involve the respondent in great expense with small prospect of being recouped if he won. The respondent accordingly petitioned the High Court on its Appellate Side for an order that the appellant should give security for costs under Order XLI, rule 10 (1) of the Code of Civil Procedure, 1908, and on the 18th December 1914 an order was made, that the plaintiff appellant should within two months from that date furnish security to the extent of Rs. 5,000 to the satisfaction of the Registrar.

On the 17th February 1915 Counsel for the appellant appeared before the Registrar and offered that his client should furnish the

security by executing a bond charging two properties, but as it was objected that the properties belonged not to her but to the estate, and there was no time left under the order to enquire whether she could charge them or not, the Registrar refused the offer and certified that the order had not been complied with.

On the same day the appellant filed a petition asking for three months' further time, which came on before the Court on the 18th February and was refused. Order XLI, rule 10 (2) of the Code of Civil Procedure, 1908, prescribes that if an order for security for costs is made and is not complied with during the period fixed by the Court, the Court "shall reject the appeal" and, accordingly, on the 22nd February the respondent filed a petition, alleging that his taxed costs amounted to Rs. 58,832.12 annas, 6 pies as between Solicitor and client, and Rs. 25,469, 8 annas as between party and party, and praying that the appeal might be dismissed with costs. Upon this the appellant for the first time sought to proceed *in forma pauperis*, and telegraphed to the Chief Justice begging for an opportunity of making an application for that purpose. She was given a week's time and filed a petition on the 23rd March 1915. On the same day an order was made refusing her application, and this is the order now under appeal. By a separate order the appeal against the decree of Chandhuri, J., was dismissed for failure to comply with the order for security. Leave to appeal against the refusal to allow the appellant to continue her appeal *in forma pauperis* was granted to the appellant by His Majesty in Council on the 29th December 1916.

When the High Court heard the application for leave to continue the appeal *in forma pauperis*, after some discussion of the question whether the appellant was really without means or not, objection was taken by the respondent that leave, if given at all, should have been given before the time for furnishing the security expired, to which the appellant's Advocate replied that the Court had jurisdiction to protect his client, her want of means having arisen since the date of the order for security. In giving the Court's reasons for dismissing the application, the Chief Justice

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Sir Lawrence Jenkins, used the following language:—

"In our opinion this application for leave to continue the appeal as pauper comes too late. It should have been made before the order for security was passed. The result of that order for security is that which is prescribed in Order XLI, rule 10, that is to say, the appeal is rejected with the obligation imposed upon the Court by the Code."

The appellant has urged before their Lordships that the Court's sole reason for dismissing the application was the view, that it should have been made, under Order XLIV, rule 1, when the appeal was first lodged against the decree of Chaudhuri, J., no subsequent application to proceed as pauper being competent, and it is said that, having decided on a wrong construction of that Order, the Court should now have the matter remitted to it to consider whether or not leave should be given under the circumstances of this case.

In their Lordships' opinion it is clear that the appellant's argument completely misconceives the real meaning of the judgment in question. The High Court did not intend or purport to lay down the proposition that, under the Orders and rules or otherwise, an application for leave to appeal *in forma pauperis* must be made, when first the appeal is lodged or not at all, but to state what it conceived to be the effect of Order XLI, rule 10 (2) upon the facts of the present appeal. The learned Judges' proposition was, that under that rule they were bound, by words mandatory and not permissive, to reject the appeal under the circumstances of this case, and could not, therefore, grant a permission to continue it, which would in effect contradict the terms of rule 10 (2). Whether this view was right or wrong is the question now to be decided, and their Lordships do not propose to travel outside it.

The appellant argued strenuously that a Court of Appeal as such, unless restricted by the express language of the instrument which creates it, must possess inherent power over the terms as to costs, on which litigants are allowed to proceed before it, and this in order that complete justice may be done. Whether

this contention is sound and whether a rule limiting the exercise of such power to applications contemporaneous with the institution of the appeal would be a valid exercise of a power to make rules regulating procedure are questions eminently deserving consideration when they arise, but they lie outside the scope of the present appeal.

The appellant further contended, broadly, that the Orders and rules made under the Code of Civil Procedure, 1908, have no application to appeals brought under the Letters Patent of 1865. This contention again is too wide. The real question is whether Order XLI, rule 10 applies to such appeals, as the High Court thought that it did, and to this question alone their Lordships will proceed to address themselves.

By section 117 of the Code of Civil Procedure, 1908, the provisions of the Code apply to all High Courts established under the Indian High Courts Act, 1861, and therefore, to the High Court at Calcutta, and although section 129 saves the power of the High Court to make rules not inconsistent with the Letters Patent establishing it, for the purpose of regulating its own procedure in the exercise of its original civil jurisdiction and adds that "nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code," there has been no exercise of this power to affect the present appeal. From section 120 it would further appear that the Act was intended to apply to the High Court in the exercise of its original civil jurisdiction generally, for that section makes specific provision for certain sections of the Code which do not so apply. Again, Order XLIX, rule 3 specifically enumerates certain orders and rules, which are not to apply to a Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, none of the Orders or rules now material being there enumerated, although it is noteworthy that another rule of Order XLI, namely, No. 35, is included in the enumeration. Order L also excludes from application to Courts constituted under the Provincial Small Cause Courts Act, 1887, and other similar Courts

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certain specified Orders and rules, including Order XLI.

The Orders and rules made under the Code are, by section 121, given the same effect as if they had been enacted in the Code, and therefore, Order XLI, rule 10, is one of the provisions of the Code. It applies to appeals in the High Court, including the present appeal, unless any particular section of the Act can be found to exclude it. Section 104 (1) is the section relied on for this purpose. It prescribes what orders shall be appealable and enumerates them, and among the orders enumerated there is not included such an order as that made by Chaudhuri, J. Out of the operation of section 104 there are, however, expressly excepted matters, which are otherwise expressly provided for in the body of the Code. In order to appreciate the full effect of section 104 it should be compared with the corresponding section of the Act of 1882, section 588. The earlier section enacted that appeals should lie in certain cases, which it enumerated, "and from no other such orders." This raised the question neatly, whether an appeal expressly given by section 15 of the Letters Patent and not expressly referred to in section 588 of the Code of 1882, could be taken away by the general words of section 588 "and from no other such orders." The change in the wording of section 104 of the Act of 1908 is significant, for it runs, "and, save as otherwise expressly provided . . . . by any law for the time being in force, from no other orders." Section 15 of the Letters Patent is such a law, and what it expressly provides, namely, an appeal to the High Court's appellate jurisdiction from a decree of the High Court in its original ordinary jurisdiction, is thereby saved. Thus regulations duly made by Orders and rules under the Code of Civil Procedure, 1908, are applicable to the jurisdiction exercisable under the Letters Patent, except that they do not restrict the express Letters Patent appeal. There is a fallacy involved in the appellant's argument that the Letters Patent right of appeal is limited and to a certain extent taken away by orders and rules, which prevent the High Court from permitting the continuance of such an appeal in *forma pauperis* at any stage

for there is, of course, a marked difference between a right to appeal on ordinary terms and without special indulgence, and a power to relieve the appellant in the exercise of that right from the burden of the ordinary terms. The High Court order as to security for costs is not a limit on the right to appeal nor does it take the right to appeal away, but it is a rule of procedure now applicable to the appeal under the Letters Patent under the words "any law for the time being in force," which are contained in section 104.

The appellant puts the point in another way and says that under the Act of 1882 some Indian Courts, notably the Courts in Madras, had held the Procedure Code of 1882 inapplicable *in toto* to Letters Patent appeals; that the Legislature had these decisions before it when the Code was re-enacted in 1908; that the changes of form and language between the Act of 1908 and that of 1882 are not substantial, and that, accordingly, the Legislature must be deemed to have adopted the judicial interpretation of the language used in 1882, when it repeated that language in substance in 1908. Their lordships have already pointed out that the re-enactment is made not in identical language but with material differences, and it may be doubted how far this mode of construing a re-enacting Statute is in point, where all that has been decided is the effect of the older Statute upon the provisions of another legal instrument, and not the actual meaning of the Statute re-enacted itself. There is, however, a prior question, namely, whether the Indian Courts have really laid down the proposition contended for.

It is true that in *Sesha Ayyar v. Nagarathna Lala* (1) Ayyangar, J., said that in a Letters Patent appeal from a single Judge a respondent could not apply for security for costs, because section 549 of the Civil Procedure Code, which corresponded to Order XLI, rule 10 of the Code of 1908, applied only to appeals to the High Court from Subordinate Courts, and that in *Sabhapathi Chetti v. Narayanasami Chetti* (2) the Court said that the provision made by section 15 of the Letters Patent was entirely foreign to the provisions of the Civil Procedure Code relating to appeals



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from one Court to another, but both these cases followed and purported only to apply *Chappan v. Moidin Kutti* (7), a Full Bench decision of 1898, and *Toolsee Money Dasse v. Suddevi Dasse* (8). These are cases in which the point actually decided was that the appeal expressly given by section 15 of the Letters Patent is not interfered with by section 588 of the Code of 1882, on the principle *generalia specialibus non derogant*, following *Hurrish Ohunder Chowdhry v. Kalisunderi Debi* (9) in 1882. From a consideration of these older cases, which were very fully argued and considered, it appears that the decisions in 25 and 27 Madras laid down their effect much more widely than was necessary and overlooked the distinction between rules which took away existing rights of appeal and rules which recognise these rights but regulate the procedure of the Court in which such appeals are pending. It is also plain that the words in section 104 of the Act of 1908 are inserted for the purpose of given effect to the decisions of the Full Bench at Madras and of the High Court at Calcutta, for the excepting words "save as otherwise expressly provided by any law," cut down the general words, and thus carry out the very reasoning of those two judgments.

Further, where section 632 of the Act of 1882 enacted that "except as provided in this Chapter, the provisions of this Order apply to such High Courts" (i. e., such as the High Court at Calcutta), section 117 of the Act of 1908 says: "save as provided in this Part or in Part 10 or in rules, the provisions of this Code shall apply to such High Courts." Now Part 10 of the Code of 1908 enacts (sections 122 and 128) that rules made under the authority of the Code may provide for any matters relating to the procedure of Civil Courts subject to their not being inconsistent with the provisions in the body of the Code, that is to say, that, under the Act of 1908,

rules relating to all procedure are competent unless the body of the Code contains something inconsistent with them, while under the Act of 1882 the provisions of the Code merely (and subject to exceptions, which are now immaterial) "apply to such High Courts," which leaves in doubt the point, which the Code of 1908 puts beyond controversy.

A further point is taken, that section 151 of Code of Civil Procedure, 1908, preserves the inherent powers of the Court to make such orders as may be necessary for the ends of justice, and to this general saving section appeal is made to take the present case out of the operation of the Orders and rules, if they are applicable to Letters Patent appeals. How far a mere general saving clause gives power in effect to refuse to apply an appropriate rule, made in the exercise of other powers of the Court and having statutory force, is another question, but for present purposes it is enough to say that, in the terms of the section, the inherent powers saved are such as are used to secure the ends of justice. Now, the question is, whether or not the appellant should be assisted in prosecuting an appeal in a case which has been tried once and decided against her, where failure in her appeal will impose a heavy burden of costs on the beneficiaries under the earlier Will, and as to this question their Lordships have not the materials even for forming a *prima facie* view of the merits of the case or the probabilities of its issue. It is evidently one, which turns mainly on the facts proved, and these depend on the credibility of witnesses whose testimony has been rejected by the learned Judge who saw and heard them. Their Lordships are not in a position to say that justice requires the prosecution of an appeal on terms so onerous to the party, whom that learned Judge declared to be in the right.

In conclusion, there is no reason why there should be any general difference between the procedure of the High Court in matters coming under the Letters Patent and its procedure in other matters, and if this particular matter of security for costs is not dealt with in the Orders and rules made under the powers of the Code, when it arises in connection with the jurisdiction created by the Letters Patent, section 15, no rules

(7) 22 M. 68 (F. B.); 8 M. L. J. 231; 8 Ind. Dec. (N. S.) 49.

(8) 26 C. 361; 3 C. W. N. 347; 13 Ind. Dec. (N. S.) 834.

(9) 10 I. A. 4 at p. 17; 9 C. 482 (P. C.); 12 C. L. R. 511; 7 Ind. Jur. 161; 4 Sar. P. C. J. 406; 4 Ind. Dec. (N. S.) 970.

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procedure have been formulated with regard to it, though the High Court's power to regulate procedure in Letters Patent appeals is independent and has been preserved. The Code is framed on the scheme of providing, generally, for the mode in which the High Court is to exercise its jurisdiction, whatever it may be, while specifically excepting the powers relating to the exercise of Original Civil Jurisdiction, to which the Code is not to apply. It confers a general rule-making power saving only what is excepted in the body of the Code.

Their Lordships are accordingly of opinion that the High Court at Calcutta rightly conceived itself precluded from entertaining the appellant's application to be allowed to continue her appeal *in forma pauperis*, since to grant her application at that stage would in effect have been to keep alive an appeal which they were, by reason of her default in the matter of security, bound to reject. The consequence is that the appeal fails, and so their Lordships will humbly advise His Majesty.

*Appeal dismissed.*

Solicitor for the Appellant.—Mr. J. Tucker.

Solicitor for the Respondents.—Mr. G. O. Farr.

### CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 707 of 1917.

May 12, 1920.

*Present* :—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice Sir Ernest  
Fletcher, Kt.

BHUSHAN CHANDRA PAL—

DEFENDANT—APPELLANT

*versus*

NARENDRA NATH KOOR, AND

ON HIS DEATH HIS HEIR AND

LEGAL REPRESENTATIVES DHIRENDRA

NATH KOOR AND OTHERS—

PLAINTIFFS—RESPONDENTS.

*Execution of decree—Attachment, wrongful, of property—Damages, suit for, by rightful owner, whether maintainable—Appeal, second—Limitation, plea of, whether can be raised for first time—Civil Procedure Code (Act V of 1908), O. VIII, r. 2.*

Inasmuch as a decree-holder is responsible for the attachment of moveable property seized in

execution of his decree as the property of his judgment-debtor, a suit by the rightful owner of such property is maintainable against him for wrongful attachment. The mere fact that there is a subsequent order that the property should not be released and returned to the rightful owner, pending the decision of a suit by the decree-holder that the property was liable to attachment, would afford no protection against a claim for damages. [p. 281, col. 2.]

A question of limitation cannot be raised for the first time in appeal; such question must, under Order VIII, rule 2 of the Civil Procedure Code, be raised by the defendant in his pleading. [p. 282, col. 2.]

Appeal against the decree of the Subordinate Judge, First Court, 24 Parganahs, dated the 8th of January 1917, modifying the decree of the Munsif, First Court, Sealdah, dated the 31st of August 1915.

FACTS appear from the judgment.

Babus Monmatha Nath Roy (with him Babus Jogesh Chandra Roy) for the Appellant.—The case is not one of trespass but is what is technically known as an action on the case. So that malice must be proved. Refers to *Peruvian Guano Co. v. Dreyfus* (1). I was not actuated by malice. I simply pursued my civil remedy. I never knew that the attachment was wrongful. It was only by a subsequent judicial determination that it was declared that the properties had been wrongfully attached. Refers also to *Bishun Singh v. Wyatt* (2). The present action is, therefore, not maintainable.

Then the lower Appellate Court ought to have held that the claim of the plaintiff was barred by limitation, if not wholly, at least in part. On this ground also, the decision of the Court below is erroneous.

Babu Baranasibasi Mukherjee, for the Respondent, was not called upon to reply.

### JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal by the defendant in a suit for damages for wrongful attachment of moveable property. The appeal had been referred to a Full Bench. [*Narendra Nath Koor v. Bhushan Chandra Pal* (3)] and has now come up for final disposal.

The defendant obtained a decree for money against the father and the brother of the plaintiff. In execution of that decree, he

(1) (1892) A. C. 166; 61 L. J. Ch. 749, 66 L. T. 536; 7 Asp. M. C. 225.

(2) 11 Ind. Cas. 749; 14 C. L. J. 515; 16 C. W. N. 540.

(3) 67 Ind. Cas. 375; 31 C. L. J. 495 (F. B.).

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caused an oil mill to be attached which he alleged was the property of his judgment-debtors. The attachment was effected on the 22nd January 1911. The oil mill was taken to pieces and was brought into Court. The plaintiff thereupon preferred a claim on the allegation that the oil mill was his property, had been purchased with his separate funds, was in his possession and was not liable to be attached in execution of the decree obtained by the defendant against his judgment-debtors. The claim was duly investigated with the result that on the 1st April 1911 it was allowed. The Court found that the oil mill had been purchased by the plaintiff with his own money, was his exclusive property, was in his possession and was not liable to be attached in execution of the decree obtained by the defendant. The Court thereupon made an order that the property be released from attachment and be returned to the plaintiff. The order was made on a Saturday and the Court found it impossible to make over the moveable property to the plaintiff on that day. On Monday following, that is, the 3rd April 1911, the defendant instituted a suit for declaration of his right to execute his decree against the oil mill as the property of his judgment debtors. At the same time, he applied to the Court that the oil mill might be retained in the custody of the Court during the pendency of the litigation. The Court directed the plaintiff to furnish security, if he desired to have the oil mill restored to him pursuant to the order made in his favour two days previously. The plaintiff was unable to furnish the security demanded, an order absolute was consequently made that the oil mill was to continue in the custody of the Court till the suit instituted by the defendant was decided. That suit was ultimately dismissed by the Trial Court on the 31st May 1912, and the decree of dismissal was confirmed on appeal. On the 22nd January 1914, the plaintiff instituted the present suit for damages for wrongful attachment of his oil mill. He alleged that he had suffered considerable loss as his oil mill had been taken to pieces and had become useless, and he added that this injury had been caused by the defendant maliciously. The Courts below have decreed the suit. On behalf of the defendant appellant, it has been argued that the suit is not maintainable inasmuch as this is not a case of trespass to

goods. We are of opinion that this contention is wholly unfounded.

The damage suffered by the plaintiff is attributable directly to the wrongful attachment effected on the 22nd January 1911. There can be no question that for that attachment the defendant is responsible. Order XXI, rule 12 of the Civil Procedure Code, 1908, provides that "where an application is made for the attachment of any moveable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same." It is on the basis of this inventory that the attachment is effected in the manner prescribed in rule 43 which provides that: "Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof." It is plain, as pointed out by Norman, J., in *Soobjan Pe bee v. Sheikh Shureentoollah* (4), that for the attachment the decree-holder is responsible, because it is he who specifies the goods which are seized in execution as the property of his judgment-debtor. Consequently, the attachment in this case, on the facts found, was wrongful, and, in the words of Lord Watson in *Kissari Mohun Eoy v. Harsu'h Das* (5), "the illegal attachment was thus the direct act of the appellants for which they became immediately responsible in law."

But it has been argued that the position of the defendant was improved by reason of the subsequent judicial determination that the properties had been wrongfully attached, as they were not the properties of his judgment-debtors. His contention is that the subsequent order that the property should not be released and returned to the plaintiff was a judicial order which affords a protection against the claim for damages. In support of this position, reliance has been placed on

(4) 12 W. R. 329; 8 B. L. R. A. C. J. 413.

(5) 17 I. A. 17 at p. 27; 7 O. 448 at p. 443; 13 Ind. Jur. 452; 5 Sar. P. C. J. 472; 8 Ind. Dec. (N. S.) 830.



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the decision in *Peruvian Guano Co v. Dreyfus* (1). That case is clearly distinguishable. In that case, there was a judicial appointment of a Receiver who was authorized to take charge of the disputed property. In the present case, the root of the mischief was the wrongful attachment effected at the instance of the defendant, who pointed out the oil mill as the property of his judgment-debtors. The case is obviously one of trespass and falls within the principle laid down in *Clissold v. Cratchley* (6) which was followed in *Bhut Nath Pal Mistry v. Chandra Benode Pal Chowdhury* (7) and the suit is consequently maintainable. The decisions in *Joykalee Dassee v. Representative of Chandmalla* (8), *Wilson v. Kanhya Sahoo* (9), *Raj Chunder Roy v. Shama Scondari Debi* (10), *Madras Steam Navigation Co. Limited v. Shalimar Works Limited* (11), *Mohini Mohan Misser v. Surendra Narain Singh* (12) and *Nanjappa Othettiar v. Ganapathi Goundan* (13) are clearly distinguishable, as, on their special facts, they were not regarded as cases of trespass at all.

It has finally been argued that the claim is barred by limitation, if not in its entirety at least in part. No question of limitation, however, was raised in either of the Courts below, and we are of opinion that the appellant is not entitled to invite the Court at this stage to entertain the point. The principle applicable in circumstances of this character, under the Code of 1852, was laid down by this Court in *Balaram Gantia v. Mangla Dass* (14). It was there pointed out that section 4 of the Indian Limitation Act, 1877, which has been re-placed by section 3 of the Limitation Act of 1908, does not entitle the defendant to raise a point of limitation at the appellate stage, unless the Court can give effect to the contention without the determination of questions of fact, in other words, that the Court of Appeal is bound to entertain a new

ground of limitation, only when the point appears, on the face of the record, to be supported by the evidence produced in the Court of first instance. The matter has now been placed beyond all doubt by Order VIII, rule 2, Civil Procedure Code, which shows that the question of limitation must be raised by the defendant by his pleading. It is impossible for us to say that if the question of limitation had been raised in the Court of first instance, as it should have been, there could not have been a complete answer by the defendant. In our opinion, there is no doubt that the decree is correct and must be affirmed.

The appeal is dismissed with costs of two hearings before the Division Bench.

FLETCHER, J.—I agree.

*Appeal dismissed.*

### PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 774  
OF 1919.

November 17, 1920.

Present :—Mr. Justice Das and  
Mr. Justice Adami.

INDER CHAND—PLAINTIFF—  
APPELLANT

versus

BIDYADHAR PANDEY—RESPONDENT.

*Hindu Law—Joint family—Family consisting of two branches—Loan by member of one branch, whether binding on family—Pleadings—Undue influence, plea of, when can be investigated.*

Where two branches of a family taken together constitute a joint family, each one of them is liable for a debt binding on the joint family, and the presumption is that the member of the family who incurs a debt had authority to do so for joint family necessity. [p 283, col. 2]

Undue influence, being a species of fraud, must be pleaded with precision, and unless a case of undue influence is made in the pleadings, such a case cannot be investigated by the Courts. [p. 283, col. 1.]

Appeal from a decision of the District Judge, Shahabad, dated the 5th June 1919, confirming a decision of the Subordinate Judge, Shahabad, dated the 27th May 1918.

(6) (1910) 2 K. B. 244; 79 L. J. K. B. 635; 102 L. T. 590; 64 S. J. 442; 26 T. L. R. 409.

(7) 16 Ind. Cas. 443; 16 C. L. J. 24.

(8) 9 W. R. 133.

(9) 11 W. R. 143.

(10) 4 C. 583; 2 Ind. Dec. (N. S.) 370.

(11) 25 Ind. Cas. 463; 42 C. 85 at p. 108.

(12) 26 Ind. Cas. 286; 42 C. 550; 21 C. L. J. 68; 19 C. W. N. 1189.

(13) 12 Ind. Cas. 597; 35 M. 598; 10 M. L. T. 365; (1911) 2 M. W. N. 414; 21 M. L. J. 1052.

(14) 34 C. 941; 6 C. L. J. 237; 11 C. W. N. 959.

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Messrs L. Agarwala, Lachmi Narain Singh and Bimola Charan Sinha, for the Appellants.

Messrs. Noresh Chandra Sinha, Nitaichandra Ghose, for the Respondents.

#### JUDGMENT.

DAS, J.—This appeal comes before us from the judgment and decree passed by the learned District Judge of Shahabad and arises out of a mortgage action instituted by the appellant against the respondents. The appellant cited as defendants in the action the executant of the mortgage-bond as well as his sons who were defendants Nos. 1 to 7. He also cited as defendants one Makri Pandey and his sons as defendants Nos. 8 to 10.

The case of the plaintiff was that the defendants Nos. 1 to 10 constituted a joint family and that Bidyadhar, defendant No. 1, borrowed Rs. 250 from him for the benefit of the entire joint family. The defendants entered appearance and on behalf of defendants Nos. 8 to 10 it was urged that they were separate from Bidyadhar and his branch of the family and are, therefore, not liable for the mortgage-debt at all. On behalf of all the defendants objection was taken to the rate of interest and to compound interest.

The Courts below have concurrently come to the conclusion that the two families taken together constituted a joint family, but being of opinion that the particular transaction was a transaction of Bidyadhar's branch of the family, the Courts have dismissed the suit as against the defendants Nos. 8 to 10.

On the question of interest, both the Courts have come to the conclusion that there was undue influence exercised on Bidyadhar in respect of compound interest and they have accordingly passed a decree against Bidyadhar's branch of the family for Rs. 250 with simple interest at the rate of 24 per cent. per annum.

We are of opinion that the learned District Judge erred in law in dismissing the suit as against Makri Pandey's branch. We are also of opinion that he ought not to have dismissed the claim for compound interest.

On the first point it is sufficient to refer to the finding of the learned District Judge that the two families taken together constituted a joint family. No doubt the learned District Judge does say that each branch had transactions of its own. Now, it was open to the learned Judge on a consideration of all

the facts to come to the conclusion that, as a matter of fact, the two branches were separate, but that is not the finding. The finding being that the two families taken together constituted a joint family, there is no escape from the conclusion that every one of them is liable for a debt binding on the joint family. It was, however, urged on behalf of the respondents that there is no finding that Bidyadhar was the *karta* of the joint family and that, therefore, the family is not liable for the debt incurred by one who was not *karta* of the joint family. With this contention I do not agree. If the debt was a debt binding on the joint family we must assume that there was an authority vested in Bidyadhar to borrow the money for what must now be considered to be a joint family necessity.

On the second point it was, of course, open to the learned District Judge to dismiss the claim for compound interest on the ground that there was undue influence exerted on Bidyadhar, but no case of undue influence is made in the written statement. The question of undue influence is a question of fact, and it is well established that undue influence being a species of fraud must be pleaded with precision. If a case of undue influence is not made in the pleadings such a case cannot be investigated by the Courts. That being so, the decision as regards compound interest is wrong.

I would set aside the judgment and decree passed by the Courts below and grant the plaintiff the usual mortgage-decree for Rs. 250 with compound interest at the rate of 24 per cent. per annum, with yearly rests. The appellant is entitled to costs throughout. The period for redemption will be six months from the date of the decree of this Court.

ADAMI, J.—I agree.

*Appeal decreed.*

DEBENDRA NATH RAI V. PRANAB CHANDRA GHOSE.

**CALCUTTA HIGH COURT.**

APPEALS FROM APPELLATE DECREES  
Nos. 1501, 1592 AND 1542 OF 1919.  
July 19, 1920.

*Present:*—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice Sir  
Ernest Fletcher, Kt.

DEBENDRA NATH RAI CHAUDHURI  
AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

PRANAB CHANDRA GHOSE, CHAIR-  
MAN, TAKI MUNICIPALITY—

DEFENDANT—RESPONDENT.

*Bengal Municipal Act (III B C. of 1884), 85 (a)—  
Tax, assessment of—Means and property liable to  
assessment—Measure of means and property.*

In assessing a tax under section 85 (a) of the Bengal Municipal Act, the means and property of an assessee outside the Municipality cannot be taken into account, it is only the means and property within the Municipality that are liable to assessment. To measure the means and property within the Municipality, the test is, not what is spent, but what is earned within the Municipality. [p. 255, cols. 1 & 2.]

Appeals against the decisions of the District Judge, 24 Parganahs, dated the 30th April, 1919, reversing those of the Munsif, Basirhat, dated the 30th April 1918.

Babus Sarat Chandra Rai Chowdhury, Panchanan Ghose, Ramendra Mohan Majumdar and Indu Bhushan Ray, for the Appellants.

Babus Jogesh Chunder Roy and Anilendra Nath Roy Chowdhury, for the Respondent.

**JUDGMENT.**

IN S. A. No. 1501 OF 1919.

MOOKERJEE, ACTG. C. J.—This is an appeal by the plaintiff in a suit for declaration that a tax assessed by the Taki Municipality upon him under section 85 of the Bengal Municipal Act, 1884, is in contravention of law and is consequently null and void.

The Court of first instance upheld the contention of the plaintiff. Upon appeal, that decision has been reversed by the District Judge.

The determination of the question in controversy depends upon the interpretation of section 85 which provides for the imposition by a Municipality of two classes of taxes, namely, "(a) a tax upon persons occupying holdings within the Municipality according to their circumstances and property within the Municipality" and "(b) a rate on the annual value of holdings situated within the Municipality." The tax in the

present case has been imposed under clause (a).

The contention of the appellant is, that the assessment has been made according to his circumstances and property, *not within but outside the Municipality*. In our opinion, the facts found leave no room for doubt that this contention is well founded.

The appellant has been assessed on the basis of a valuation of his circumstances and property at the sum of Rs. 1,440. But it is plain, from the facts set out in the judgment of the District Judge, that he could not have been assessed on the basis of a valuation exceeding Rs. 250, if his circumstances and property within the Municipality were alone taken into account. He holds his family dwelling house in Taki jointly with his nephews and looks after the property.

The family of his son, who is a Deputy Magistrate, sometimes lives with him. He and his two co-sharers get Rs. 660 as the net income of the property within the Municipality; this gives him Rs. 220. It is further conceded that his circumstances within the Municipality are worth another Rs. 30. But the Municipality has assessed him on Rs. 1,440 by taking into account his circumstances outside the Municipality. The question is, whether the Municipality was competent to take such circumstances into account.

The argument for the Municipality in substance is that, for practical purposes, an assessing body will consider the style of living of the assessee within the Municipality which they control, on the theory that a man's means can ordinarily be fairly and reasonably computed upon a consideration of his mode of life. It is manifest that this is an unsound basis for assessment, and if the claim of a Municipality to make assessment on these grounds were upheld, we should have to omit the words "within the Municipality" from clause (a). The Municipality has argued in effect that clause (a) has the same effect as if it had a right to impose a tax upon persons occupying holdings within the Municipality according to their circumstances and property, irrespective of the place where these circumstances and property might exist. A similar contention was put forward in the case of *Chairman of Giridih Municipality v.*



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*Srish Ohandra Morumdar* (1). There the question arose whether the resident was to be taxed on what he got or on what he spent in the Municipality. It was held that the measure of his liability was what he got and not what he spent within the Municipality. In that case, the contention was put forward that the tax should be determined on what he spent in the Municipality for the purpose of reduction of the assessment. In the present case, the same test has been applied by the Municipality to increase the amount of the assessment, because here the appellant spends more within the Municipality than what his property and circumstances within the Municipality are worth. The decision in *Chairman of Giridih Municipality v. Srish Chandra Morumdar* (1) accepted as correct the rule laid down in *Rameshwar Pershad v. Chairman of the Bhabua Municipality* (2), namely, that an assessment of tax under clause (a) of section 85 of the Bengal Municipal Act made in consideration of the assessee's "circumstances and property" (altogether or partly) outside the local limits of the Municipality is *ultra vires* and illegal. This Court was again invited to consider the same point in the case of *Deb Narain Datta v. Chairman of the Baraipure Municipality* (3), where Sir Lawrence Jenkins, C. J., pointed out that the word "circumstances" in section 85 is equivalent to "means" and that the assessment under that section must be made according to the "means and property" within the Municipality; in other words, that for the purpose of assessment the means and property outside the Municipality cannot be taken into account. This principle has subsequently been applied in the case of *Chairman of the Rajpur Municipality v. Nogendra Nath Bagchi* (4). We are clearly of opinion that the construction which has been uniformly placed upon section 85 (a) during the last twenty years cannot be successfully questioned. That interpretation is that, for the purpose of assessment, the Municipality cannot take into account the "circumstances and property" of the assessee outside the

Municipality, but must restrict itself to the "circumstances and property," that is, the "means and property" within the Municipality, and, further, that to measure the means and property within the Municipality, the test is, not what is spent, but what is earned within the Municipality.

On behalf of the respondent Municipality, the contention has been finally put forward that this interpretation, (which it is not disputed is the well recognized construction) is likely to embarrass it in its work. That is plainly a matter which the Court cannot take into consideration, where statutory provisions have to be construed. It is clearly a question of policy for the Legislature to consider, whether the tax should be based upon circumstances and property of the individuals concerned, irrespective of the place where such circumstances and property exist, or whether, in the process of assessment, only such portion of the circumstances and property should be taken into account as lie within the Municipality. The plain language of the Statute leave no room for argument as to what the Legislature intended.

The result is, that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. This order will carry costs both here and before the District Judge.

The same order will be made in the other two appeals which are accordingly decreed with costs.

FLETCHER, J.—I agree.

*Appeal allowed.*

# PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 22 OF 1920.

August 11, 1920.

*Present*:—Sir Dawson Miller, Kt., Chief Justice, and Justice Sir B. K. Mullick, Kt.

RAJENDRA KISHORE—APPLICANT

*versus*

Rajkumar KAMAKHYA NARAIN

SINGH—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 110, 122

(1) 35 C. 859; 12 C. W. N. 703; 7 C. L. J. 631.

(2) 27 C. 849; 14 Ind. Dec. (N. S.) 558.

(3) 20 Ind. Cas. 264; 41 C. 168; 17 C. W. N. 1230; 19 C. L. J. 206.

(4) 10 Ind. Cas. 894; 29 C. L. J. 379; 28 C. W. N. 475.

## RAJENDRA KISHORE V. KAMAKHYA NARAIN SINGH.

123, applicability of—Patna High Court, rules of, whether ultra vires—Appeal dismissed in default—Order, whether appealable to Privy Council.

The provisions of sections 122 and 123 of the Civil Procedure Code have no application to the Patna High Court, and the fact that the rules made by the High Court were not submitted to any Rule Committee and that no Rule Committee is in existence in Patna would not make those rules *ultra vires*. [p. 287, cols. 1 & 2.]

An order dismissing an appeal in default of the appellant's compliance with the rules of the Court as to the composition of the paper-book in the case is not appealable to the Privy Council. [p. 286, col. 2.]

Application to appeal to Privy Council.

Mr. S. N. Dutt, for the Applicant.

Mr. Muhammad Fakhruddin, for the Opposite Party.

## JUDGMENT.

MILLER, O. J.—In this case an application is made for leave to appeal to His Majesty in Council from an order dated the 4th February 1920 dismissing the applicant's appeal in this Court for default in furnishing his list of papers to be printed in the paper-book. According to the Rules of this High Court the appellant preferring the appeal is required to prepare and deliver a list of the papers to be inserted in the paper-book to the Deputy Registrar, and by rule 8 of Chapter IX of the High Court Rules it is laid down that he shall within 30 days after service of the notice required by rule 6 deliver to the Deputy Registrar a list prepared in accordance with the previous rules. In the present case the appellant filed his memorandum of appeal on the 11th July 1919. Subsequently, he was notified under rule 6 requiring him to prepare a list of the papers. The exact date upon which that notice was issued does not appear, but on the 6th January 1920 the appellant appears to have been in default and on that day he was given until the 20th January, for filing his list upon an application to the Registrar. On the 22nd January, not having filed his list, a further application to the Registrar was made and he was given further time until the 2nd February. The order then, made was:—

"If not filed then, place before the Bench."

On the 4th February, the appellant was still in default with the preparation of his list and on that day the case came before the Bench for orders, and, as there was no explanation why the list was not ready,

and as it appeared from the order-sheet that the appellant had been in default on a previous occasion in paying his Court-fees, the Court, considering that he was already a month overdue and had not yet started to prepare his list, dismissed his appeal for default, and the Court, as appears from their order, took into consideration the previous history of the case.

From that order dismissing the appellant's appeal he wishes now to prefer an appeal to His Majesty in Council and has filed the present petition asking for a certificate that the appeal complies with the provisions of section 110 of the Civil Procedure Code. He contends, in the first instance, that the appeal involving a sum of over Rs. 10,000 ought to be admitted and that, notwithstanding that the order or decree from which he appeals is one affirming the decision of the Court below there is a substantial question of law to be decided by their Lordships of the Privy Council. For that purpose he relies upon the questions of law which had to be determined in the Court of first instance, questions which arise upon the merit of the case. It is quite obvious that, so far as the present appeal is concerned, no question of the merits of the case at all can arise until the Privy Council has set aside the order which was passed on the 4th February 1920 and, so far as this appeal is concerned, the only question which can go for determination to the Privy Council is the question of whether or not we were justified on that occasion in passing the order which we did dismissing the appeal for default. It is, therefore, in my opinion, idle for the appellant to contend that there is some question of law arising on the merits of the case. Those merits do not become the subject of appeal to His Majesty in Council. The only question is, as I have already said, which will have to be determined is the question whether or not our order was justified in the circumstances.

But the appellant contends that, even if the view just expressed is right, there is a substantial question of law which arises upon the order already made. He contends that the whole of the rules of the High Court at Patna made in 1916 when the

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Court was constituted *ultra vires* because they contravene or, at least, do not comply with the provisions of the Civil Procedure Code. He has referred to sections 122 and 123 of the Civil Procedure Code and contends that the High Court at Patna at the time it was established was one of the Courts established under the Indian High Courts Act of 1861 mentioned in that section. The earlier section provides that such Courts as well as the Chief Courts of the Panjab and Lower Burma may from time to time, after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule. He then refers to section 123 which provides that:—

"A Committee, to be called the Rule Committee, shall be constituted at each of the towns of Calcutta, Madras, Bombay, Allahabad, Lahore and Rangoon."

It then provides that each such Committee shall consist of certain persons. Then he relies upon section 124 which provides that:—

"Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and, before making any rules under section 122, the High Court shall take such report into consideration."

There is no direct proof before the Court from which we could decide that the provisions referred to in sections 122 to 124 have not been complied with, but I will assume, for the purposes of this case, that the rules made by the Patna High Court, when it was constituted in the year 1916, were not submitted to any Rule Committee and that no such Rule Committee as is contemplated in section 123 was in existence. But it is perfectly clear, looking both at section 122 and at section 123, that the High Courts contemplated there do not include the High Court at Patna. I doubt very much whether the section was intended to include any new Court which might be constituted even under the Act of 1861, but the High Court at Patna, in the first place, was not constituted under that Act and the necessity of forming Rule Com-

mittees is only enjoined under section 123 in the cases of Calcutta, Madras, Bombay, Allahabad, Lahore and Rangoon, and does not include Patna. Therefore, the Patna High Court cannot in any sense be said to come within the provisions of sections 122 and 123 and it is quite clear that section 124 which refers to the Rule Committees refers only to the Rule Committees constituted under section 123 and to no others. Therefore, in my opinion, these rules which have been relied upon have no application to the rules originally framed by the High Court at Patna. The power to make rules given to the High Court at Patna when it was constituted is set out in clause 29 of the Letters Patent which provides that:—

"And we do further ordain that it shall be lawful for the High Court of Judicature at Patna from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adapting as far as possible the provisions of the Code of Civil Procedure, being an Act, No. V of 1908, passed by the Governor-General in Council, and the provisions of any law which has been made, or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate and matrimonial jurisdiction, respectively."

That is the power under which the High Court at Patna originally made the rules which it follows up to the present day and it seems pretty clear that under the Civil Procedure Code cases such as arose when this High Court was constituted were actually in contemplation of the Legislature at that time, because we find in section 125 it is provided that High Courts other than the Courts specified in section 122 shall exercise the powers conferred by that section not in the manner provided in sections 123 and 124 but in such manner and subject to such conditions as the Governor-General in Council may determine. Then there follows a proviso that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court. That section provides two things; first, that High Courts other than those mentioned in the



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preceding sections may exercise the powers mentioned in section 122 subject to such conditions as may be imposed by the Governor General in Council, and, further, that they may in any event by mere publication adopt the rules already in force in any other High Court, such rules having presumably been passed with proper sanction and, therefore, in the opinion of the Legislature, requiring no further sanction. What was done in the case of the Patna High Court appears quite clearly, I think, from the note at the beginning of the volume which contains the Patna High Court Rules. The note is to the following effect:—

"The following rules have been made by the Court under the powers in that behalf conferred upon it by Parliament, the Letters Patent, and the Acts of the Indian Legislature, and have received the sanction of the Governor-General in Council and of the Local Government where necessary,"

signed by the then Registrar of the High Court. Nothing has been shown nor even suggested that the note stated at the beginning of the book which I have just referred to does not accurately state the true condition of affairs and in any case we are bound to presume that these rules which have been acted upon since the constitution of this Court in 1915 have been properly passed and regularized until the contrary is shown. In these circumstances, it seems to me that there is no substantial question of law for determination by the Privy Council in the present case. The application must be rejected with costs.

MULLICK, J.—I agree.

*Application rejected.*

## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 105  
OF 1919.

March 23, 1920.

Present:—Justice Sir Anutosh Mukherjee, Kt.  
and Justice Sir Ernest Fletcher, Kt.  
J. W. CREWDSON AND ANOTHER  
—DEFENDANTS—APPELLANTS

versus

GANESH DAS HARI BUX—PLAINTIFF—  
RESPONDENT.

*Interest Act (XXXII of 1839), s. 1—Civil Procedure Code (Act V of 1908), s. 34—Unliquidated damages, suit for—Interest, pendente lite, whether can be claimed.*

In a suit for the recovery of money representing the depreciation in the value of goods supplied interest cannot be claimed during the pendency of the suit as the amount claimed is not a "debt" nor a "sum certain" within the meaning of section 1 of the Interest Act, but is unliquidated damages, and interest does not run on such damages. [p. 293, col. 2.]

Appeal against the following decision of Mr. Justice Chaudhuri, dated the 20th August 1919:—

CHAUDHURI, J.—The plaintiff is an importer of printed goods. He did business originally with Vasey & Co., of Manchester. That business continued for two years 1905 to 1908 when it was taken up by the Valley Weaving Co. and then by Crewdson & Co., in 1910. The terms of business are set out in the 4th paragraph of the plaint, said to have been "partly expressed" in correspondence and "partly implied." The claim in this suit arises upon clause (d) which runs as follows:—"Should cut and otherwise faulty pieces be found in the cases received, the plaintiff firm should examine one or more of the said cases as the plaintiff firm should think proper in order to arrive at an average of the proportion of faulty pieces in the said cases and on the basis of the said average, claim the usual allowance of 33 1/3rd per cent." The plaintiff made a complaint about the faulty pieces in November 1912 in respect of goods received between September 1911 and February 1912, and it is said that the defendant firm paid that claim. This suit relates to faulty pieces said to have been received from February 1912 to 1914 in respect of goods invoiced as perfect. It is said that the plaintiff made a complaint in respect of these goods, but the defendant firm did

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not pay any attention to it and eventually Mr. Blair, an agent of the defendant firm, came out to India in 1914 when he asked Kerr Tarruck & Co. of Calcutta to examine the goods and make a final survey and report; that such survey was held on the 17th March 1914 and it is said that a report was made by that firm that there was an average of 40 per cent. of unduly faulty pieces. The plaintiff claims upon the basis of that report the sum of Rs. 31,047 8 0 and, alternatively, that the said amount is fair and reasonable compensation for "the damages and faults" in the goods. There was also a claim for Rs. 4,098-4 as customary interest.

The defendant firm pleads limitation and submits that section 13 of the Limitation Act does not apply as the defendants have never carried on business in British India. The defendants deny the terms of business as alleged in the plaint and state that they are contained in the correspondence between the parties and that no terms were implied. They do not, however, set out the terms. It is admitted that business transactions with the plaintiff commenced in 1910 and they state that the last shipment of goods was made in September 1913 which is also an admitted fact. It is further admitted that Mr. Blair came to Calcutta in March 1914 and he was shown some *Saris* upon which he informed the plaintiff that Kerr Tarruck & Co., would be instructed to examine a full case and make their report to the defendant firm, but Mr. Blair did not acknowledge that the plaintiff firm's claim was justified nor did he promise payment. They deny liability for damages or interest and say that many of the plaintiff's claims were adjusted by awards made by the Bengal Chamber of Commerce and they claim Rs. 950 3 as due to them upon such awards.

Two matters may be disposed of at once; (1) the plaintiff admits liability to the defendants to the extent of Rs. 980-3 0. (2) As regards the question of interest, it was claimed in the plaint as customary, but it was claimed at one stage of the hearing on the basis of a notice. Plaintiff's Counsel, however, did not press this claim and it has, therefore, been treated as abandoned.

The main point for consideration is, what was the term of business between the parties in respect of faulty pieces. The plaintiff

undoubtedly made a claim at the end of November 1912 and the matter awaited the arrival of Mr. Blair. Blair came to Calcutta and examined some of the goods and then he asked Kerr Tarruck & Co., to examine them and make a report. It is unfortunate that the evidence of Blair is not available. He died on the 10th August 1918, but it is to be noticed that, although the suit was instituted in June 1916, no steps were taken for his examination. The only oral evidence before me is that of the plaintiff on one side, and on the other side of Mr. N. Sarkar of Kerr Tarruck & Co., and of Kishori Chand Mitra, a clerk of that firm. The plaintiff's version is as follows: that Blair, when he came to Calcutta, asked the plaintiff to open one case said that he would examine it and settle the rates for the disputed cases; that Blair was thereupon taken to the plaintiff's godown and one case was opened which he selected. At that time there were over 90 cases in stock. Blair is said to have examined two packages from the case he had selected about 40 or 50 pieces, and that some cut pieces were found amongst them. He said he had no time to examine the entire contents of the case and would send Kerr Tarruck's man to examine the goods. He put down on paper the result of his examination; this was on the 19th February 1914. There was some discussion. The plaintiff wrote out what had happened, but Blair wrote "No" across it and below that the result of his examination (Exhibit E). He said there were small holes and hook marks and nail marks, but the plaintiff said that they were big cuts. The plaintiff says that Kerr Tarruck's man afterwards came and examined one case. It was a fresh case; all the 400 pieces were examined and a report was made by him (Exhibit F). It was written out by one of the plaintiff's men and Kerr Tarruck's man signed it. That man had taken notes in pencil and the plaintiff's man wrote the report at his dictation. Out of the 400 pieces examined, 160 were found defective. Thus, 40 per cent. of the goods were found faulty and an allowance of  $33\frac{1}{3}$  per cent. is based upon it. The plaintiff says he submitted his bill on the 28th May 1914. Mr. Sarkar says that he was asked by Blair to send a man to plaintiff's godown to

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take measurements of cut pieces out of a case in stock. He said he sent a man who had no experience of survey and arbitration. The clerk, Kishorichand, says that he made a report after opening an original case. He, however, said that the case was picked out by the plaintiff, which I am not prepared to accept, and how it was an original case that he examined. There is no evidence except that of the plaintiff that it was agreed by Blair that such examination was to be the basis of calculation for damages in respect of all the goods as claimed by the plaintiff. It is, therefore, necessary to refer to the correspondence on this point. The case as regards the terms also depends upon the correspondence, an enormous quantity of which has been put in. It was due to that fact that I had to reserve any judgment. Unfortunately, other work intervened and I was not able, much to my regret, to take up this matter earlier, but inasmuch as there is very little oral evidence mostly of an *ex parte* character and the consideration of the case mainly depends upon the correspondence, I do not think the parties have been prejudiced by such delay.

As regards the allowance, I find as follows from the correspondence. There is a letter from the defendant firm signed by Blair, dated 21st July 1910 in which they say that in respect of cut pieces that the plaintiff had agreed to take them at a discount of Rs. 50 per cent. That term was eventually altered. On the 8th September they said that they did not think that they could possibly manage to allow more than 25 per cent. on seconds and cut pieces. The plaintiff replied that no one could accept cuts and jobs at less than one-third off the value of fresh goods, and they were prepared to accept that discount. The defendant firm wrote on the 20th October that they were not prepared to raise it beyond 25 per cent. allowance. On the 10th November 1910 the plaintiff said that the defendants must allow 33 1/3 per cent. for cuts and jobs, which they asserted was the universal rule of that business. On the 1st December 1910 the defendant firm said "Cuts and jobs—When we see the new printer's work and the number of cuts we may be able to manage to allow you 33 1/2 per cent." On the

22nd December 1910 the plaintiff insisted upon 33 1/2 per cent. allowance as the custom in the market. On the 20th April 1911 the plaintiff said "Re cuts and jobs; as was settled sometime ago, we hope there will not be any further misunderstanding to shipping the cuts and jobs to us and allowing us the 33 1/2 per cent. allowance." On the 27th April the plaintiff gave packing instructions about cuts and jobs. The reason for the request was that such process might be adopted as would simplify the division of cuts and jobs amongst the dealers "according to their contract for fresh quantity." They asserted that the matter of allowance had already been settled at 33 1/2 per cent. They also said that directions were to be given to the packers not to pass a single piece of cuts and jobs "even those with the slightest defect" with the fresh goods as that was likely to lead to disputes with the dealers. In a letter, dated the 8th February 1912, the plaintiff complained about the packing and said that in future "faulties," short pieces and damaged goods were to be sent in separate cases and not with the "perfects." On the 8th February 1912 the defendants required survey of certain cases in respect of which complaints had been made. On the 30th May 1912 the plaintiff informed the defendants that they had received frequent complaints from their dealers under different heads. They were complaining that many damaged and cut pieces were coming out amongst the fresh goods with injuries specially at the borders. They said that they were sending by the mail a few pieces of such *Series* and said that 20 to 30 pieces on an average were coming out from every case. The defendant firm replied that their packers could not have been so grossly careless, but having regard to the complaints they said there was no way out of it but to have an unopened package surveyed. It appears that in respect of the complaint the plaintiff made on the 28th November 1912 about goods sent out between September 1911 and February 1912 it was met by a payment on the 27th November 1913. The present claim relates, as already stated, to faulty and damaged pieces received between February 1912 and 1914.



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On the 29th August 1912 the plaintiff sent a draft of the terms of business between themselves and the defendant firm. It contained a clause about reference to arbitration to the Bengal Chamber Commerce of disputes arising regarding quality, finish, colour and other matters. There is a further clause in it, that claims and disputes for quality, finish, shortage, damage, must be recognised up to four months after the goods have been landed. The defendant firm in their letter of 19th September 1912 did not agree to several of the items; they said that four months were much too long, they could only agree to 30 days, and said that they were enclosing two copies of a much fairer agreement, and requested them to keep one and sign the other and return it. They added that until the matter was finally settled further business would be impossible. The plaintiff replied on the 10th October and said that they required four months to put their complaints regarding quality, finish, etc., as they sold their goods here allowing 90 days godown due. The defendants replied on the 31st October agreeing to some of the terms and not accepting others. They repeated that four months were too long, but in order to meet the plaintiff they were prepared to allow two months only. They said that there were not many points that divided them and practically those that did divide them were already arranged by the Manchester and Bengal Chambers of Commerce; they said they were awaiting the plaintiff's views and would then forward him the agreement in duplicate for his signature. On the 21st November 1912 the plaintiff said that he found that most of the terms were in order with the exception of a few and that he was prepared to settle the matter about time if three months were fixed, but I find no acceptance by the defendant of that term. It is quite clear that up to this time the terms of business were not finally arranged. There is a letter on the 13th December 1912 and also on the 9th January 1913 which show that certain terms were still under discussion, although the parties treated some of the terms which had been accepted as terms of business settled; but those relate to matters other than those about

outs. On the 23rd October 1913 the defendant firm said that they had overlooked sending a final copy of the terms of business with duplicate for the plaintiff's signature which they were then enclosing. On the 29th November the plaintiff acknowledged two copies of the terms and said that he was considering them. He repeated the same thing in his letter on the 20th November 1913. The terms of business were eventually not signed. There is a letter on the 28th November 1912 from the plaintiff about "Cuts and damages in the fresh." He says: "As per our advice in our letters of some time ultimo we have been able to inspect and find out most of the cases with short and have drawn up a list of them found amongst the fresh, showing also the amounts charged and the amounts to be allowed as allowance. We hope this will have your careful attention with the debit notes formerly sent and remit the amount at your early business." The debit note sent on that day had a column "less value 33.1.3 per cent." The defendants acknowledged receipt of that letter and debit note on the 19th December 1912 and said that as it was a large amount they were making enquiries into the matter and would report later. On the 17th July 1913 the defendants wrote that if the plaintiff's dealers were making complaints about quality they "would always like the matter to go to survey and whenever that happened they must have cuttings return to them certified by the arbitrators that they were the basis samples upon which they gave their award whether for quality, finish, colour, etc." The next letter about this matter is dated the 11th December 1913, in which the defendant firm said that they did not see that further correspondence would be of much use. They looked forward to an amicable settlement when their Mr. Blair reached Calcutta.

Blair arrived early in February 1914. He had interviews with the plaintiff and examined some of the goods on the 19th February 1914. The plaintiff in his letter, dated the 19th February 1914, to the defendant firm at Manchester said that Blair had examined 40 pieces out of which 10 pieces were found faulty. On the same date the plaintiff firm wrote a note for Blair's signature and acceptance, but Blair

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wrote "No" across it and wrote that he had found three pieces with holes not big ones but the others were cut, 10 pieces with hooking needle marks. The plaintiff said that he had made a mistake and Blair said that if a mistake was made it was one that could be easily remedied. He asserted that he had not made a mistake. On the 27th February the plaintiff wrote "Regarding our claim for the damaged pieces we have showed you one of the cases for your satisfaction and you admitted that our claim is quite justified and that we are to get the allowance. We expect to hear from you in settlement by return." Blair said in reply that he would see them again when he would open another case; he also wrote that it had been agreed between the parties that any disputes not amicably settled should be referred to the Bengal Chamber of Commerce, and he claimed that right. Blair informed the plaintiff that Kerr Tarruck & Co., were going to send a man to see the case of *saries* and they would report to him in Manchester. On the 4th March he wrote that Kerr Tarruck's man would go on the 6th to examine a case of the *saries* which the plaintiff complained contained faulty pieces. He also made over a letter addressed to Kerr Tarruck's man to the effect that he should examine a case of red and yellow *saries* No. 311. "He will take the case number and will pass on to me the pieces faulty (that are not so marked)." "He may also let me know whether in his opinion there is anything to complain about, taking into consideration that no firm supplies absolutely perfect goods." This letter bears an endorsement on the back "Received these damaged pieces for inspection K. C. Mitra 7 3 14." On the 4th March the plaintiff asked Blair for the report of his previous inspection. Blair wrote on the back of that letter that his report would follow in due course after his man's inspection on Friday the 6th. He added that the 6 pieces were quite up to any body's standard for that style. On the 5th March he made a note of his examination in respect of the 60 pieces, that he found four pieces torn to the extent of 2 inches. He also noted tears in edges, hook marks, holes and other faults. He did not admit that all the above pieces were faulty, and

said that many of them were a reasonable tender for that class of goods. Kerr Tarruck's man could not go on the 6th. On the 10th March 1914 the Bengal Chamber of Commerce informed the plaintiff that a dispute relating to certain other goods (O E 1969) had been referred to their arbitration but this matter was evidently not referred to them. On the 12th March the Manchester firm wrote hoping that the dispute had been arranged amicably. Inspection by Kerr Tarruck's man actually took place on the 14th March. The plaintiff wrote on the 17th March to Mr. Sarkar of that firm stating that Kiori Oband Mitra had called and inspected a full case of *saries* marked G 311, H 1147 containing 400 pieces and found out that 160 pieces in all were damaged, the length of the cuts varying from half an inch to 6 inches. There is a report by K. C. Mitra, dated 17th March. He said in it that he had examined one case, the case above mentioned. It confirmed the description given by the plaintiff. He added that some cuts were in the middle of the pieces and some on the borders. He said that as the plaintiff did not claim allowance for the pin holes he had not taken the measurements of those holes. He stated that he found 20 pieces badly stained. This report was sent to Manchester by Kerr Tarruck & Co., on the 18th March with a note that the man had found stains measuring from 3 to 5 feet in length, although they had understood from Blair that some of the pieces might have had stains merely 6 to 8 inches square. The plaintiff also sent a copy of the report of Kerr Tarruck's man to the defendant firm on the 18th March. In their letter, dated the 2nd April 1914, they said that Blair had arranged for a final survey to be held of the goods before his departure, and the report had been sent duly and that they expected the settlement instructions shortly, meaning payment, I believe. On the 30th April the plaintiff wrote about "Costs and damages": "We learn that you will deal with the matter within the next incoming mail." On the 14th May they complained about the defendants' silence and they said they expected to get their final decisions by the next incoming mail. On the 4th June they sent a detailed statement of their claim "in

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compliance with the terms of our market" and requested immediate payment. On the 18th June the plaintiff said that he had paid to his dealers the amount in the debit-note amounting to the present claim in suit "for the damaged goods as promised by you." On the 25th June the defendant firm wrote to the plaintiff that they were quite willing to settle the matter, but they considered the claim an extraordinary one. They offered 13s. 4d. per case without prejudice. They added that small hook holes of  $\frac{1}{2}$  inch, 1 inch,  $1\frac{1}{2}$  inches or 2 inches could not come under the  $33\frac{1}{3}$  per cent. rate for allowance, which only applied to big damages. If the plaintiff did not accept the offer he was to submit the goods to arbitration. The defendant wrote on the 9th July denying that they promised to pay £2,060.16.8 for damaged goods. There the matter rests so far as the correspondence is concerned. Out of the amount claimed, £1,754 are for goods supplied in 1912 and £315 for goods in 1913. The plaintiff at first said that there were 80 or 90 cases in stock in 1912 but looking into his books of April 1913 he said there were 23. The plaintiff asserts that Blair said to him that there was no question about the allowance and that he admitted it was  $33\frac{1}{3}$  per cent. of the price. On the date of inspection the plaintiff had 15 cases of *series* No. 311. The plaintiff has put his case that it was expressly agreed between him and Blair that the damages were to be paid at the above rate; but from the correspondence, it does not appear that the plaintiff asserted that there had been any such agreement. The plaintiff had said in one of the above letters that the defendant firm had promised to pay, which the defendants denied. It is quite clear that the dispute was intended to be amicably settled; that Blair himself examined some pieces and then he suggested that one case was to be opened and I think it may be fairly held that Blair intended that the settlement was to be arrived at by inspection of one case selected out of the lot then in stock and that was to be basis of the settlement. In that case 160 pieces were found faulty. From the report it appears that there were 76 pieces which had cuts ranging from  $\frac{1}{2}$  to 2 inches and that there were 14 pieces with cuts between 3 inches and 6 inches and there were 20

pieces badly stained. The defendants in their letter of the 25th June said that  $\frac{1}{2}$  inch, 1 inch,  $1\frac{1}{2}$  inches or 2 inches were small hook holes and could not come under  $33\frac{1}{3}$  per cent. rate for allowance. No evidence has been given on behalf of the defendants that such hook holes are not taken into account. It is difficult to believe that goods with 1 inch,  $1\frac{1}{2}$  inches, or 2 inches cuts can be looked upon as hook holes. That letter is relied upon by the plaintiff as showing that the allowance of  $33\frac{1}{3}$  per cent. for damaged goods is not disputed. When the defendant firm asked for an arbitration I think it was then too late. The plaintiff had been told that amicable settlement would be arrived at upon the basis of the examination by Blair. I do not think he could be asked to keep the goods unsold indefinitely. Taking all the circumstances into consideration, the plaintiff was justified in thinking that the matter would be settled on the basis of the examination by Kerr Tarruck & Co.'s man. It was the fault of the defendant firm that they had not appointed a better man if Kerr Tarruck's partner's statement that he was not qualified as a surveyor or arbitrator is accepted; but there was no question of survey or arbitration. His report was to be on a selected original package. What he found in it, was to be the basis upon which the allowance was to be calculated. He undoubtedly was qualified for such work. Although I am not prepared to hold that there was an express agreement for  $33\frac{1}{3}$  per cent. arrived at the interview between Blair and the plaintiff having regard to the statement of the plaintiff that it is the customary rate and there being no express denial by the defendant firm that is not an allowable rate in respect of cuts and damages. I think the plaintiff is justified in asking for  $33\frac{1}{3}$  per cent. The only point that the defendants left open in their letter was about cuts up to 2 inches. "I think having regard to that dispute it would be just to allow the plaintiff three fourths of the amount claimed. There were 35 pieces in that package with cuts up to 1 inch. I think that cuts above one inch ought to be taken into account. I find there was no term agreed upon as regards the period within which complaints were to be made. There is everything to show that complaints were made within reasonable



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time but the settlement was unreasonably postponed. I do not think that the plaintiff's claim is barred by limitation. Section 13, Limitation Act, I hold, applies to this case. "Absent from British India" does not necessarily imply previous presence here. The provision of the English Statute has been held to apply to absence from the United Kingdom of a defendant who has never been there. Halsbury, Volume XIX, p. 56. See also *Atul Kristo Bose v. Lyon & Co.* (1), *Rampartab Samrathrai v. Foelibai* (2), *Poorno Ohunder Ghose v. Sassoon* (3). I allow the plaintiff a decree for Rs. 23,285.10-0 less Rs. 980.3-0, that is to say, for Rs. 22,305 7-0 with interest at 6 per cent. from date of suit, namely, 6th June 1916. I allow the plaintiff costs on Scale No. 2.

Mr. A. A. Avatoom (with him Mr. Ameer Aly), for the Appellants.

Sir B. C. Mitter (with him Messrs. K. P. Khaitan and N. Chowdhury), for the Respondents.

#### JUDGMENT.

MOOKERJEE, J.—This is an appeal by the defendants from a judgment of Mr. Justice Chaudhuri in a suit for recovery of money representing the depreciation in the value of goods supplied by them to the plaintiffs in a damaged condition. The plaintiffs carry on business as a firm importing printed *saries* and selling them to dealers. The defendants are a firm in London carrying on business as exporters of printed *saries*. There have been transactions between the firms since 1910, and, according to the plaintiffs, one of the terms and conditions of business was as follows:—

"Should cut and otherwise faulty pieces be found in the cases received, the plaintiff firm should examine one or more of the said cases as the plaintiff firm should think proper in order to arrive at an average of the proportion of faulty pieces in the said cases and on the basis of the said average, claim the usual allowance of 33½ per cent."

(1) 14 C. 457; 7 Ind. Deco. (N. S.) 304.

(2) 20 B. 767 at p. 776; 10 Ind. Deco. (N. S.) 1082.

(3) 25 C. 496 (F. B.); 2 C. W. N. 269; 13 Ind. Deco. (N. S.) 329.

The plaintiffs further assert that on the basis of the survey of a sample case made on the 17th March 1914 by Kerr Tarruck & Co., with the concurrence of both parties. The proportion of faulty pieces was determined as 40 per cent. The plaintiffs accordingly claimed Rs. 31,047.8 0 as from the defendants as due on faulty pieces invoiced in 1912, 1913 and 1914 as perfect goods. The plaintiffs further claimed a sum of Rs. 4,098.4 as customary interest on this amount from the 17th March 1914 to the 29th May 1916. The defendants repudiated the claim as largely exaggerated and denied liability for interest. Mr. Justice Chaudhuri has found in favour of the plaintiffs that the proportion of damaged goods should, on the basis of the survey by Kerr Tarruck & Co., be taken at 40 per cent. but he has come to the conclusion that as the cuts were of various lengths the depreciation should be allowed at the rate of, not one-third, but three-fourths of one-third, that is, one-fourth. Mr. Justice Chaudhuri has in substance held that the proportion of faulty goods should be taken to be two-fifths and the depreciation in value thereof should be taken at one-fourth. On this basis, he has allowed the plaintiffs a decree for Rs. 23,285.10-0 less Rs. 980.3-0 (covered by previous awards), that is to say, a net amount of Rs. 22,305.7 0. The claim for interest antecedent to the suit was abandoned in the Court below but interest has been allowed on the sum decreed from the date of commencement of the suit. The plaintiffs have also been awarded costs. Both parties were dissatisfied with this decree. The defendants have appealed and have contended, first, that the plaintiffs have not proved that 40 per cent. of the goods were damaged, secondly, that as, according to the learned Judge, the plaintiffs had failed to prove that the value of the damaged goods was depreciated by one third, he should not have arbitrarily assessed the depreciation at one-fourth; and, thirdly, that no interest should have been allowed before date of decree. The plaintiffs have preferred cross-objections and have contended that the depreciation in value of the damaged goods should have been assessed at one third and that the evidence does not justify a reduc-

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tion to one-fourth, which is not the case of either of the parties. We are of opinion that the appeal must succeed in part and the cross-objections must also be allowed.

In the appeal we have to consider two elements, each essential for calculation of the sum recoverable by the plaintiffs from the defendants on account of the damaged condition of the goods supplied. The evidence conclusively proves that an appreciable proportion of the goods invoiced as perfect were in fact damaged; indeed, this conclusion of the Court below has not been seriously contested here. Consequently, we have to determine in the proportion of the damaged goods and the depreciation in value on account of their damaged condition. Theoretically, the ideal method would be, if the goods were still unsold and available for inspection, to examine each piece and to determine its depreciation in value. But even if the goods were available, such a procedure would be manifestly impracticable from the point of view of transaction of mercantile business. The plaintiff stated in his deposition that when allowance for damaged goods is fixed each case is not examined, because if that were attempted, it would not only be very difficult to find room for the pieces taken out but also to fold them again; they could not plainly be sold as fresh goods, because the finish would inevitably get spoiled. It is obvious that, in these circumstances, recourse must be had to some method of averages. The question is, did the parties in the present case agree upon such a method. The correspondence between the parties, which is summarised in the judgment of Mr. Justice Chandhuri, shows that the parties did not reach an agreement on this matter before 1914. In February 1914, Mr. Blair came to Calcutta as the representative of the defendant firm. He opened one case of goods on the 19th February 1914 and examined two parcels. The parties were not, however, agreed as to the inference to be drawn from this partial examination of a single case. Mr. Blair then arranged for the examination of another case by Kerr Tarruck & Co. An officer of Kerr Tarruck and Co. actually inspected a case taken at random on the 14th March. The result of the inspection was that one

hundred and sixty pieces out of four hundred were found damaged; the length of the cuts varied from half an inch to six inches, and while some of the cuts were in the borders, others were in the middle of the pieces. The report of this inspection, dated the 17th March 1914, further shows that 20 pieces had defective colours, that is, were badly stained. The forwarding letter of Kerr Tarruck & Co. states that although, according to Mr. Blair, some of the pieces had stains 6 to 8 inches square, the stains actually found measured 3 to 5 feet in length. This report and the forwarding letter were sent to Manchester for information of the defendant firm. We are of opinion that the parties intended that the proportion of the damaged goods should be determined on the result of this inspection. The parties had carried on an inconclusive correspondence on the subject for many months; the representative of the defendants came to Calcutta for the purpose, amongst others, of settling the matter. He himself made a partial inspection of one case and then requested a well-known firm in the trade to make an inspection of another full case. If Mr. Blair had intended that the result of this inspection should not be accepted as the basis for calculation, he might easily have arranged for inspection of some more cases. The result of the inspection was communicated to the defendants; they did not suggest that the case opened could not be deemed a fair sample and they did not ask for examination of other cases. The present suit was instituted on the 6th June 1916, and the defendants made no attempt to examine Mr. Blair on commission, till the 1st July 1918. The application was adjourned and Mr. Blair died on the 10th August 1918. It is worthy of note that the application was not proceeded with, though it included the names of other members of the defendant firm as possible witnesses. In these circumstances, we hold that Mr. Justice Chandhuri has correctly found that the proportion of damaged goods must be taken at 40 per cent. on the basis of the survey made by Kerr Tarruck & Co. with the concurrence of both parties.

Next comes the question of the extent of the depreciation due to the damaged condition of the goods. Here, the application

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of the principle of averages is still more imperative from practical considerations, than it is for the purpose of ascertaining the proportion of damaged goods. The depreciation depends, not merely upon the size, but also upon the location of the cuts, while the depreciation due to stains must vary with size, location and colour of the spots. In such circumstances, an almost infinite variety and gradation is possible, and a classification is well nigh impracticable. The plaintiffs assert that the usual allowance for depreciation is one-third. The defendants only generally deny the terms alleged by the plaintiffs but do not specifically contradict the statement; they do not allege an alternative rate or rates. On the other hand, the plaintiff asserted on oath that other European firms, for instance, Ralli, Graham, Finlay Muir gave allowances on the basis of one third for damaged and cut pieces; it is significant that no attempt was made to cross-examine the plaintiff on this point. It is further worthy of note that when "cuts and jobs," are separately supplied, a reduction of one third is allowed on the price for perfect goods; the inference may, therefore, be reasonably drawn that the same rate would be allowed when these are mixed with and invoiced as perfect goods. There is also some evidence to show that previous claims by the plaintiffs, though for small amounts, were paid by the defendants at the same rate. Finally, the correspondence between the parties shows that the plaintiffs have consistently adhered throughout to the statement that the reduction in value is calculated at one-third. In their letter, dated 25th June 1914, the defendants practically admit that this is the rate, but allege that this rate is not applicable to cuts not exceeding two inches; they do not, however, state what, if any, special rate is applicable in such cases. We hold accordingly that the plaintiffs have established that the reduction in the value of damaged goods must be calculated at one-third and we are unable to uphold the conclusion of Mr. Justice Chaudhuri that the rate is one-fourth, which is not supported by any evidence on the record.

The only other point which requires consideration is, whether the plaintiffs should have been allowed interest during the pen-

dency of the suit. It is plain that such interest cannot be claimed under section 1 of the Interest Act, 1839, as the sum due is neither a "debt" nor a "sum certain" within the meaning of that section. The only statutory provision which authorises the Court to allow interest, in its discretion, in such a case is that contained in section 34 of the Code of Civil Procedure, 1908. That section contemplates interest in three stages, namely, (1) interest prior to the institution of the suit on the principal sum adjudged, as distinguished from the principal sum claimed; (2) additional interest on the principal sum adjudged, from the date of the suit to the date of the decree, at such rate as the Court deems reasonable; and (3) further interest on the aggregate sum adjudged, from the date of the decree to the date of realisation or to such earlier date as the Court thinks fit. The section does not provide for payment of interest for period antecedent to the suit but it empowers the Court when the decree is for the payment of money, to allow interest *pendente lite* as also interest subsequent to decree. We are not called upon to consider whether the plaintiffs can claim interest prior to the institution of this suit, because though such interest was claimed in the lower Court as "customary interest," the claim was abandoned at the trial. We have only to consider, whether interest *pendente lite* should have been allowed. We are of opinion that interest during the pendency of the litigation should not have been decreed. The sum recoverable by the plaintiffs is not a debt but unliquidated damages, and, as Westropp, C. J., observed in *Fram i Hormasji v. Commissioner and Deputy Commissioner of Customs, Salt and Opium* (4), interest does not run upon unliquidated damages. The same view was adopted in *Rutneshur Biswas v. Hurish Ohundur Bose* (5). We do not see why, in point of principle, a distinction should in this respect be made between interest prior to suit and interest *pendente lite*; interest prior to suit was clearly not recoverable for reasons stated in *Subramania Aiyar v. Subramania Aiyar* (6), *Boddu Sanyasiraju v. Kotra Ramamurthi* (7), though the point was

(4) 7 R. H. C. R. A. C. J. 59.

(5) 11 C. 221 at p. 2-5; 5 Ind. Dec. (N. S.) 906.

(6) 31 M. 250; 18 M. L. J. 24; 3 M. L. T. 278.

(7) 21 Ind. Cas. 543; (1913) M. W. N. 674.



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apparently overlooked in *Mahamad Ravuther v. British India Steam Navigation Company Limited* (8) We may add that interest *pendente lite* is not claimed as damages for wrongful detention of money which the defendants had profitably invested [see the observation of Lord Maugham in *Johnson v. Reg.* (9)]. We cannot also overlook the fact that there was a substantial dispute between the parties as to the basis for assessment of damages, and the litigation itself lasted for more than two years in the Court of first instance. In view of all these circumstances, we must hold that the Court should not allow the plaintiff's interest *pendente lite*.

We may add, finally, that the plea of limitation which was overruled in the Court below, was not even mentioned in the course of argument, though it was taken in one of the grounds of appeal.

The result is that the appeal is allowed in part and the cross-objection also is allowed. The decree of the Court below will be varied in two respects, namely, first, the sum due to the plaintiffs will be calculated on the basis that the depreciation in value of the goods delivered was one-third and not one-fourth; and secondly, interest will be allowed, not from date of suit, but only from date of judgment of the Court below, that is, the 20th August 1919. Subject to these variations, the decree will stand confirmed. As the victory has been a divided one, each party will bear his own costs of this appeal.

FLETCHER, J.—I agree.

*Appeal allowed in part;  
Cross objection allowed.*

(8) 1 Ind. Cas 977; 32 M. 95 at p. 130; 4 M. L. T. 110 (F. B.); 18 M. L. J. 497.

(9) 1904 A. C. 817 at p. 822; 73 L. J. P. C. 112; 91 L. T. 234; 51 W. R. 207; 20 T. L. R. 697.

## PATNA HIGH COURT.

APPEAL FROM APPEALATE DECREE No. 319  
OF 1919.

January 4, 1921.

Present :—Mr. Justice Das and  
Mr. Justice Adami.

HON'BLE Babu BHUPENDRA NATH  
BOSE AND ANOTHER DEFENDANTS—  
APPELLANTS

*versus*

AMI PRASAD SINGH AND ANOTHER  
— PLAINTIFFS

GEORGE R. TOOMEY, Esq., AND OTHERS  
— DEFENDANTS—RESPONDENTS.

*Lease—Assignment of lease—Assignee, liability of,  
covenants, extent of.*

No action of covenant will lie against an assignee of a lessee except for breaches of covenant occurring while he is assignee.

Appeal from a decision of the District Judge, Mozaffarpore, dated the 19th December 1918, affirming that of the Additional Subordinate Judge, Mozaffarpore, dated the 21st June 1917.

Messrs. S. C. Mitter and S. K. Mitter,  
for the Appellants.

Mr. L. N. Singh, for the Respondents.

JUDGMENT.—I am unable to agree with the decisions of the Courts below. I will assume that the factory, the lessee, covenanted to pay a portion of the rent due to the plaintiffs to the mortgagees of the plaintiffs. I will also assume—though I must not be understood as deciding the point—that the covenant was a covenant touching or concerning the thing demised and as such bound the appellants as the assignees of the interest of the factory. But it is well settled that no action of covenant will lie against the assignee of the lessee, except for breaches of covenant happening, while he is assignee." (See the cases cited in Smith's Leading Cases, Volume 1, page 73) It is conceded that the present suit was instituted for breaches of covenant that happened before the interest of the factory was purchased by the appellants.

If the action on the covenant will not lie against the appellants, I do not see under what other principle the liability that was of the factory could be fastened on the appellants. The plaintiffs as the lessors were, of course, entitled to proceed against the subject matter of the demise for their rent into whosoever's hand that subject-matter

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might happen to be; but such an action would be an action for rent, not an action on the covenant. Even if we were at liberty to change the action into an action for rent, it will not help the plaintiffs, because it is conceded that the claim for rent in respect of the period for which the action has been brought is barred by limitation.

The basis of the decisions of the Courts below is this: the factory was bound to pay the rent to the mortgagees and the appellants, as the purchasers of the interest of the factory, were likewise bound to pay the rent to the mortgagees. I assent to the first proposition, but I altogether deny the correctness of the second proposition. In my view, the appellants would be bound to pay the rent to the mortgagees only if the covenant on the part of the factory was a covenant running with the land and then only in respect of the period subsequent to their purchase. They, no doubt, remained liable for the rent in the sense that the plaintiffs could proceed against the thing demised for the recovery of the rent, but that liability was to the plaintiffs and not to the mortgagees. In my judgment, the defendants were not bound to pay to the mortgagees the rent in respect of the period claimed in the action, and the plaintiffs are not entitled to be reimbursed by the defendants. I would allow this appeal, set aside the judgments and decrees of the Courts below, and dismiss the action with costs throughout.

*Appeal allowed.*

### CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2110  
OF 1918.

July 29, 1920.

*Present:*—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice  
Sir Ernest Fletcher, Kt.

BALARAM GURIA, AND ON HIS DEATH  
HIS HEIR AND LEGAL REPRESENTATIVE  
SANKAR CHANDRA GURIA, MINOR,  
BY HIS NEXT FRIEND, CHAITANYA GURIA  
AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

SYAMA CHARAN MONDAL AND OTHERS  
—DEFENDANTS—RESPONDENTS.

*Adverse possession—Co-owners—Possession of one co-*

*owner, nature of—Appeal, second—Adverse possession, question of, mixed question of law and fact—Finding of fact, whether binding—Inference from such finding—High Court, power of.*

Inasmuch as the possession of one co-owner is rightful and does not imply hostility, as would the possession of a stranger, the entry and possession of land under the common title of one co-owner does not give rise to the presumption that such possession is adverse possession to the other co-owners. Ordinarily, the possession of one co-owner is for the benefit of all co-owners. [p. 300, cols. 1 & 2.]

The question of adverse possession is a mixed question of law and fact, and although a Court of second appeal is bound to accept as conclusive a finding on a question of fact, yet where the question is whether from the facts found an inference can fairly be drawn that possession is adverse, it is a question of law, which that Court is entitled to investigate. [p. 301, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, Jessore, dated the 22nd of August 1918, reversing that of the Munsif, First Court, at Narail, dated the 31st of July 1917.

FACTS appear from the judgment.

Babus Surendra Chandra Sen and Hemendra Chandra Sen, for the Appellants.—Plaintiffs are the appellants. The appeal arises out of a suit for recovery of possession of land on declaration of title. The first Court decreed the suit. On appeal it was dismissed on the ground that there was adverse possession. Having regard to the decision in *Hardit Singh v. Gurmukh Singh* (1), I submit the decision is not correct. There are findings to this effect that my vendor purchased it from Jharu and Baikuntha who are admittedly two third sharers. The question is whether their title has been extinguished by adverse possession. See *Lokenath Singh v. Dhakeswar Prosad Narayan Singh* (2) and *Jatindra Nath Roy v. Sabidanessa Bhatun* [*Narendra Bhusan Roy v. Jogendra Nath Roy*] (3). That ruling has been followed in *Hardit Singh v. Gurmukh Singh* (1). There is no indication whether the mere fact of exclusive possession by one co-sharer will amount to adverse possession. In order to extinguish the title, I submit, there must be assertion of hostile title by other co-sharers. These are the principles. The lower Appel-

(1) 47 Ind. Cas. 626; 28 C. L. J. 437; 58 P. W. R. 1918; 64 P. R. 1918; 24 M. L. T. 389; 20 Bom. L. R. 1064; (1919 M. W. N. 1; 9 L. W. 123; 1 U. P. L. R. (P. O.) 8 (P. O.).

(2) 27 Ind. Cas. 465; 20 C. W. N. 51; 21 C. L. J. 253.

(3) 35 Ind. Cas. 36; 20 C. W. N. 1258; 24 C. L. J. 165.

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late Court has not gone into that question. The first Court decides in my favour. The principal question is whether possession by co-sharer will amount to adverse possession. The lower Appellate Court, no doubt, finds against me, but he has not considered the main point, namely, the sole possession of the *iama*.

Babus *Sarat Chandra Roy Ohoudhuri* and *Mukunda Behari Mullick*, for the Respondents.—The question here is whether the title of Baikuntha and others ever ceased to subsist by adverse possession. It depends upon other circumstances. They were not here for fifty years; other two brothers were in possession. No rent was paid by them. The two brothers who were in possession paid rent. They conveyed a portion of the land to strangers. Mere long possession will not amount to ouster. There are other circumstances. Here the brothers in possession conveyed a portion of it by registered documents at any rate, from 1870, the possession would be adverse. This is the finding. The Court of Appeal below came to the conclusion that the possession was adverse. Since 1876 Harachand dealt with the property as his own. Is not that finding sufficient? No express notice is necessary. Your Lordships' decisions are to the effect that only notorious acts are sufficient. From 1876 to 1901 I go on selling properties as my own. Is that not sufficient to show that the possession is adverse? In the *kabuliyat* the whole of the property is described as his own; then he sells a portion of it. One of the brothers, Gargadhar, inherited his share. The decision in *Hardit Singh v. Gurmukh Singh* (1) is based on joint possession. See *Ayennessa Bibi v. Sheikh Isuf* (4). Mere non-participation will not do. The lower Appellate Court, taking all the circumstances into consideration, has come to the proper finding that there was adverse possession. In *Lokenath Singh v. Dhwaakeshwar Prosad Narayan Singh* (2). Your Lordships laid down the principle which has been the guidance of the lower Appellate Court. No open notice is necessary. Registered conveyance is not an open act. The Subordinate Judge does not rely upon their non possession for fifty years but says that they left the place for good. There are several *kobalas*, they show how Harachand dealt with the property as his own since 1284 corresponding to 1876. There

(4) 14 Ind. Cas. 722; 16 C. W. N. 849.

are the circumstances upon which the Subordinate Judge came to the conclusion. Your Lordships have laid down that adverse possession is a mixed question of law and fact. That is true. The findings arrived at by the lower Appellate Court, I submit, are correct.

## JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal by the plaintiffs in a suit for recovery of possession of land on declaration of title. The land belonged to one Bhagirath Majhi, who left four sons, Gangadhar, Baikuntha, Lakhan and Jharu, Baikuntha and Jharu left the ancestral home and went to reside in a different village. The plaintiffs claim title by purchase from the representatives of Baikuntha and Jharu. The defendants claim title by purchase from the representatives of the other two brothers. The substantial question in controversy between the parties is, whether the title of Baikuntha and Jharu was extinguished by adverse possession on behalf of their brothers. The Court of first instance found that adverse possession had not been established, and decreed the suit. The Subordinate Judge has taken a different view, and has dismissed the suit. The Subordinate Judge has found that Baikuntha and Jharu removed to another village; that the predecessors-in interest of the plaintiffs were not in possession for 50 years; that during this period the property was possessed by the co-owners; that the predecessors-in-interest of the defendants have alone paid rent to the superior landlord, and have dealt with the property as their own since at least 1278. The appellants have contended that, assuming that these facts have been correctly found, they do not show that the title of the predecessor of the plaintiffs was extinguished by adverse possession on the part of their co-owners.

It is plain from the judgment of the Subordinate Judge that he has not kept in view the principles applicable to cases of this character, which must now be deemed to be well settled and beyond controversy. The question has been considered by the Judicial Committee in three recent cases, namely, *Corea v. Appuhamy* (5), *Muttunayagam v. Brito* (6) and *Hardit Singh v. Gurmukh* (5) (1912) A. C. 230 at p. 236; 81 L. J. P. C. 151; 105 L. T. 836.

(6) (1918) A. C. 165; 87 L. J. P. C. 146.



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*Singh* (1). In the first of these cases, *Corea v. Appuhamy* (5), Lord Maugham cited with approval the dictum of Vice-Chancellor Page Wood in *Thomas v. Thomas* (7), namely, that possession is never considered adverse if it can be referred to a lawful title, and held that possession of one co-parcener could not be held *prima facie* as adverse to other co-parceners. Lord Maugham, however, added that in former times, before the Statute of William IV when the justice of the case seemed to require it, Juries were sometimes directed that they might presume an ouster. This is borne out by the judgment of Lord Denman, C. J., in *Culley v. Doe d. Tylerson* (8) where we find the following observations:— "Generally speaking, one tenant-in-common cannot maintain an ejectment against another tenant-in-common, because the possession of one tenant-in-common is the possession of the other, and, to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But, where the claimant, tenant-in-common, has not been in the participation of the rents and profits for a considerable length of time and other circumstances concur, the Judge will direct the Jury to take into consideration whether they will presume that there has been an ouster; as to which see the cases of *Doe d. Fisher v. Prosser* (9), *Doe d. Hellings v. Bird* (10) and *Doe d. White v. Off* (11)." The same view was taken by Lord Denman in *Muttunayagam v. Brito* (6) and by Lord Buckmaster in *Hardit Singh v. Gurmukh Singh* (1). Among the cases in this Court, reference may be made to the decisions in *Jogendra Nath Roy v. Baladeo Das* (12), *Ayenussa Bibi v. Sheikh Isuf* (4), *Lokenath Singh v. Dhurakeshwar Prasad Narayan Singh* (2) and *Jotenra Nath Roy v. Sabidannessa Khatun* [*Narendra Bhusan Roy v. Jogendra Nath Roy*] (3). In the words of the judgment in the first of these cases, the principle may be stated in the following terms. The fundamental rule is that the entry and possession of land under the common title of one co-owner,

(7) (1855) 2 K. & J. 79 at p. 83; 25 L. J. Ch. 159; 1 Jur. (N. S.) 1160; 4 W. R. 135; 69 E. R. 701; 110 R. R. 107.

(8) (1840) 11 A. & E. 1008 at p. 1014; 3 P. & D. 589; 9 L. J. (N. S.) Q. B. 288; 52 R. P. 566; 113 E. R. 697.

(9) (1774) 1 Cowper 217; 98 E. R. 1052.

(10) (1809) 11 East 49; 103 E. R. 922.

(11) (1808) 1 Camp 178.

(12) 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735.

will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all. The obvious reason for this rule is that the possession of one co-owner is, in itself, rightful and does not imply hostility, as would the possession of a mere stranger. The law will never construe a possession tortious, unless from necessity; on the other hand, it will consider every possession lawful, the commencement and continuance of which is not proved to be wrongful; and this upon the plain principle, that every man shall be presumed to act in obedience to his duty until the contrary appears. In other words, the only difference between the possession of a co-owner and other cases is, that acts, which, if done by a stranger, would *per se* be a *disseisin*, are, in the case of tenancies-in-common, susceptible of explanation consistently with the real title; acts of ownership are not, in tenancies-in-common, acts of *disseisin*; it depends upon the intent with which they are done and their notoriety: the law will not presume that one tenant-in-common intends to oust another; the facts must be notorious and the intent must be established in proof.

Now, if we apply these principles to the case before us, what is the position? Stress is laid on the fact that the predecessors of the plaintiffs left the village fifty years ago, and that the property was thereafter in the occupation of their brothers. There is, however, nothing to indicate that their possession of the entire property was in its inception unlawful. On the other hand, the presumption is that the co-owners possessed the entire property in their character as co-owners as they were entitled to do, when the co-tenants were in another place. It is next urged that these co-owners who were in enjoyment of the entire profits alone, paid rent to the superior landlord. The obvious answer is that the rent to the superior landlord would have to be paid in any event, as otherwise the tenancy would be sold; and, it may be presumed that, when the entire rent was paid by the persons who took the whole profits, they only did what might be expected from them in the circumstances. It is then said that the absent co-tenants did not put forward any special claim when succession took place by reason of death in the family. But this is conduct which

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admits of an obvious explanation; the persons who were in possession as co-owners would be entitled to continue in possession as co-owners, notwithstanding the death of one or other of the co-tenants. Finally, it is contended that one of the co-owners has dealt with the land as his own since 1878. This statement is of a somewhat sweeping character. On examination, it appears that on the 18th March 1878 this co-owner transferred the entire lands or only a portion thereof (this is a point upon which the two parties are not here agreed) to his infant nephew. Whether this was a real transaction, or not, may be a matter of doubt; the Court of first instance was inclined to the view that this was a fictitious transaction. The infant, on attainment of age, on the 23rd December 1902, transferred the property to one Kunja Biewas (the second defendant), who, on the 23rd March 1908, transferred it to the first defendant, Shyama Charan Mondal. The Trial Court expressed the opinion that these frequent transfers were calculated to create considerable suspicion about the reality of possession of the successive transferees. The question thus arises, whether the conveyance of the 18th March 1878 can be treated as an act of ouster of the predecessor of the plaintiffs. We are not prepared to hold that the mere execution of the conveyance was an act of such notoriety as to impress on the predecessors of the plaintiffs that their co-sharers who lived in the village and occupied the joint property intended to set up a hostile title against them. In our opinion, it is impossible to hold, on the facts found, that the title of the predecessors of the plaintiffs was extinguished by adverse possession, on the part of their co-owners.

It has been contended on behalf of the respondents, as a last resort, that this a matter with which we are not competent to deal in second appeal. It is plain, however, from the decision of the Judicial Committee in the case of *Lachmeswar Singh v. Manowar Hossein* (13) that the question of adverse possession which we have to determine is a mixed question of fact and law. In respect of the facts found by the lower

Appellate Court, which is the final Court competent to deal with facts, we are bound to accept them as conclusive. But when we are called upon to consider whether, from the facts found, an inference can fairly be drawn that the possession was adverse, it is a question of law which we are entitled to investigate. The facts found need not be questioned; it is the soundness of the conclusion from them that is in question, and this is a matter of law [see also *Ramgopal v. Shamskhaton* (14), *Satgur Prasad v. Raj Kishore Lal* (15), *Ishan Chunder v. Bishu Sirdar* (16), *Rajaram v. Ganesh Hari* (17), *Rajoh Makund Deb v. Gopi Nath Sahu* (18), *Maruti v. Banubai* (19), *Venkatesh v. Bhavanishankar* (20), *Rajaram Tuljaram v. Nanchand Tuljaram* (21), *Pandurang v. Anant* (22), *Ganapati Ambados v. Raghunath Anant* (23).

The result is, that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored with costs in all the Courts.

FLETCHER, J.—I agree.

*Appeal allowed.*

- (14) 19 I. A. 223; 20 C. 93; 6 Sar. P. C. J. 247; 17 Ind. Jur. 38; 10 Ind. Dec. (N. S.) 63.  
 (15) 55 Ind. Cas. 486; 42 A. 152; 11 L. W. 384; (1920) M. W. N. 3; 24 C. W. N. 394; 38 M. L. J. 259; 18 A. L. J. 235; 2 U. P. L. R. (P. C.) 55; 22 Bom. L. R. 451; 46 I. A. 197; 27 M. L. T. 200 (P. C.).  
 (16) 24 C. 825; 1 C. W. N. 665; 12 Ind. Dec. (N. S.) 12.7.  
 (17) 21 B. 9; 11 Ind. Dec. (N. S.) 63.  
 (18) 25 Ind. Cas. 286; 21 C. L. J. 45.  
 (19) 4 Bom. L. R. 871 at p. 808.  
 (20) 5 Bom. L. R. 174.  
 (21) 5 Bom. L. R. 225.  
 (22) 5 Bom. L. R. 956 at p. 933.  
 (23) 4 Ind. Cas. 244; 11 Bom. L. R. 1057; 33 B. 712.

(13) 19 I. A. 46; 19 C. 253; 6 Sar. P. C. J. 133; 19 Ind. Dec. (N. S.) 614.

VISVANADHAN CHETTI v. ARUNACHALAM CHETTI.

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 662 OF 1919.

October 6, 1920.

Present:—Sir John Wallis, Kt., Chief Justice, Justice Sir William Ayling, Kt., Mr. Justice Sadasiva Aiyar, Mr. Justice Napier and Mr. Justice Krishnan.

E. M. VISVANADHAN CHETTI

AND OTHERS—DEFENDANT No. 2

AND PLAINTIFFS NOS. 1 AND 2—

APPELLANTS

versus

ARUNACHALAM CHETTI—DEFENDANT

No. 1—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 73—Money deposited in Court to credit of judgment-debtor—Subsequent attachment—Rateable distribution.*

Where money is deposited in Court to the credit of a judgment-debtor before any decree-holder applies in execution to have it paid in satisfaction of his decree, it is liable to rateable distribution among decree-holders who apply for execution either before or after the receipt of the money by the Court. [p. 306, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Sivaganga, in Appeal Suit No. 85 of 1918, preferred against the decree of the Court of the Additional District Munsif, Sivaganga, in Original Suit No. 477 of 1916.

This second appeal coming on for hearing on the 27th February 1920, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit, and upon hearing the arguments of Messrs. K. Raja Aiyar and V. Ramanwami Aiyar, for the Appellants, and of Messrs. A. Krishnaswami Aiyar and M. Patanjali Sastri, for the Respondent, and the case having stood over for consideration till the 5th of March 1920, the Court (Sadasiva Aiyar and Spencer, JJ.) made the following

#### ORDER OF REFERENCE TO A FULL BENCH.

SPENCER, J.—The question to be decided in this second appeal is, whether money deposited in Court to the credit of a judgment-debtor before any decree holder applies in execution to have it paid towards the satisfaction of his decree should be dealt with on a system of priority when several decree-holders afterwards come in

and apply to have it attached or whether it should be rateably distributed among them.

In this case the money was deposited on January 7th 1909 by the judgment-debtor in Original Suit No. 207 of 1903 to the credit of his decree holder, Muthiah Chetty, and was about to lapse to Government on 15th February 1916, when the appellants attached it on December 23rd 1915 in execution of their decree in Original Suit No. 87 of 1913. The respondent (another decree holder) came in later on, February 25th, and obtained rateable distribution, notwithstanding the fact that the amount would have lapsed to Government by the date he filed his execution petition had it not been for the appellants' diligence. The present suit was brought to obtain a re-adjustment of the order for rateable distribution passed in execution.

On the point of law, as stated above, there is a considerable difference of opinion.

Section 73, Civil Procedure Code, does not in terms apply, because the money deposited is not strictly speaking "assets held" in the process of execution [*Vide Sorabji Ooovarji v. Kala Raghunath* (1)] and because the persons desirous of having it paid towards their decrees did not apply for execution before the money was received. [*Vide Tiruchittambala Chetti v. Seshayangar* (2).]

Order XXI, rule 52, Civil Procedure Code has been held by Bakewell, J., in *Suikena Katum Sahiba v. Muhammad Abdul Aziz* (3) to be the appropriate section of the Code for disposing of such a fund but in his opinion that section does not stand in the way of the Court making a rateable distribution disregarding the order in which attachments have been made, as attachment does not confer any right of priority. A similar view was taken by Sanderson, C. J., and Mookerjee, J., in *Thakurdas Moti Lal v. Joseph Iskendar* (4) on general principles of justice, equity and good conscience. On the other hand, in the

(1) 12 Ind. Cas. 911; 36 B. 156; 13 Bom. L. 1193.

(2) 4 M. 383; 1 Ind. Dec. (N. S.) 1102.

(3) 29 Ind. Cas. 239; 38 M. 221.

(4) 41 Ind. Cas. 516; 44 C. 1072; 25 C. L. J. 505; 21 C. W. N. 887.



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latest reported case of this Court in *Umma Venkatratnam & Co. v. Adamji Usman & Co.* (5) Oldfield and Seshagiri Aiyar, J.J., have laid down that in such cases the diligence of the first applicant should be rewarded by paying him in full before other decree-holders are allowed to take a share; and this decision has been followed since in an unreported case, Civil Revision Petition No. 1309 of 1917 by Bakewell, J.

Bakewell, J., in 38 Mad. [*Suikena Katum Sahiba v. Muhammad Abdul Aziz* (3)] followed the practice in administration suits which was fully discussed in *Soobul Ohundur Law v. Russick Lall Mitter* (6).

Seshagiri Aiyar, J., in his judgment in *Umma Venkatratnam & Co. v. Adamji Usman & Co.* (5), purports to follow the judgment of Wallis, C. J., in *Tiruvangadial v. Thiruvangadih* (7), but the head-note in that case does not properly represent what was decided.

Under these circumstances, I think that an authoritative decision is needed for the guidance of Courts which are hesitating whether under the compulsion of Act XVIII of 1875 to follow the opinion of a single Judge reported in the authorised reports, or to follow the judgment of a Bench which has not been so reported, when the single Judge who pronounced the former judgment has since subscribed to the decision of the Bench of two Judges who took a different view. I would, therefore, refer the question stated at the beginning of this reference to a Full Bench.

SADASIVA AIYAR, J.—I agree that the question raised is an important one and as the answer is not free from difficulty, it should be referred to a Full Bench.

In the old section, the words were "are realized by sale or otherwise" and "prior to the realization". In the new section, the words are "are held" and "before the receipt of such assets." I do not think the change of language is very material. The moneys which were held not liable to be distributed under old section 295 because they were not realised by sale or otherwise but were voluntarily paid into Court seem

(5) 50 Ind. Cas. 925; 26 M. L. T. 82; (1919) M. W. N. 623; 42 M. 692.

(6) 15 C. 202; 12 Ind. Jur. 307; 7 Ind. Dec. (N. S.) 719.

(7) 24 Ind. Cas. 617; 26 M. L. J. 364.

also to be governed by section 73 [See *Vibudapriya Tirthaswami v. Yusuf Sahib* (8) for the old law] (moneys whether in the possession of the same Court or of another Court are attached by the procedure laid down in Order XXI, rule 52).

Both the new section (73) and the old section (295) contemplated rateable distribution only among those decree-holders who have applied for execution before the receipt by the Court of the moneys sought to be operated upon. On that ground, section 73 does not, in terms, apply to the present case. I am not quite sure of the other ground mentioned in my learned brother's opinion for taking the case out of section 73, namely, that the moneys were not "assets held" in the process of execution. I am inclined to think that they are so held. The case in *Sorabji Covvarji v. Kala Raghunath* (1) referred to was a case in which the assets were deposited by the judgment-debtor for the particular purpose of satisfying two individual creditors and hence, it was decided that the assets were not held in the process of execution, that is, as assets to be disposed of by the Court in execution proceedings in accordance with the general provisions of the Civil Procedure Code relating to execution, including section 73. In the present case, the assets remained in Court to the credit of the judgment-debtor and had not been earmarked by him to be paid to any of the competing decree holders in particular and when attached, were (it seems to me) assets held in the process of execution.

In deciding the difficult point in dispute some weight has to be given to the argument that the fact that the Legislature specially provided for rateable distribution among those competing decree-holders who had put in execution petitions before receipt of assets is some indication that the Legislature probably intended a different rule to be followed when the competition was between decree-holders who put in execution applications after the date of the receipt of assets.

This second appeal came on for hearing on the 8th and 9th of September 1920 in pursuance of the above Order of Reference to a Full Bench.

(8) 28 M. 380; 15 M. L. J. 202.

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Mr. K. Rajah Aiyar (with him Mr. V. Ramasami Aiyar), for the Appellants.—When the Statute provides for rateable distribution under certain conditions there cannot be anything as equitable rateable distribution or inherent powers of Court apart from Statute. The requisites of the section must be complied with.

In the case of a fund in Court attached under Order XXI, rule 52, Civil Procedure Code, the proviso expressly recognizes priority. *Umma Venkataratnam & Co. v. Adamji Usman & Co.* (5).

[WALLIS, C. J.—The proviso is a remnant of the old Code which recognized priority. You cannot rely upon it.]

The question is when such fund in Court becomes assets held by the Court.

[WALLIS, C. J.—First take the case of two different Courts, one the attaching Court and the other the custody Court.]

Then the attachment is ordered in terms of Order XXI, rule 52 and communicated to the custody Court. The further procedure is prescribed by the Civil Rules of Practice, rule 179 and rule 180 which convert the custody Court into the distributing Court.

[WALLIS, C. J.—Rule 179 goes beyond the section. Why should the attaching decree-holder be compelled to transfer his decree to the Court where the fund is?]

The rule is *intra vires*. It provides the machinery for working out the scope of rule 52.

[WALLIS, C. J.—The custody Court has to transmit the money to the attaching Court and then it becomes liable to be rateably distributed under section 73.]

My submission is, no there is no such procedure prescribed. If there are several attachments by different Courts, what is the custody Court to do? Why should priority of attachment confer any right in such a case? Rules 179, 180 will simplify matters and the custody Court will distribute as provided by rule 52.

[COURT. Take the case of a single Court.]

Yes. In such a case, the receipt of assets is when it first comes into Court. The language used is "where assets are held by a Court." There is only one Court not as many Courts as there are suits.

[COURT. Must there be a transfer to the credit of the suit?]

ANSWER. There is no warrant for that in

the section. Here there is an order to attach. The attachment makes it assets received by the Court. The respondent's application is later and he is not entitled to the benefit of section 73.

Mr. A. Krishnasami Iyer, for the Respondent—I am content to bring myself under section 73—I contend that I applied before assets were received. A bare order to attach is of no effect. It does not confer title or priority. The doctrine is well-settled. Here the assets must be deemed to have been received only later.

Mr. Rajah Aiyar, in reply.—If there was no receipt of assets when the order to attach was passed there was no subsequent order transferring to the credit of the suit and hence also the order under section 73 will be bad.

#### JUDGMENT.

WALLIS, C. J.—The answer to the reference appears to depend on the construction of Order XXI, rule 52 of the Code of Civil Procedure, which was first enacted as section 237 of the Code of 1859, under which the first attaching decree holder was entitled, as the first judgment-creditor suing out a writ of *fifa* in England to have his claim satisfied in full out of the proceeds of execution, the surplus only being liable under the Codes to rateable distribution among subsequent attaching creditors. It was, however, retained as section 272 of the later Codes under which, by virtue of section 295, now 73, the attaching judgment-creditors were obliged to submit to rateable distribution with, but only with, other decree holders who had applied to the attaching Court for execution before the date specified in the section. Now, it does not seem likely that the Legislature would have retained, and even extended the old section 217 by substituting the word "property" for "money or any security", if it had considered that it would interfere with the due working of the procedure for rateable distribution introduced by section 295, and would authorise the admission to rateable distribution of decree-holders who had not entitled themselves to rateable distribution under section 295 by applying for execution to the Court in which the first attaching decree-holder's decree was being executed, but had themselves subsequently to the

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first attachment, attached the property in the Court which had the custody of it, hereinafter called the custody Court. The procedure for rateable distribution under section 295, now 73, applies to attached property in the custody of a Court just as much as to any other kind of attached property, and in my opinion precludes any rateable distribution on equitable grounds of property attached under rule 52 among any other class of decree-holders.

The section, which is now rule 52, prescribes a form of attachment for property which is "in the custody of a Court or any Public Officer" and "under the attachment is to be held subject to the further orders" of the attaching Court. Where the property attached is in the custody of a Public Officer, it is clearly the duty of the attaching Court to provide if necessary for the realization of the property and to divide the proceeds of the realization rateably between the attaching decree-holder and the other decree-holders who have applied to it for execution before it received such proceeds in satisfaction of their decrees. If the attached property is money, it is now, in my opinion, the duty of the attaching Court, having regard to the provisions of section 295, to call on the Public Officer to pay it into Court and to deal with it in the same manner. When the property attached is in the custody of a Court it is equally to be held by the custody Court subject to the further orders of the attaching Court and subject also to the proviso which has next to be examined which does not, in my opinion, either relieve the attaching Court of the duty of getting in and distributing the money or proceeds of realization, if available, and distributing them among the decree-holders entitled under section 295, now 73, or authorise the custody Court to embark on another sort of rateable distribution among another class of decree-holders. The proviso only says that "any question of title or priority arising between the decree-holders" (meaning the decree-holder who had made the attachment) "and any other person not being the judgment-debtor claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined

by such Court," the custody Court. This will include claims questioning the title of the judgment-debtor and other cases, but, taking the present case of the property in the custody Court being made the subject of several attachment in execution of several decrees, the custody Court is then, in my opinion, required by the proviso to determine which of these attachments is entitled to priority, and, in the absence of any legislative provision, (section 63 which has given rise to difficulties which need not now be considered does not apply to the present case), to award such priority to the first attachment in date because that attachment became complete on the service of the notice on the custody Court and subsequent attachments cannot, in the absence of express legislative provision, affect the right of the first attaching creditor to have the attached property realized in execution of his decree and distributed rateably among the decree-holders entitled under section 295, now 73, in satisfaction of their decrees. If the other decree-holders want to share in the rateable distribution, their proper course is to apply in time, if they can, to the attaching or executing Court; and if, instead of doing so, they choose to attach the property in the custody Court, the result will be that the attaching decree holder who is second in point of time will be entitled to proceed in execution against any balance that may be left in the hands of the custody Court after the full satisfaction of the decree of the first attaching decree holder and of the other decree-holders who have entitled themselves to rateable distribution under section 295, now 73, in executing his decree. For these reasons, I am of opinion, with great respect, that the decisions in *Suikena Katum Sahiba v. Muhammad Abdul Aziz* (3) and in *Thakurdas Moti Lal v. Joseph Iskender* (4) allowing rateable distribution among decree holders attaching the property in the custody Court should not be followed.

The same principles must be applied in the present case in which the attaching Court and the custody Court are the same. The fact that money was lying in Court to the credit of the judgment-debtor in a suit other than that in which the attachments were made does not make it assets "held by a Court" within the



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meaning of section 73 which clearly refers to assets levied in execution or paid into Court in satisfaction of the decree under execution, and not to assets lying in the same Court to the credit of the judgment-debtor in another suit. Such assets may, of course, be attached by the Court in execution of another decree of the same Court. The Code does not say how such attachment is to be made. The order "attach" appears to be sufficient, though, of course, some record of the attachment must be placed among the records of the suits to the credit of which the money is lying. On the other hand, the order of attachment does not of itself effect a transfer to the credit of the suit in which the attachment is made so as to constitute a receipt of assets within the meaning of section 73. The money may not be available as being already subject to another attachment possibly in another Court, and it is only when the attaching Court comes to the conclusion that there is no objection and orders the transfer of the money or so much as is necessary to satisfy the decree-holders who have applied to it for execution, to be transferred to the credit of the first attaching creditor's suit which it is engaged in executing that there can be said to be a receipt of assets within the meaning of section 73 and that a rateable distribution can be made. Judged by this test, the respondents in this appeal were entitled to rateable distribution, not on the grounds assigned in the lower Courts and referred to in the reference, but under section 73, Civil Procedure Code, because they applied for execution of their decrees to the Court executing the first attaching creditor's decree before the receipt of assets by that Court. The appeal, therefore, fails and is dismissed with costs.

AYLING, J.—I agree.

NAPIER, J.—I agree.

SADASIVA AYYAR, J.—I agree with my Lord in his reasoning and in his conclusion. I shall, however, say a few words of my own principally on the question "what further receipt of assets" means. In our referring orders, Spencer, J., and myself held that section 73 of the Civil Procedure Code did not in terms apply to the present case. Spencer, J.'s reasons were two, namely,

(1) because "the money deposited" was not "assets held" within the meaning of those words in that section; and (2) because execution was not applied for "before the receipt of" such assets within the meaning of those words in that same section. My sole reason was the reason No. 2 of Mr. Justice Spencer as I was doubtful about his reason No. 1. On the further consideration which I have been able to give to this case, I am satisfied that the second reason also is not valid as the words "before receipt of such assets" in section 73 though much more clear than the words "prior to the realization" in the old section 295 (realization having been a word of controverted meaning) must themselves be qualified by the understood words "levied in the course of execution and paid into Court in satisfaction of any of the decrees under execution or transferred for purposes of execution to the credit of one or more of the decrees under execution."

In the present case, the assets seem not to have been "received" in this sense till long after the dates of the two attachments in question and in fact, till the money was impliedly so transferred to the credit of one or both of the decrees just before the order was passed for rateable distribution. Hence, section 73 clearly applies.

As regards Order XXI, rule 52, the proviso in the 2nd paragraph is an exception to the 1st paragraph and the words "question of priority by attachments" in the 2nd paragraph, in my opinion, were intended to include questions of priority arising by reason of attachments made by several executing Courts but not questions of priority arising out of attachments made by decree-holders executing through the same Courts where the latter Court is not the custody Court.

I think that portions of rules 179 and 180 of the Civil Rules of Practice which require that the Court should proceed in certain cases mentioned in rule 179 as if the decree-holder was an assignee of the judgment-debtor and require, in certain cases mentioned in rule 180, that "the execution petition shall ask that the decree may be transmitted to the custody Court," are *ultra vires* as being inconsistent with the rights and privileges given to decree-

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holders and their assignees in the old Civil Procedure Code and as not having been framed in the manner and by the authority prescribed by the new Code for the making of valid new rules and for altering existing rules.

Rules 179 and 180 of the Civil Rules of Practice are, however, very convenient rules and, if followed, would markedly diminish the number of conflicts among orders passed by different Courts as the directions in these rules when followed have the effect of converting the custody Court into the executing Court. I would, therefore, suggest to the Rule Committee to take up this question and frame new rules on the lines of Rules 179 and 180 of the Civil Rules of Practice to avoid as far as possible nice, intricate and difficult questions as regards the conflict of jurisdiction and powers among Courts being litigated in execution proceedings.

KRISHNAN, J.—As I agree with the judgment of the learned Chief Justice who has dealt with the case very fully. I shall only briefly state my reasons.

It seems to me that Order XXI, rule 52, Civil Procedure Code, is the provision for the attachment of money or property in the custody of any Court whether that Court be the same Court as the attaching Court or a different Court. There is no limitation on the point in the wording of the rule and there is no other provision for attachment when the attaching Court and the "custody Court" are one and the same. When the two are the same, it seems to me that, as attaching Court, it will act in the suit in which the attachment order was made, and as custody Court, in the suits in which the money or property attached was brought into Court. This is the only distinction that I can see when the Court acts.

As the custody Court, it will decide in the latter suit the questions arising under the proviso to rule 52 such as questions of title arising in claim petitions under rule 58 and if there are attachments by more Courts than one on the property, questions as to which attachment has priority. After deciding these it will hold the property, as the rule directs, subject to the further orders of the Court whose attachment it has held to have priority

whether it is the same Court or another Court. The position is just the same whether the custody Court is the same Court as the attaching Court or a different Court.

The custody Court has, in my view, nothing to do with the distribution of assets under the Code, as it has to hold the property subject to the further orders of the attaching Court, and section 73 of the Civil Procedure Code has no application in the custody Court. If the property attached has to be sold to convert it into money, the attaching Court will take the necessary steps under the rules for sale in the Code as in the case of any other property attached. But if it is money in the hands of the custody Court, the attaching Court may direct the money to be paid over to itself. It is only when the attaching Court gets the money into its hands, so as to be available for distribution that section 73, Civil Procedure Code, comes into play; rateable distribution will then have to be given to all decree-holders who have brought themselves under the terms of the section by having applied for execution prior to the receipt of such assets. When the attaching Court and the custody Court are the same, it seems to me that an order should be made by the Court as attaching Court for transferring the money from the suit in which it came into Court to the suit in which the attachment took place. It is only when this is done, the Court as attaching Court can properly be said to have received the assets and to hold it within the meaning of section 73; and decree-holders who have attached prior to that are entitled to rateable distribution.

This view, it seems to me, is in complete accord with the provisions of the Code and applies the statutory rule of rateable distribution to all cases including property in the custody of a Court. There is no necessity to treat the case of such property as different from the case of other properties as regards rateable distribution and as an exception to the general rule, and to rely on equitable principles as was done in *Thakurdas Moti Lal v. Joseph Iskender* (4) and in *Suikseena Katum Sahiba v. Muhammad Abdul Aziz* (3). In fact, when there is a statutory rule governing the case, there is no room, in my view, for the application

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of equitable principles and, with all respect to the learned Judges in the Calcutta and Madras cases, I agree that they should not be followed. The Code makes no difference between property in the custody of the attaching Court itself, property in the custody of other Courts or in the custody of Public Officers and property in the possession of other persons as regards the method of distribution; the difference under the Code is in the method of attachment and in the mode of decision as to its effect and validity. After the assets have been realised by the executing Court, section 73 of the Civil Procedure Code applies to all of them equally. If the other decree holders cannot bring themselves within the section the decree-holder under whose attachment the assets were realised must be paid in full, for section 73 is the only provision which enables other decree-holders to share with him. (See *Umma Venkatratnam & Co. v. Adamji Usman & Co.* (5).]

Applying this view to the present case, the second appeal before us fails, and I agree to its being dismissed with costs.

M. C. P.

*Appeal dismissed.*

### PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 307  
OF 1919.

January 4, 1921.

Present :—Mr. Justice Das, and  
Mr. Justice Adami.

MAHESHWAR PRASAD SINGH  
AND OTHERS—APPELLANTS

versus

BABU RAM RAI AND OTHERS—  
RESPONDENTS.

*Mortgage—Accretion to mortgaged property—Intention to keep accretion as separate acquisition—Merger—Redemption.*

The general principle is that any acquisitions by the mortgagees are treated as accretions to the mortgaged properties and are, therefore, subject to redemption. But though the mortgagees may treat the acquisitions as accretions to the mortgaged property, he may, if he choose, keep them for his

own benefit and distinct from the mortgaged property. [p. 309, col. 1.]

Appeal from a decision of the District Judge, Mozaffarpore.

Messrs. S. H. Imam, Siva Saran Lal and Sant Prasad, for the Appellants.

Messrs. Rajendra Prasad, S. O. Mitter and B. N. Mitter, for the Respondents.

### JUDGMENT.

DAS, J.—I am of opinion that the matter must be reconsidered by the learned District Judge. The Court of first instance recorded a finding to the effect that the lands in dispute were the tenancy lands of the mortgagors and of Harakh. I do not understand the learned District Judge to dissent from this view, but he has recorded a finding that "the land must have been settled with the mortgagors by the *zerpeshgidars*." He gives as his reason for this finding the fact that there is no mention of any such holding in the *zerpeshgi* deed itself. I am wholly unable to follow this line of reasoning. The fact that there is no mention of any such holding in the *zerpeshgi* deed is no doubt consistent with the case of the plaintiffs that the lands, being the *bakasht* and *zirat* lands of the mortgagors, passed with the mortgage and formed part of the mortgage security without any express mention; but it is also consistent with the case of the defendants that the lands were the tenancy lands of the mortgagors and did not form part of the mortgage security. In my judgment, a mere perusal of the *zerpeshgi* deed does not decide the question which must be determined on the evidence in the case. The defendants strongly rely upon the fact that, so far as 11 *bighas* belonging to the mortgagors are concerned, they were undoubtedly in the possession of the mortgagors and were purchased by the mortgagees in execution of a rent-decree against them. They argue that this 11 *bighas* could not have passed to them as part of the mortgage security.

To this the answer is that they did pass along with the mortgage, but were subsequently settled with the mortgagors by the mortgagees. Unless the plaintiffs can establish the fact of the subsequent settlement by cogent evidence, they must fail on this point. The finding of the learned District Judge on this point is defec-



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tive inasmuch as it is based not on evidence but on surmise.

But it seems to me that the learned District Judge did not altogether reject the theory that these lands were the tenancy lands of the mortgagors. He has considered the question of merger which could only arise if in fact the lands were the tenancy lands and not the *bakasht* lands of the mortgagors. I will assume for the moment that the lands were the tenancy lands of the mortgagors. The plaintiffs' case is that they are still entitled to recover possession of these lands on redemption as an accession to the mortgage-security. The general principle, well recognised in England, is that any acquisitions by the mortgagee are treated as accretions to the mortgaged property and, therefore, subject to redemption. The Lords of the Judicial Committee saw no reason whatever for not extending the doctrine to India, especially if it appears that the mortgagee had peculiar means or facilities for making the purchase as mortgagee in possession. But though the mortgagee may treat the acquisition as accretion to the mortgaged property, he may, if he chooses, keep them for his own benefit and distinct from the mortgaged properties. The question, therefore, arises, did the mortgagees treat these acquisitions as merged in the mortgaged properties, or did they keep them for their own benefit separate and distinct from the mortgaged property.

The learned District Judge has again recorded a finding that they did not keep these acquisitions alive as distinct from their rights as *zerpeshgidars*. This finding would ordinarily be binding on us in second appeal; but in this case it is quite clear that the learned Judge did not take into consideration many important facts which may have an important bearing on the question at issue. It is necessary for the determination of this point and for the guidance of the Court below, to deal with certain antecedent events. On the 30th September 1885, Ram Baran, one of the mortgagees, who had half the share in the advance made to the mortgagors, sold his interest as mortgagee to Matukdhari, grandfather of the defendant-appellants. On the 1st October 1885 Sheonandan, son of Matukdhari, purchased Ram Baran's share of these holdings from Ram Baran. On

the 26th October 1903 Basist and Attam, who were the other mortgagees, sold their interest as mortgagees to Matukdhari. So far as their shares in the tenancy lands are concerned, they dealt with them in the following manner:—On 8th January 1890 they mortgaged 4 *bighas*, 6 *kattis* and 5 *bighas*, 15 *kattas* to Mathura, another son of Matukdhari. On the 9th July 1891 they again mortgaged the same lands to Mathura and on the 26th October 1903 they sold the mortgaged lands to Matukdhari. The documents of sale in favour of Matukdhari, so far as the lands of Basist and Attam are concerned, and in favour of Seo Nandan, so far as the lands of Ram Baran are concerned, described these lands as ancestral *kasht*. The mortgage-deeds executed by Basist and Attam in favour of Mathura also described these lands as *kasht* lands. The learned District Judge says that the statements in these deeds are not binding on the plaintiffs. This is not wholly correct. On the question whether the lands were the *kasht* lands of the mortgagors, the statements made in these documents may not bind the mortgagors, but on the question whether the mortgagees treated these lands as merged in the mortgage-security, the statements made in these documents are not only evidence against the plaintiffs but very strong evidence. It was for the mortgagees to treat these lands as merged in the mortgage-security, or it was for them to keep them alive as tenant lands distinct and apart from the mortgage security. All these documents show that they treated these lands as *kasht* lands; that is to say, as distinct and apart from the mortgage-security. I am of opinion that the learned Judge committed an error in not taking the statements made in these documents as strong evidence of the intention of the mortgagees.

Apart from these statements in these documents, the learned District Judge should have taken into consideration the fact that, while Matukdhari purchased from Ram Baran his interest as a mortgagee on the 30th September 1885, he took the document of sale of the tenancy lands on the 1st October 1885 in the name of Sheonandan. The matter is not one of formality but one of substance. In England merger is often avoided through the intervention of a trustee

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and Matukdbhari may well have thought that no question of merger could possibly arise if he took the conveyance in the name of his son Sheonandan. It is not a question of deception at all but one of intention. The fact that Matukdbhari took the conveyance in the name of his son Sheonandan suggests an inference to my mind that he intended to keep these tenancy lands for his own interest distinct and apart from the mortgage-security. The same consideration applies to the mortgages which he took in the name of his son Mathura.

So far as the tenancy lands of Harakh are concerned, (and there is no dispute that the 9 *bighas* of Harakh were tenancy lands), the question is a little more difficult. It appears that the mortgagees in their suit for rent against Harakh got a decree for ejectment against him. The learned Vakil on behalf of the respondents argued that, as soon as ejectment takes place, the *raiya* interest is extinguished and the landlord gets into possession freed from the tenancy. That undoubtedly is so; but the question still remains whether the mortgagees treated these acquisitions as merged in the mortgage-security or not. The question is again one of intention and I am not satisfied that the learned District Judge has properly considered all the evidence in the case.

In my view, the judgment of the learned District Judge must be set aside and the case remanded to him for disposal according to law. The learned District Judge must consider, first, whether, so far as 11 *bighas* belonging to the mortgagors are concerned, they were the tenancy lands of the mortgagors or their *zerait* and *bakasht* lands. In dealing with this matter he must give due importance to the fact that the mortgagors were undoubtedly in possession of the lands paying rent to the mortgagees at the time when the mortgagees instituted their suit for rent against them. If the mortgagors rely upon a subsequent settlement by the mortgagees with them they must establish that subsequent settlement by cogent evidence. If, on a consideration of all the evidence in the case, the learned District Judge comes to the conclusion that the 11 *bighas* of land which belonged to the mortgagors were the *zerait* and *bakasht*

lands of the mortgagors, then they are entitled on redemption to recover possession of these lands. If, on the contrary, the learned District Judge comes to the conclusion that the lands were the *kasht* lands of the mortgagors then he must determine the further question whether, on acquisition of these lands, (including 9 *bighas* belonging to Harakh which are admitted to be *kasht* lands), the mortgagees treated them as merged in the mortgage security or as belonging to them distinct and apart from the mortgage security. If he comes to the conclusion that the mortgagees treated them as merged in the mortgage-security, then the plaintiffs are on redemption entitled to recover possession of these lands. If not, their action must fail.

I would accordingly allow this appeal, set aside the judgment and decree of the Court below and remand the appeal to the Court below for disposal according to law. The appellants are entitled to the costs of this appeal. The costs incurred in the Courts below will abide the result and will be disposed of by the lower Appellate Court.

ALMI, J.—I agree.

*Appeal allowed.*

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 106. B  
OF 1918.

March 22, 1919.

Present :—Mr. Mittra A. J. C.

MAHADEO—PLAINT FF—

APPELLANT

versus

KRISHNAJI—RESPONDENT.

*Civil Procedure Code (Act V of 1908), Sch. III, Para. 11—Execution of decrees—Decree transferred to Collector—Powers of Collector, termination of—Judgment-debtor, competency of, to transfer property.*

A decree was transferred to the Collector for execution, and a portion of the property of the judgment-debtor was sold, the price realized being more than sufficient to satisfy the decree; before the sale was confirmed the judgment-debtor transferred by

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deed of sale the remaining portion of the property to the plaintiff who brought the present suit on the basis of the sale-deed in his favour:

*Held*, that the judgment-debtor was incompetent to make the transfer, as until the sale by the Collector was confirmed, his powers and duties under Schedule III, paragraph 11 of the Civil Procedure Code had not ceased, and until then the property was under his management.

Appeal against the decree of the Additional District Judge, Amraoti, dated the 21st December 1917, reversing that of the Subordinate Judge, Yeotmal, dated the 28th August 1917.

Mr. M. V. Joshi, for the Appellant.

Mr. V. R. Pandit, R. B., for the Respondent.

**JUDGMENT.**—This second appeal arises out of a suit based on a sale deed, dated the 13th April 1915, executed by the defendants Nos. 2 and 3 in favour of the plaintiff. Defendant No. 1 had, in execution of his decree against the remaining defendants, attached survey numbers 91 and 95. The execution of the decree was transferred to the Collector, and on the 1st April 1915 survey number 91 was sold by auction and purchased by the plaintiff. The balance of the purchase-money was deposited on the 6th April, and it is admitted that the amount realised by the sale of survey number 91 was more than sufficient to satisfy the decree. The sale, however, was not confirmed till the 15th May 1915. The lower Appellate Court has held that the judgment-debtors were incompetent to transfer survey number 95 to the plaintiff on the 13th April 1915. The sole point for decision is, whether on the 13th April 1915 the field in suit was under the management of the Collector. It is now settled by the decision of their Lordships of the Privy Council in *Gaurishankar Balmukund v. Chinnumiya* (1) that the transfer to the plaintiff is absolutely void if it contravenes the provisions of paragraph 11 of Schedule III of the Civil Procedure Code. That section lays down that, so long as the Collector can exercise or perform in respect of the judgment-debtor's immoveable property any of the powers or duties conferred or imposed on him by paragraphs Nos. 1 to 10, the judgment-debtor shall be incompetent to transfer it

in any way. The appellants rely upon the following passage in the judgment of this Court in *Sonba v. Ganesha* (2):—

"The moment the decree is satisfied, in or out of Court, the Collector's power is at an end, and the incompetency to transfer created by section 325A of the 1882 Code ceases."

Having regard to the dates given in the earlier part of the reported ruling, it was not necessary to fix the exact date when the Collector's power came to an end and the incompetency of the judgment-debtor ceased. Moreover, the judgment does not say when a decree is to be regarded as satisfied, whether upon deposit of the price by the auction-purchaser, or upon payment to the decree-holder, or upon the Court declaring that the decree is satisfied. In *Khushalchand Premrai Marwadi v. Nandram Sahebram Marwadi* (3) it was held that, where the decree-holder himself declares to the Collector that the decree is satisfied, there is no longer a decree capable of execution, and the judgment-debtor's incompetency ceases.

I am of opinion that, until at least the 15th May 1915, when the sale was confirmed, the Collector could exercise his powers under Schedule III of the Civil Procedure Code. Both the decree-holder and the judgment-debtor could have applied under Order XXI, rule 90, to have the sale set aside on the ground of material irregularity in conducting or publishing the sale. This might have necessitated a fresh sale. Similarly, under paragraph 10 (c), the Collector may buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit. The fact that no such application was made and a resale became unnecessary does not entitle us to hold that the Collector's powers and duties had ceased. To hold otherwise, would be to frustrate the object of the law. The result is that the appeal is dismissed with costs.

*Appeal dismissed.*

(1) 48 Ind. Cas. 312; 14 N. L. R. 181; 35 M. L. J. 738; 16 A. L. J. 593; 25 M. L. T. 64; 23 C. W. N. 150; 29 C. L. J. 201; 46 C. 188; 1 U. P. L. R. (P. C.) 14; 22 Bom. L. R. 541; 9 L. W. 327; 45 I. A. 219 (P. C.).

(2) 17 Ind. Cas. 887; 8 N. L. R. 182.

(3) 12 Ind. Cas. 572; 13 Bom. L. R. 977; 35 B. 516.



MOTI LAL PAL CHOUDHURY V. CHANDRA COOMAR SEN.

**CALCUTTA HIGH COURT.**

APPEALS FROM APPELLATE DECREES NOS. 2286  
AND 2287 OF 1918.

July 9, 1920.

Present:—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice

Sir Ernest Fletcher, Kt.

IN No. 2286 OF 1918

MOTI LAL PAL CHOUDHURY, IN HIS  
OWN RIGHT AND AS EXECUTOR TO THE  
ESTATE OF LATE MAHIMA CHANDRA  
PAL CHOUDHURY AND OTHERS—  
DEFENDANTS—APPELLANTS

*versus*

CHANDRA COOMAR SEN, AND ON HIS  
DEATH HIS HEIRS AND LEGAL REPRESENTATIVES  
SATYA PROSUNNA SEN SARCAR  
AND OTHERS—PLAINTIFFS—RESPONDENTS

IN No. 2287 OF 1918

MOTI LAL PAL CHOUDHURY,  
IN HIS OWN RIGHT AND AS ADMINISTRATOR  
TO THE ESTATE OF LATE MAHIMA  
CHARAN PAL CHOUDHURY AND OTHERS  
DEFENDANTS—APPELLANTS

*versus*

CHITTARANJAN SEN AND OTHERS—  
PLAINTIFFS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 143—Lease  
forbidding alienation—Forfeiture on breach of condi-  
tion—Suit by lessor for possession—Limitation terminus  
a quo—Transfer of Property Act (IV of 1882), s. 111  
(g).—Lease, determination of—Suit for ejectment, effect  
of.*

Where in contravention of the terms of a lease,  
the lessee alienates the property held by him, a suit  
by the lessor to recover possession of the property  
must, under Article 143 of Schedule I to the Limita-  
tion Act, be brought within 12 years from the date  
of the alienation, and not from the date on which the  
lessee surrenders possession to his transferee.  
[p. 314, col. 1]

A lease which is subject to the provisions of  
section 111 g of the Transfer of Property Act, is  
not determined by forfeiture immediately on the  
breach of a covenant contained therein; the breach  
must be followed by some overt act on the part of  
the lessor, the mere institution of a suit for ejectment  
is not a requisite act, because the forfeiture must be  
completed and the lease determined before the  
commencement of the action. [p. 315, cols. 1 & 2.]

Appeals against the decrees of the Ad-  
ditional District Judge, Faridpur, dated the  
29th of June 1918, affirming that of the  
Subordinate Judge, First Court, of that dis-  
trict, dated the 2nd of October 1915.

FACTS appear from the judgment:

Babu *Mcendra Nath Roy* (with him Babu  
*Luxendra Kumar Mitter*), for the Appellants.  
—There was no forfeiture of the tenancy

as the lessors had not complied with the  
requirements of section 111 (g) of the Trans-  
fer of Property Act and, therefore, the pre-  
sent suits are not maintainable. The mere  
fact that there was a breach of the covenant  
is not sufficient to determine the lease.  
The breach must be followed by an overt  
act on the part of the lessor showing an  
intention that the lease is determined.  
Before this is done, the lessor is not entitled  
to institute a suit for ejectment. See  
*Naurang Singh v. Janardan Kishore Lal Singh  
Deo* (1).

Then, assuming that there was a forfeiture,  
the suit which was instituted on the 12th  
November 1912, is clearly barred by limita-  
tion. The covenant was broken on the  
27th October 1900. The plaintiff is entitled  
to recover *khas* possession by reason of the  
forfeiture or breach of condition. Article 143  
of the Limitation Act is plainly applicable  
to the case and the suit having been instituted  
more than 12 years from the date when the  
forfeiture was incurred as the condition was  
broken, is clearly barred by limitation.  
See *Gochi Sheikh v. Mathewson* (2).

Lastly, if my contention as regards limi-  
tation prevails, and the suit instituted on the  
12th November 1912 be held to be barred  
by limitation, the earlier suit, that is, the  
suit instituted on the 5th October 1912, is  
not maintainable. The two suits together  
demand recovery of possession of the entirety  
of the lease hold. If one of the suits is dis-  
missed as barred by limitation, the other  
suit becomes one for ejectment in respect  
of a portion of the lands of a tenancy which  
has been forfeited or a condition whereof  
has been broken. Under such circumstances,  
the suit is not maintainable. *Gopal Ram  
Mohuri v. Dhakeswar Pershad Narain Singh*  
(3).

Babu *Gunada Charan Sen* (with him Babu  
*Prakash Chandra Mazumdar* and *Manmohan  
Nath Roy*), for the Respondents.—The sub-  
ject-matter of the lease-hold was a non-  
transferable occupancy holding. There was  
then transfer and abandonment. Article  
143 of the Limitation Act has, therefore, no  
application. See *Bhairab Chandra Naskar v.  
Kadam Bawa* (4). Moreover, time ought to

(1) 41 Ind. Cas. 952; 45 O. 469; 22 C. W. N. 812  
27 O. L. J. 277.

(2) 11 O. W. N. 681.

(3) 35 O. 607; 7 C. L. J. 493.

(4) 22 Ind. Cas. 28; 18 O. L. J. 553.

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run against the plaintiff not from the date of alienation but from the date when the lessees delivered possession to the transferees.

Then, if one of the suits is held to be barred by limitation, the other suit cannot fail. On the principles applicable to tenants-in-common, the plaintiff is entitled to sue for a share. Refers to *Ahmad Sahib Shuttari v. Magnesite Syndicate Limited* (5).

Finally, the suit cannot fail by reason of the fact that there was no determination of the lease. It is not necessary that the intention to determine the lease should be manifested in a particular way. It is not necessary that a formal notice should be given before instituting the suit for ejectment. The institution of the suit itself may be a sufficient indication of the intention to determine the lease. Refers to *Ramnath Sil v. Siba Sundari Debya* (6). And, lastly, the covenant against alienation in the lease is really a covenant against transfer of possession. There was thus no breach of the covenant unless it was shown that the transferees had been placed in possession of the land.

Babu Mohendra Nath Roy was not called upon to reply.

#### JUDGMENT.

MCCKERJEE, ACFT. O. J.—These are appeals by the defendants in two suits for recovery of possession of land. The same tract is in dispute in both the suits; but the subject-matters are different shares making up the entirety in the aggregate.

On the 3rd March 1897 a lease of the disputed land was granted, containing a provision to the following effect: "you will enjoy the lands of this jama from generation to generation by using it for the purpose of your own residence or for the residence of your own people, if necessary, without in any way altering the character of the lands and by keeping the boundaries intact, and without having the power of making gifts or any sort of alienation. If you or your heirs alienate it, we and our heirs will be entitled to recover *khais* possession; any objection to the same will be rejected by the Court." In contravention of this covenant, the land was sold by the lessees to the defendants on the 27th

October 1900. One of the present suits was instituted on the 8th October 1912 the other was instituted on the 12th November 1912. This latter suit was instituted in a Court which had no jurisdiction to entertain it, with the result that the plaint was returned to the plaintiffs and was re filed in a competent Court on the 6th September 1913. We may take it, however, in view of the provisions of section 14 of the Indian Limitation Act, that, for the purposes of the question of limitation raised before us, the suit may be treated as instituted on the 12th November 1912. The Courts below have decreed the suits.

On the present appeals, those decrees have been assailed on the ground that there was no forfeiture of the tenancy, on the basis of which the lessors could maintain these actions, as they had not complied with the requirements of clause (g) of section 111 of the Transfer of Property Act. It has further been argued that, assuming there was a forfeiture, the suit which was instituted on the 12th November 1912 is barred by limitation; and that, if this contention prevails, the other suit should be dismissed as not maintainable. We are of opinion that these contentions are well-founded and must prevail.

As regards the question of limitation which arises in one of the suits only, it is plain that the provision of the Limitation Act applicable is Article 143, which requires that a suit for possession of immoveable property when the plaintiff has become entitled by reason of any forfeiture or breach of condition, must be instituted within twelve years from the date when the forfeiture is incurred or the condition is broken. The plain language of this provision shows that it is applicable to the case before us. Here the plaintiffs sued to recover possession on the ground that they became entitled to recover possession under the terms of the contract of tenancy by reason of breach of the condition against alienation. This view is supported by the decision in *Goochi Sheikh v. Mathewson* (2). Reliance, however, has been placed on behalf of the respondents upon the decision in *Bhairab Chandra Naskar v. Kadam Bewa* (4) which is clearly distinguishable. In that case, Article 144 was applied, on the ground that at the

(5) 32 Ind. Cas. 512; 39 M. 1049.

(6) 40 Ind. Cas. 313; 25 C. L. J. 332.

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date of the institution of the suit, the defendants had ceased to be tenants, inasmuch as, from the date of the written statement in a previous suit in which they had denied the title of the landlord, they had forfeited their tenancy and had held adversely to him. In these circumstances, it was held that Article 144 and not 143 was applicable. This is manifestly of no assistance to the plaintiffs in the case before us. It has further been argued on their behalf that time ought to run against them not from the date of alienation but from the date when the lessees surrendered possession to their transferees. We are of opinion that there is no foundation for this contention which is contrary to the provisions of Article 143. We must accordingly hold that the suit, which was instituted on the 12th November 1912 is barred by limitation. If that suit is barred by limitation, it is plain that the other suit which had been instituted earlier and was not barred by limitation is not maintainable, on the ground that a suit for ejectment does not lie in respect of a portion of the lands of a tenancy which has been forfeited or a condition whereof has been broken. This view is supported by a long series of decisions in this Court mentioned in the case of *Gopal Ram Mohuri v. Lhakeswar Pershad Narain Singh* (3) although we do not overlook that a contrary view has been taken in Madras in the case of *Ahmad Sahib Shutt ri v. Magnesite Syndicate Limited* (5). From this point of view, both the suits are liable to be dismissed.

We are further of opinion that both the suits must fail on the ground that the plaintiffs have failed to comply with the requirements of clause (g) of section 111 of the Transfer of Property Act. That clause provides as follows:—"A lease of immoveable property determines by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re enter, or the lease shall become void; or (2) in case the lessee renounces his character as such by setting up a title in a third person, or by claiming title in himself, and in either case the lessor or his transferee does some act showing his intention to determine the

lease." In the case before us, the allegation of the plaintiffs is that the lessees committed a breach of an express condition against alienation which provided that on breach thereof the lessors might re-enter. It is, consequently, necessary for the plaintiffs to establish that the lessors have done some act showing an intention to determine the lease before the suit was instituted. The plaintiffs have failed to show that they have complied with this requirement of the Statute. That this is the plain intention of the Legislature is clear from the decision of this Court in the case of *Anandimoyee v. Lkhi Chandra Mitra* (7). The same view was taken by the Madras High Court in the case of *Venkatramana Bhutta v. Gundaraya* (8). In the latter case, however, it was overlooked that the lease was of a date antecedent to the Transfer of Property Act, and the case was consequently not governed by the provisions of section 111, clause (g). This was pointed out in *Palmanabha v. Ranga* (9) where the Madras High Court in the case of a lease granted before the Transfer of Property Act, refused to apply the provisions of section 111, clause (g), but invoked the aid of the English Law on the subject as consonant to the principles of justice, equity and good conscience. In a later case, *Korapalu v. Narayana* (10), where the lease had been granted for agricultural purposes, and consequently was not covered by the Transfer of Property Act, the Madras High Court similarly applied the rule of English Law and declined to apply clause (g) of section 111. In the case before us, the lease was executed long after the Transfer of Property Act had come into operation, and is subject to the provisions of section 111, clause (g). In our opinion, there is no room for serious controversy as to the true meaning of that section. No doubt, it is not necessary that a formal notice should be given before the institution of the suit; the intention to determine the

(7) 33 C. 337; 8 O. L. J. 274.

(8) 31 M. 407; 4 M. L. T. 241.

(9) 6 Ind. Cas. 417; 31 M. 161; 20 M. L. J. 930; 8 M. L. T. 100; (1910) M. W. N. 462.

(10) 20 Ind. Cas. 930; 33 M. 445; 25 M. L. J. 815; (1913) M. W. N. 656.



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ease may be manifested in many ways. For instance, in the case of *Ramnat's Sil v. Siba Sundari Daby* (6) it was held that the institution of a prior suit for ejectment, which was withdrawn with liberty reserved to the plaintiff to institute a fresh suit on the same cause of action, was, for the purposes of the second suit, a sufficient indication of the intention to determine the lease. There can be no doubt that the insertion of the condition mentioned at the end of clause (g) of section 111 was a deliberate departure from the English Law on the subject. Under the English Law a proviso in a lease leaves it optional with the lessor whether he will or will not exercise his right of determining the lease upon a case of forfeiture arising. This does not by itself enable the lessee who has committed a breach to treat the contract as at an end. The lease is not void but only voidable and the lessor alone can avoid it *Bowser v. Colby* (11), *Davenport v. Reg.* (12), *Jones v. Carter* (13), *Toleman v. Portbury* (14). In such circumstances, questions might well arise whether the lessor did or did not waive the forfeiture. It was possibly with a view to avoid difficulties of that nature that the Indian Legislature has provided that, before the suit was instituted, the lessor should do some act to show his intention to determine the lease.

It is not necessary to discuss the matter in farther detail, as the question was fully examined recently in the case of *Naurang Singh v. Janardan Kihre Lal Singh* (1). We see no reason to depart from the rule enunciated therein, namely, that where the rights and obligations of the parties are regulated by section 111, clause (g) of the Transfer of Property Act, there is no determination of a lease by forfeiture immediately on breach of covenant, but such breach must be followed by an overt act on the part of the lessor before the institution of the suit for ejectment; the institution of the suit cannot be rightly regarded as the requisite

act, because the forfeiture must be completed and the lease determined before the commencement of the action.

We have finally been asked by the respondent to put such a construction on the covenant as to justify the inference that there has been in fact no breach of condition in this case. His argument was, that the covenant against alienation was really a covenant against transfer of possession, and that there was no breach of covenant till it was shown that a document had been executed and the transferees had been placed in possession pursuant thereto. We are of opinion that the clause in the lease is incapable of such an interpretation. A covenant of this description must be interpreted in the same way as any other covenant in the document, and we cannot twist its terms in order to enable the plaintiffs to avoid the consequences of their failure to comply with the statutory requirement. Conditions of this nature are entitled neither to favour nor disfavour, but a fair construction is to be put upon them according to the apparent intent of the contracting parties, such intention, according to ordinary rules of construction to be found from the language they have used. *Oroft v. Lumley* (15), *Goolt le v. Sarville* (16), *Doe d. Davis v. Elsam* (17), *Doe d. Muston v. Gladwin* (18). We are accordingly unable to hold that the plaintiffs are entitled to possession though they have not complied with the requirement of section 111, clause (g) the objection in fact is, fatal to the case.

The result is that these appeals are allowed, the decrees of the Courts below set aside and the suits dismissed with costs in all the Courts.

FLETCHER, J.—I agree.

*Appeal allowed.*

(15) (1858) 6 H. L. O. 672 at p. 698; 27 L. J. Q. B. 321; 4 Jur. (N. S.) 903; 6 W. R. 523; 10 E. R. 1459; 105 R. R. 252.

(16) (1812) 16 East 87 at p. 95; 14 R. R. 305; 104 E. R. 1022.

(17) (1828) Moo. & Mal. 189 at p. 191; 31 R. R. 729.

(18) (1845) 6 Q. B. 958 at p. 961; 14 L. J. Q. B. 159; 9 Jur. 503; 115 E. R. 859; 66 R. R. 611.

(11) (1841) 1 Hare 109; 11 L. J. Ch. 132; 5 Jur. 1106; 66 E. R. 969; 90 R. R. 879.

(12) (1877) 3 App. Cas. 115 at p. 128; 47 L. J. P. C. 8; 87 L. T. 727.

(13) (1844) 15 M. & W. 718 at p. 725; 71 R. R. 800; 10 Jur. 83; 153 E. R. 1040.

(14) (1871) 6 Q. B. 24<sup>n</sup> at p. 250; 40 L. J. Q. B. 125; 24 L. T. 24; 19 W. R. 523.

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## NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE NO. 322  
OF 1919.

April 20, 1920.

*Present*:—Mr. Mittra, Offg. J. C., and  
Mr. Hallifax, A. J. C.RANGLAL—JUDGMENT-DEBTOR—  
APPELLANT*versus*

CHUNNILAL—RESPONDENT.

*Evidence Act (1 of 1872), s. 92—Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Adjustment of decree—Oral evidence to prove adjustment, admissibility of.*

Inasmuch as Order XXI, rule 2 of the Civil Procedure Code contemplates the taking of evidence to prove the adjustment of a decree, section 92 of the Evidence Act is no bar to the admissibility of oral evidence to prove an agreement by way of adjustment of a decree.

Appeal against the decree of the District Judge, Hoshangabad, dated the 29th July 1919, reversing that of the Munsif, Sohagpur, dated the 25th March 1919.

Mr. M. Gupta, for the Appellant.

Mr. G. L. Subhedar, for the Respondent.

**JUDGMENT.**—The question referred is, whether oral evidence is admissible to prove the adjustment of a decree within the meaning of Order XXI, rule 2. In *Karan Singh v. Kanhai Lal* (1), Stanyon, A. J. C., held that section 92 of the Evidence Act forbids proof of a distinct subsequent oral agreement to rescind or modify a decree. This conclusion was based mainly upon proviso (4) to section 92. We agree with him that if the enacting clause forbids such proof, the proviso cannot be called in aid to let in such oral evidence. In our opinion, a decree is not an embodiment of a disposition of property. It is a matter required by law to be in writing within the meaning of section 91, which excludes extrinsic evidence. The prohibition against the admission of oral evidence or statement, contained in section 92, applies only where the matter required by law to be in writing constitutes an instrument *ex eodem generis* with a contract, grant, or other disposition of property. Further, it is only evidence offered for the purpose of contradicting, varying, adding to or subtracting from the

(1) 8 Ind. Cas. 279; 6 N. L. R. 123.

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terms of such a contract that is prohibited and that only between the parties to it or their representatives. A decree is not such an instrument of a dispositive character, as pointed out by Messrs. Ameer Ali and Woodroffe in their notes to section 92 of the Evidence Act. A decree can only be modified or rescinded by an order of the Court and not by a mere agreement of the parties. An agreement by way of adjustment of a decree does not contradict, vary, add to or subtract from its terms. Such an agreement is the basis on which an adjustment is certified by the Court and the certificate of the Court modifies or rescinds the decree according to the nature of the adjustment.

Further, the procedure laid down in Order XXI, rule 2, of the Civil Procedure Code, clearly contemplates the taking of evidence before the Court records the adjustment, and we think this includes oral evidence, a view which has guided the practice of all Courts for a very long time.

Our answer to the question referred is in the affirmative, and we respectfully dissent from *Karan Singh v. Kanhai Lal* (1).

*Answered affirmatively.*

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 756 OF 1919.

July 27, 1920.

*Present*:—Justice Sir William Ayling, Kt.,  
and Mr. Justice Krishnan.RAMANATHAM CHETTY—PLAINTIFF  
—APPELLANT*versus*A. L. A. R. R. M. ARUNACHALLAM  
CHETTIAR, THROUGH AGENT T. N. RAMA-  
CHANDRA—DEFENDANT—RESPONDENT.*Madras Estates Land Act (1 of 1909), ss. 55, 146—Suit by transferee from ryot to obtain patta—Rival claimant, non-joinder of, effect of—Revenue Court, jurisdiction of, to inquire into merits of claim—Civil Procedure Code (Act V of 1908), O. I, r. 10 (2).*

A suit under section 55 of the Madras Estates Land Act should not be dismissed by reason merely of the non-joinder of a rival claimant. Where an objection on the ground of non-joinder is taken, the Court should act under Order I, rule 10

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(2) of the Civil Procedure Code and add such claimant as a party defendant. [p. 317, col. 2.]

Section 55 of the Madras Estates Land Act is not affected in any way by section 146 of the Act and the Revenue Court's power to deal with the rights of parties before it under the former section is not controlled by anything in the latter. In a suit, therefore, under section 55, the Court is bound to decide whether the plaintiff is entitled to a *patta* or not, if his title to it is denied. [p. 318, col. 2.]

Second appeal against the decree of the District Court, Ramnad at Madura, in Appeal Suit No. 855 of 1918, preferred against the decree of the Court of the Special Deputy Collector, Ramnad, in Summary Suit No. 2847 of 1916.

FACTS appear from the judgment.

Mr. C. V. Ananthakrishna Aiyar (with him Mr. K. B. Venkatachala Aiyar), for the Appellants.—The lower Appellate Court erred in holding that it had no jurisdiction to enquire into the merits of the plaintiff's claim. The recognition of another transferee by the land-holder does not oust the Court's jurisdiction. The plaintiff's right of suit under section 55 of Madras Act I of 1908 necessarily implies that the Court should try and adjudge on his claim. The plaintiff denies that the rival claimant whom the land-holder recognized has any right superior to his. That question must be decided by the Court. Section 55 is not controlled by section 146. Nor is it necessary that plaintiff should first obtain a declaratory decree as against the rival claimant, Perianayagi.

The suit should not have been dismissed for non-joinder of Perianayagi. She is not a necessary party. In any event the Court should have impleaded her under Order I, rule 10 Civil Procedure Code.

Mr. A. Krishnaswami Aiyar (with him Mr. Rajagopala Aiyar), for the Respondents.—The defendant has already recognized the title of Perianayagi and had issued a *patta* in her name. The plaintiff could not invoke the aid of the Court without first taking appropriate action under section 146 of the Estates Land Act.

#### JUDGMENT.

KRISHNAN, J.—This second appeal arises from a suit brought by the plaintiff under section 55 of the Estates Land Act (I of 1908) to obtain a *patta* from the defendant, the land-holder, for the plaint land. Plaintiff's case was that he obtained the occupancy right by purchase of the rights of the previous *ryot*, one Kaliappan Servai, some years ago, and

that he was paying the rent due, though the *patta* remained in the later's name. Kaliappan died sometime ago leaving his widow one Kaliammai. Plaintiff recently made an application under section 146 of the Estates Land Act jointly with Kaliammai for the transfer of *patta* to his name but the defendant refused it. Hence the suit. Defendant pleaded that sometime ago he had recognised one Perianayagi as the *ryot* on a joint application by herself and Kaliammai alleging that the occupancy right had been sold to her by one Mathu Servai, a nephew and heir of Kaliappa, that he had issued a *patta* in her name and that, having done so, he was not bound to issue a new *patta* to the plaintiff, unless the latter took proper steps under section 146 of the Estates Land Act. He also pleaded that, as plaintiff did not take such steps, the Revenue Court had no jurisdiction to decree delivery of *patta* to him. He further contended that the suit was also bad for non-joinder of Perianayagi. The District Judge upheld his objections and dismissed the suit. Hence the appeal to us by the plaintiff.

On the question of non-joinder I agree with the Deputy Collector that Perianayagi was not a necessary party, though it may be desirable to have her as a party to settle effectively the dispute raised. But even if she was a necessary party the suit should not have been dismissed for her non-joinder. It is clear from Order I, rule 9, Civil Procedure Code, which applies to Revenue Courts by force of section 192 of the Estates Land Act, that the order of dismissal is improper. The Court should have acted under Order I, rule 10, clause (2) and added her as a party defendant if it thought fit to do so.

The defendant's chief objection, however, is that, in the circumstances stated by him, the Revenue Court had no authority to direct him to issue a *patta* to the plaintiff. This is said to result from section 146 of the Act. I am unable to see what bearing that section has on the present case. That section seems to be intended to prevent land-holders from contumaciously refusing to recognise transfers which are *prima facie* valid. But it cannot be read as validating transfers which are in truth invalid or as affecting the real rights of parties. Section 50 gives every *ryot* a right to demand a *patta* and section 55 a right to sue for it in the



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Revenue Court. When such a suit is brought, the Court is bound to decide whether the plaintiff is entitled to a *patti* or not, if his title to it is denied. The fact that the landholder has previously recognised a rival claimant, who is alleged to have no rights in the land, cannot, in my opinion, make any difference in the matter for any action of his to which plaintiff is not a party cannot be allowed to prejudice the latter's right. The definition of the term *ryot* in section 2, clause (15), does not seem to lend any support to the defendant's contention on the point. Nor has any authority been cited in support of it. I consider section 55 is not affected in any way by section 146 and the Revenue Court's power to deal with the rights of parties before it under the former section is not controlled by anything in the latter. The opinion of the learned District Judge that plaintiff's only remedy was to sue Perianayagi in a Civil Court for a declaration that his rights are superior to her's and after getting a decree to apply to defendant to recognise him as the *ryot* is not, in my opinion, correct, for I think he is entitled to ask the Revenue Court to decide whether he is not the rightful *ryot* and to dispose of his suit on the merits of his claim.

I would, therefore, set aside the decree of the lower Appellate Court and remand the appeal to it for disposal according to law and direct respondent to pay appellant's costs in this Court.

AYLING, J.—The maintainability of the suit in the Revenue Court is a point on which I must confess to a certain amount of doubt. But I am not prepared to differ from my learned brother, and I agree in the order proposed.

M. C. P.

*Appeal allowed.*

## PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 85  
OF 1920.

January 11, 1921.

Present:—Mr. Justice Das.

BALDEO SHUKUL AND OTHERS—JUDGMENT.  
DEBTORS—APPELLANTS

VERSUS

Syed YUSUF AND ANOTHER—DECREE-  
HOLDERS—RESPONDENTS.Civil Procedure Code (Act V of 1908), s. 48—  
Execution of decree—Amendment of decree—Limitation,  
commencement of.

Where a decree is amended, the date of amendment is the date of the decree within the meaning of section 48 of the Civil Procedure Code [p. 319, col. 1.]

Appeal from a decision of the District Judge, Shahabad.

Mr. Siu Saran Lal, for the Appellant.

JUDGMENT.—This appeal is directed against the judgment of the learned District Judge of Shahabad. The appellant is the judgment debtor and his point is, that the application for execution is barred by limitation. The facts are not in dispute.

The decree was passed on the 6th January 1908 and was amended on the 5th February 1908. There were several applications for execution with which we are not concerned. We are, however, concerned with the application for execution which was made on the 12th January 1920. The judgment-debtor says that under section 48, Civil Procedure Code, execution is barred by limitation. The relevant portion of section 48 runs as follows:—"Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from the date of the decree sought to be executed."

Now, the application for execution was made after the expiry of 12 years from the 6th January 1908 when the decree was originally passed against the judgment-debtor but within 12 years from the 5th February 1908, the date on which the decree was amended, and the question which I have to determine is this: what is the date of the decree sought to be executed?

The learned Vakil for the appellant argues before me that under Order XX,

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rule 7 of the decree must bear date the day on which the judgment is pronounced, and, therefore, it is quite immaterial that the decree was amended. The decree, whether it is the original decree or the amended decree, must bear date the day on which the judgment is pronounced, that is to say, in this particular case, 6th January 1905. It seems to me that when we consider the history on this subject the argument of the learned Vakil will appear unsubstantial. Under section 179 of the old Limitation Act, the period began to run from the date of the decree or order, and there was no provision at all in the old Limitation Act for the period to run from the date of the amended decree, and great difficulty arose whenever the decree was amended by the Court and the decree as amended was put in execution. That difficulty has now been removed by the present Limitation Act which gives as one of the starting periods the date of the amendment of the decree. Article 182 gives several starting points, one of them being the date of the decree or order and the other being, where the decree has been amended, the date of amendment. If the learned Vakil's point is right, namely, that the decree must always bear date the day on which the judgment is signed, there is no object in the Legislature in providing two different starting points for Limitation. It is quite clear that if the case fell under Article 182, time would begin to run not from the date of the decree but from the date of amendment.

But it has been argued before me that, in so far as section 45 does not embody the provisions of Article 182, time must begin to run from the date of the decree. I am unable to agree with this contention. In Article 182 the time from which period begins to run is the date of the decree or order or where the decree has been amended the date of the amendment. In section 48, Civil Procedure Code, time begins to run from the date of the decree "sought to be executed." In my view, the words "sought to be executed" must include the amended decree. The decree holder has put in execution the decree as amended by the Court on the 5th February 1903. It is that decree which he seeks to execute and, therefore, under section 48 time must begin to run from 5th February 1903. It is conceded that if

this be so, then the decree-holder is within time.

In my view, the case has been correctly decided by the learned Judge in the Court below and I must dismiss this appeal.

*Appeal dismissed.*

### LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 683 OF 1920.

January 27, 1921.

Present: — Mr. Justice Chevie.

LABHU RAM, MINOR, THROUGH MAYA RAM  
— PLAINTIFF — PETITIONER

*versus*

MOOL CHAND — DEFENDANT —

RESPONDENT.

*Provincial Small Cause Courts Act (IX of 1897), ss 24, 25—Order directing return of plaint—Revision, whether lies—Rent, suit for—Question of title, whether arises.*

The High Court has power to revise an order returning a plaint under section 23 of the Provincial Small Cause Courts Act [p. 320, col. 1.]

In a suit for rent, if the plaintiff proves that the defendant has been his tenant during the period for which rent is asked for he is entitled to a decree for the rent for that period, no matter who the owner of the property in dispute may be, and no question of title to the property can arise in the suit. If the defendant's tenancy is proved, he is estopped from denying the plaintiff's title. [p. 320, cols. 1 & 2.]

Petition under section 25 of Act IX of 1887, for revision of the order of the Judge, Small Cause Court, Lahore, dated the 19th August 1920.

Mr. Beni Parshad Khosla, for the Petitioner.

Mr. Badr-ud-Din Kureshi, for the Respondent.

JUDGMENT.—Plaintiff in this case sues the defendant for rent. The defendant denies the plaintiff's title to the house and the Small Cause Court Judge has returned the plaint under section 23 of the Small

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Cause Courts Act holding that the relief claimed depends on the proof or disproof of ownership and that he cannot finally determine the question of title. The plaintiff applies to this Court on the revision side.

On behalf of the defendant a preliminary objection is raised that no revision lies, as under section 25 of the Small Cause Courts Act this Court's power of revision only covers cases which have been decided. It is urged here on the strength of *Subal Ram Dutt v. Jagadanunda Mazumdar* (1) that an order returning a plaint under section 23 does not decide the case, and, therefore, this Court has no power of revision. On behalf of the plaintiff it is pointed out that the ruling cited has not been followed in a later ruling of the same High Court published in *Umesh Chandra Paladhi v. Rakhal Chandra Chatterjee* (2) and it has also been dissented from in a Madras ruling published in *Ramanathan Chetty v. Maruthappa Kone* (3). In addition there is a Full Bench ruling of this Court, No. 60 of 1907 which lays down that section 622 of the Civil Procedure Code (now section 115) gives the High Court power of revising even interlocutory orders. I consider that I have power to revise and I overrule the objection.

On behalf of the plaintiff it is urged that the defendant is estopped from denying the plaintiff's title having executed a lease in his favour and here *Bogar v. Karam Singh* (4) is relied upon: but I note that in this case the lease which had been executed is dated January 1919, whereas the plaintiff sues for rent from December 1917. So that what the plaintiff has to prove is that the defendant was his tenant since December 1917. If he can prove this he is bound to get a decree, the defendant being unable to raise the plea that he is not the landlord. In fact, the only real issue in this case is, whether the defendant has been the plaintiff's tenant during the period for which rent is claimed. If so, he must pay rent no matter who

the real owner of the house may be. It seems to me, therefore, unnecessary to decide the question of title. On behalf of the plaintiff it has been urged that, even if it were necessary to decide the question of title, the Small Cause Court Judge is bound to do so, and here reliance is placed on *Mirai-ud-din v. Karam Bakhsh* (5). With all respect, I note that that judgment seems to me defective in one respect. A question of title to immovable property can, no doubt, be decided incidentally by a Small Cause Court but section 23 clearly gives the Court a discretion in cases in which the right of the plaintiff depends upon the proof or disproof of the title to immovable property or other title which the Court cannot finally determine to return the plaint. Whereas the ruling cited seems to lay down that in such cases a Small Cause Court can and must decide all issues, it seems to me to deny to the Small Cause Court the discretionary power allowed by section 23. However, in the present case I cannot see that it is necessary to decide the question of title. As I have already said, what the plaintiff has to prove is, that the defendant has been his tenant during the period for which rent is claimed. If he can prove this and can also prove that the defendant is still his tenant then the defendant is barred, by reason of section 116 of the Evidence Act, from denying that the plaintiff had at the beginning of the tenancy a title to the house.

I accept this application and return the case to the Small Cause Court for disposal in due course. Stamp on application to this Court to be refunded. Other costs in this Court to follow the event.

*Application accepted;  
Case returned.*

(5) 43 P. . 1902; 35 P. L. R. 1902.

(1) 1 Ind. Cas. 288; 13 C. W. N. 403.

(2) 10 Ind. Cas. 8; 15 C. W. N. 686; 14 C. L. J. 118.

(3) 25 Ind. Cas. 643; 27 M. L. J. 494; 16 M. L. T. 502.

(4) 141 P. R. 1906; 93 P. L. R. 1907; 13 P. W. R. 1907.



NAFAR CHANDRA DOME, *In the matter of.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 354 OF 1920.

June 29, 1920.

*Present* :—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice Sir Ernest  
Fletcher, Kt.,

*In the matter of* NAFAR CHANDRA DOME,  
(MONDAL) — PETITIONER

*Legal Practitioners Act (XVIII of 1879), s. 36—  
Order declaring person to be a tout—Authority by whom  
such order to be made.*

An order under section 36 of the Legal Practitioners Act, declaring a person to be a tout, made by a District Magistrate upon evidence recorded by a Subordinate Magistrate is not a valid order. Such an order can only be made by the authority mentioned in the section upon evidence recorded by itself.

Rule against the order of the Sub-Divisional Officer, Howrah.

Babu Bhudhâr Haldar, for the Petitioner.

Babu Surendra Ohandra Guha, for the Government.

#### JUDGMENT.

MOOKERJEE, ACTG. C. J.—We are invited in this Rule to set aside an order made under subsection (1) of section 36 of the Legal Practitioners Act, on the ground that the order was made in contravention of its provisions. That section is in these terms: "(1) Every High Court Judge, District Judge, Sessions Judge, District Magistrate and Presidency Magistrate, every Revenue Officer, not being below the rank of a Collector of a District, and the Chief Judge of every Presidency Small Cause Court (each as regards their or his own Court and the Courts, if any, subordinate thereto) may frame and publish lists of persons proved to their or his satisfaction, by evidence of general repute or otherwise, habitually to act as touts, and may, from time to time, alter and amend such lists.....". This provision has been interpreted to mean that the evidence must be taken by the officer concerned. This was first laid down in the case *Prasan Chandra Das, In the matter of* (1) and the rule there enunciated was followed in *Nadhu Pershad, In the matter of* (2) and *Ohandi Charan Poy, In re* (3). This has been the recognized interpretation of

this provision of the law ever since 1897 and we are surprised that, on the present occasion, a procedure has been followed which is wholly inconsistent with the interpretation thus placed on the Statute. In this case, the evidence was taken by the Sub Divisional Officer, who embodied his conclusion that the petitioner was a tout in an order which he placed before the District Magistrate for confirmation, the District Magistrate thereupon signified his approval, by the word 'yes.' This was clearly in contravention of the provision of section 36.

Our attention has, however, been drawn to the case of *Hari Oharan Sirkar v. District Judge of Dacca* (4) where it was observed that the Court would not set aside an order under section 36 when the proceedings had been regularly conducted and the order was manifestly justified by the evidence. In that case, an objection was taken that the proceedings were bad by reason of misjoinder. Here, however, it cannot be said that the proceedings have been regularly conducted, when in fact they have been conducted in contravention of the provision of the law. It is further plain that the decision in *Rasik Lal Nag, In the matter of* (5) (to which we have been referred) is also distinguishable. That case was decided under section 14 of the Legal Practitioners Act which empowers the High Court alone to pass the final order in respect of a Pleader or a Muktear. The section contemplates that the evidence may be taken by a Subordinate Officer and the matter then reported to the High Court with the expression of an opinion by the Judge, Magistrate or the Revenue Authority through or by whom the reference is made. In the case before us, the order has to be made by a certain specified authority and section 36 expressly requires that that authority, and that authority alone, should take the evidence which is the foundation of the order.

The result is that the Rule is made absolute and the order discharged.

FLETCHER, J. I agree.

*Rule made absolute.*

(1) 12 C. W. N. 843 note.

(2) 6 C. W. N. 252.

(3) 12 C. W. N. 842.

(4) 6 Ind. Cas. 327; 11 C. L. J. 513 at p. 520; 11 Cr. L. J. 310.

(5) 8 Ind. Cas. 987; 14 C. L. J. 190; 20 C. W. N. 1284; 18 Cr. L. J. 420.

EMPEROR *v.* JANKI PRASAD.

ALLAHABAD HIGH COURT.  
CRIMINAL APPEAL No. 707 OF 1920.

November 3, 1920.

Present:—Mr. Justice Tudball and Mr.  
Justice Walsh.

EMPEROR—APPELLANT

*versus*

JANKI PRASAD AND ANOTHER—ACCUSED.

*Penal Code (Act XLV of 1860), ss. 225, 353—  
Criminal Procedure Code (Act V of 1898), s. 56—Arrest  
under written order—Rescue from lawful custody—  
Assault on Police Officer—Offence—Criminal Court,  
duty of—Civil and criminal case, difference between  
trial of.*

A constable arrested a person in pursuance of a written order made by a Sub-Inspector under section 56 of the Criminal Procedure Code. The accused hustled the constable, pushed him aside and thus rescued the person who had been arrested:

*Held*, that the accused were guilty of offences under section 353 read with section 225 of the Penal Code. [p. 325, col. 1.]

The duty of a Criminal Court is to get to the bottom of a case before it and to see that every scrap of relevant evidence is brought before it. [p. 324, col. 1.]

The difference between the trial of a civil and a criminal case is that, in the former, it is the duty of the parties to place their case before the Court as they think best, whereas in the latter it is the duty of the Court to bring all relevant evidence on the record and to see that justice is done. [p. 324, col. 1.]

Criminal appeal by the Local Government against the order of acquittal, passed by the Sessions Judge, Mainpuri, dated the 15th of May 1920.

Mr. W. Wallach (Government Advocate),  
for the Crown.

Messrs. C. R. Alston and S. O. Mukerji, for  
the Accused.

**JUDGMENT.**—This is a Government appeal against an order of acquittal passed by the Sessions Judge on appeal from an order of conviction passed by a First Class Magistrate against two accused persons, Janki Prasad and Lachhman, under which these persons were sentenced to three months' rigorous imprisonment and a fine of Rs 100 each for offences under section 353/225 of the Indian Penal Code. The case comes from the town of Phaphund. From the record of Case No. 17, *King Emperor v. Kedar Nath, Ram Dat and Bhore, etc.*, of the Court of the Magistrate in the year 1920, and from the record of Case No. 11 of 1920, *Bachchan Lal v. Wali Muhammad*,

it appears that on the 10th of December 1919 a quarrel took place between a Brahman, named Bachchan Lal, and a Constable, named Wali Muhammad, attached to the outpost of the local Police Station. It arose over the drinking of water at a well when Wali Muhammad was washing his teeth by the side of the well. Apparently, the two men came to blows and Bachchan Lal at once made a complaint in Court. On the same date, a report was made by Nazir Husein, the Head Constable at the Police Station, which charged Kedar Nath, Ram Dat, Bhore and Bachchan Lal and two other persons with having committed the offences of criminal trespass and rioting in that, after the first squabble between Wali Muhammad and Bachchan Lal, the latter had collected some friends, had gone to the Police outpost, had dragged Wali Muhammad out of it and beaten him. The enquiry in the latter case was taken up by the Sub-Inspector, Muhammad Mohsin Jafri, and on the 11th of December he issued to Nazir Husein, Head Constable, written orders under section 56 of the Criminal Procedure Code directing him to arrest Bhore and Ram Dat as well as others for the offences charged against them. The same Magistrate tried these two cases and also the present case. The cases were apparently heard together and judgments were delivered on the same date. In the first case the charge against Wali Muhammad of assaulting Bachchan Lal was dismissed and in the second case the charge against Bhore, Ram Dat, and Bachchan Lal of the offence under section 147, Indian Penal Code, was also dismissed. The Magistrate was of opinion that, even if Bachchan Lal and his friends had gone to the outpost after the first quarrel with Wali Muhammad, they went really to make a complaint, and that the charge against them had been exaggerated. The present case, the third one, arises in this way out of the first two. The case for the prosecution is that, on the 22nd of December last, Nazir Husein and Lallu Ram, Head Constables, found Bhore and Ram Dat sitting at the shop of Janki Prasad and Lachhman; that they arrested them at the shop, showed them the written order under section 56, Criminal Procedure Code, and took them out on to the road; that thereupon Lachhman, Janki Prasad and some of their friends advanced angrily upon them,

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insisted upon the men being released, finally pushed aside the Police with their hands, and the men escaped and ran back to their shop. Nazir Husain sent to the outpost, which was some 50 or 60 paces away, for some Constables; that on their arrival he wrote a report on a piece of paper and sent it on to the Police Station to the Sub-Inspector. The Sub-Inspector at once proceeded to the spot and at once made an enquiry. Finally, he sent up Janki Prasad and Laohbman and two other persons for trial for the offense of having rescued Ram Dat and Bhore from lawful custody.

The defence case is as follows:—Janki Prasad stated that on the day in question the Head Constable came to him at his shop telling him that the Sub-Inspector desired his attendance at the Police Station in order that he might bring his influence to bear upon Baebhan Lal to settle the dispute which had arisen between Baebhan Lal and Wali Muhammad; that he (Janki Prasad) refused to go declining to interfere in a matter with which he had no concern; that the Head Constable abused him; that he returned it with compliments and the Head Constable went away; that, very shortly after, the Sub-Inspector arrived upon the scene armed with a gun; that he called for the man who had been impertinent to the Police, that he abused Janki Prasad, and the latter in return abused him, whereupon the Sub-Inspector deliberately raised his gun and fired point blank at him, and that the shot would have taken effect had not the Head Constable struck up the gun with his hand.

The Magistrate took evidence for both sides and finally came to the conclusion that the prosecution story was true; that the story told by Janki Prasad was improbable and unworthy of belief and he convicted the accused and sentenced them as mentioned above. It will be remembered that he was the same Magistrate who acquitted Ram Dat and Bhore on the charge which had been preferred against them by Wali Muhammad and Nazir Husain. We may note here that two other accused were acquitted because their names were not entered in the first report, i.e., the report which was written by Nazir Husain at the scene of the occurrence and sent to the Police

Station. Janki Prasad and Laohbman appealed to the learned Sessions Judge, who has acquitted them without going into the actual facts of the case at all. His judgment sets out the case for the prosecution and the case for the defence. He then proceeds to say as follows:—"Now, in this appeal we have to see whether Nazir Husain had any authority to arrest Bhore and Ram Dat. The record shows that there is no warrant for arrest of Bhore and Ram Dat, nor is there any order of the Thanadar to arrest Bhore and Ram Dat. The prosecution failed to prove that there was any such warrant or order. There is no secondary evidence on the record which would satisfactorily prove that there was any warrant for arrest of Bhore and Ram Dat, nor is there any satisfactory evidence to show that Ram Dat and Bhore had been accused of any cognizable offence so that a Police Officer could arrest them without any warrant." Thereupon, the learned Sessions Judge quotes the case reported as *Tafazzul Ahmed Chowdhry v. Queen-Empress* (1) which really does not govern the facts of the present case at all. He then continues to say: "The deposition of Nazir Husain would show that he arrested Bhore and Ram Dat and then showed them the warrant. In *Satish Ohandra Rai v. Jodu Nandan Singh* (2). Princep and Hill, JJ., held that an arrest by a Police Officer without notifying the substance of the warrant to the person against whom the warrant is issued, as required by section 80, Criminal Procedure Code, is not a lawful arrest and resistance to such arrest is not an offence under section 225 B, Indian Penal Code. As I have shown above there is no warrant on the record in this case nor is there satisfactory evidence of any warrant, and the evidence of Nazir Husain also shows that he did not notify the substance of the warrant before he arrested the person. So I do not see how the offence under section 353/225, Indian Penal Code, could have been committed, and how the accused could have been convicted of this. There has not been any application in writing by the prosecution that I should either get the original warrant or get the secondary evidence about it or should send

(1) 26 C. 630; 13 Ind. Dec. (N. S.) 1005.

(2) 26 C. 748; 3 C. W. N. 741; 13 Ind. Dec. (N. S.) 1079.



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the case to the Court below to get the warrant in original, or secondary evidence about it, so I do not think I would be justified in doing anything of the kind, for I do not think the Judge's duty to be to procure evidence which was never produced by the prosecution."

It is difficult to understand what conception the learned Sessions Judge has of his duty as a Sessions Judge trying a criminal case. It is the duty of every Criminal Court to get to the bottom of a case and to bring all relevant evidence upon the record and to see that justice is done. The latter portion of the Judge's judgment shows clearly that his conception of his duty as a Judge is utterly incorrect and somewhat puerile. It is the attitude that might possibly be taken up by a Civil Court trying a civil suit where it is the duty of the parties to place their case as they think best before the Court. But in a criminal case it is the duty of the Court to get to the very bottom of it and to see that every scrap of relevant evidence is brought before it. The learned Sessions Judge has fallen far short of his duty in the present case. As a matter of actual fact, the Magistrate who tried the case had the record of the other two cases before him. They were in Court and the cases were tried together and the judgments were delivered together. We have seen, and we have examined, those records. The written orders passed under section 56, Criminal Procedure Code, are before the Court and are on the record of the very case in which Ram Dat and Bhore were tried and acquitted. To say that there was no evidence before the Magistrate of any complaint of a cognizable offence is utterly incorrect. The record of the case was before the Court and the Court itself was trying that very case. In addition to this, there was the first report which was on the record of this case. The learned Sessions Judge's judgment has made it necessary for us to go through the evidence in the case and to hear the appeal just as he ought to have done.

It has been ably argued on behalf of the accused that the evidence on the record produced by the prosecution should not be believed and the story told by the accused should be accepted as true. Stress is laid

on the fact that the Magistrate has himself found that the charge against Ram Dat and Bhore under sections 452 and 147, Indian Penal Code, was not true and that the true facts had been grossly exaggerated. It is pointed out that Nazir Husain, who was a witness in that case and who claimed to have arrived upon the scene just at the close of the occurrence, must have known that the charge against Bhore and Ram Dat was grossly exaggerated if not utterly baseless. As to what actually happened on the 2nd of December we think that, in the main, the prosecution story was the true one. The story told by Janki Prasad and his brother is so incredible that we have no hesitation in agreeing with the Magistrate in rejecting it. Beyond all doubt, the written orders (which have been wrongly called warrants in this case) were issued under section 56, Criminal Procedure Code, by the Sub-inspector to whom information had been given by Nazir Husain of the offence charged against Bhore and Ram Dat. Armed with the authority of those written orders, we have little doubt that Nazir Husain and Lalla Ram arrested Ram Dat and Bhore. We have been taken through all the evidence for the prosecution. Our attention has been called to the discrepancy in regard to Exhibit A, the first report, which was written by Nazir Husain and sent to the Police Station. We do not think that this document is otherwise than genuine. It is true that one witness, after showing considerable doubt on the point, did finally say that the document had been written in pencil on a piece of paper produced by the Head Constable from his pocket, but the main evidence goes to show that the piece of paper was supplied by another constable who had come from the outpost when Lalla Ram, Constable, had been sent for assistance. The Police evidence is supported by the evidence of several other private persons and the cross-examination of these witnesses has not helped the defence in any way except in producing minor discrepancies of no value whatsoever. It, therefore, comes to this that, after the two men had been arrested and taken on to the road, the two accused persons, Janki Prasad and Lachhman, with others hustled the Policemen, pushed them aside and in that way rescued these persons

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from custody. Apart from the legality or otherwise of the arrest, neither Janki Prasad nor Lachhman had any legal right whatsoever to lay their hands upon the Police and reserve from them the persons who had been arrested. But in the present case we consider that the Constable, Nazir Husain, was armed with full authority, namely, the written orders issued by the Sub Inspector under section 53, Criminal Procedure Code. The resistance of the Police does not seem to have been great. No injury was done. It was a question of hustling and rescuing men. The two accused have suffered two days' rigorous imprisonment and, in the circumstances, we think that the ends of justice will be met by a substantial fine. We, therefore, accept the appeal. We set aside the order of acquittal. We convict Janki Prasad and Lachhman of offences under section 353, read with section 225, Indian Penal Code and sentence them to a fine of Rs. 250 each in addition to the two days' rigorous imprisonment which they have already undergone. In default of payment of the fines they will each suffer one month's further rigorous imprisonment. We allow the accused a fortnight within which to deposit the fine in the Court of the Magistrate.

WALSH, J.—I agree. In my opinion it was impossible for the Government to permit the judgment of the Sessions Judge to stand. Whatever the merits might have been, a decision that members of the public are entitled to interfere with members of the Police force while in *bona fide* execution of their supposed duty, and to rescue their friends, is so entirely without legal foundation and so dangerous in principle, that no Government could, in the public interest, permit it to stand. The learned Judge has muddled himself over cases relating to arrest, when the question which he had to decide was one of rescue, an entirely different matter. He has also muddled himself over a question of warrants, when the question which he had to decide arose out of an arrest without a warrant under section 56 of the Code. He had the courage to hold that there was no evidence on the record and that the prosecution had failed to prove the order, when a proper order dated the 11th of December was on the record before him. These are very serious blunders in a case of public importance particularly in a quarrel between Hindus and Muham-

madan members of the Police force. It is not the first time that we have had occasion to criticise the procedure of this learned Judge at Sessions, and it is important that he should take greater care to set a good example to those under him.

*Appeal allowed.*

### CALCUTTA HIGH COURT. SPECIAL BENCH.

SPECIAL BENCH IN CRIMINAL MISCELLANEOUS  
No 81 OF 1920.

August 27, 1920.

*Present:*—Sir Anantosh Mookerjee, Kt., Acting  
Chief Justice, Justice Sir Ernest Fletcher,  
Kt., Justice Sir N. R. Chatterjee, Kt.,  
Mr. Justice Richardson  
and Mr. Justice Ghose.

ALI MUHAMMAD MANDAL AND OTHERS—  
PETITIONERS

*versus*

PIGGOT AND OTHERS—OPPOSITE  
PARTY.

*Government of India Act, 19 5 (5 & 6 Geo V, c. 61),  
s. 107—Criminal Procedure Code (Act V of 1898), ss.  
145, 145 (1)—High Court, inherent power of, to give  
directions for disposal of property attached in Criminal  
proceedings—Proceedings under s. 145, Criminal Pro-  
cedure Code—High Court, power of, to set aside proceed-  
ing.*

A High Court is competent, in the exercise of the power of superintendence vested in it under section 10 of the Government of India Act, 19 5, to set aside proceedings instituted without jurisdiction by a Subordinate Court under section 145 of the Criminal Procedure Code; such power of superintendence can be exercised notwithstanding section 145 (1) of the Criminal Procedure Code. [p. 328, col. 1.]

The High Court may make consequential or incidental orders in the exercise of its power of superintendence over Subordinate Courts, which may be invoked, if occasion should arise, to reach and remedy all forms of judicial high-handedness [p. 328, col. 1.]

Owing to a dispute between a landlord and his tenants as to the right of the former to lac growing on trees, the District Magistrate apprehended a breach of the peace and initiated proceedings under section 145 of the Criminal Procedure Code, and by a subsequent order attached the trees with the lac thereon: the lac was collected and some of it sold, the sale-proceeds being deposited in the Treasury and the unsold lac stored away: the High Court set aside the proceedings as being without jurisdiction, and issued a rule calling upon the District Magistrate and the tenants to show cause why the sale-proceeds of the lac and the unsold lac should not be made

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over to the landlord, or why such order should not be passed as to the Court might seem proper :

*Held*, (1) that the High Court had inherent power to give directions as to the disposal of property attached in a criminal proceeding initiated without jurisdiction as might be necessary in the interests of justice ; [p. 328, col. 1.]

(2) that in the present case the proper order was to keep the sale-proceeds of the lac and the unsold lac in the custody of the Subordinate Judge of the District pending the decision of a suit to be instituted by the landlord for declaration of his right to the lac, and that, in default of such suit being instituted, the net sale-proceeds of the lac be distributed rateably among the tenants [p. 330, col. 2.]

FACTS appear from the judgment.

Mr. U. N. Sen Gupta Counsel, for the Opposite Party.—Before my friend begins, I should like to raise a preliminary point as to whether your Lordships, in dealing with the matter before you, are exercising revisional or original jurisdiction.

[MOOKERJEE, A. C. J.—You cannot raise the question as a preliminary objection. We shall hear you when you will address us.]

Babu Dasarathi Sanyal (with him Babus Manmathanath Mukherjee, Nisit Nath Ghatak and Debendra Narain Bhattacharya), for the Petitioners.—The question which your Lordships are invited to consider in this Rule is, whether your Lordships have inherent power to give directions as to the disposal of property attached by the District Magistrate of Malda in connection with a proceeding under section 145, Criminal Procedure Code, which has been set aside by the High Court as initiated without jurisdiction. My submission is, your Lordships have ample power in the matter.

[MOOKERJEE, A. C. J.—The first question is, under what power the proceeding under section 145 was set aside ?]

Refers to *Laldhari Singh v. Sukdeo Narain Singh* (1). The High Court interfered in exercise of the power of superintendence vested in it under section 107 of the Government of India Act, 1915. It has been held that power of superintendence includes power of revision. A power of revision implies a power to make consequential orders. Refers to section 432, 439, 520, Criminal Procedure Code.

[MOOKERJEE, A. C. J.—Your contention is

(1) 27 C. 892 at p. 899; 4 C. W. N. 613; 14 Ind. Dec. (N. S.) 583.

that in the exercise of a power under section 107 of the Government of India Act, we can make consequential orders as in the exercise of our revisional powers we can make similar orders under sections 432, 439 Criminal Procedure Code.]

Yes. Refers to *Craies on Statute Law*, 4th Edition, page 108.

The power given to your Lordships under section 107 of the Government of India Act is a very large power. The arm of this Court is long enough to reach any form of injustice.

[MOOKERJEE, A. C. J.—The High Court, in the exercise of criminal jurisdiction, has the same powers as it has in its civil jurisdiction. See *Pulin Behary Das v. Emperor* (2), *Budhu Lal v. Chattu Gope* (3), *Ram Chandra Mistry v. Nabin Mirdha* (4).]

The English Courts have gone further. See *Rodger v. Comptoir, d'Escompte de Paris* (5) per Lord Cairns at pages 474-75.

Sir A. Chowdhuri (with him Mr. U. N. Sen Gupta and Babus Hemendra Nath Sen, Probodh Sumar Das, Shitish Ohandra Chakravarty, Jatindru Mohan Chowdhuri and Promothanath Banerjee), for the Opposite Party.—The theory of inherent power has not always been recognised. See *Ohenga Reddi v. Ramasamy Gounden* (6), *Tulshi Ram v. Abrar Ahmad* (7), *Trayog Mahaton v. Gobind Mohaton* (8), *Arzu Mea v. Arman Mea* (9).

[FLECTHER, J.—There must be some power to make necessary orders with respect to the lac.]

Reads *Kalyan Singh v. Ramgolam Singh* (10).

With regard to jurisdiction, I have nothing to say. I shall make my submissions only with reference to the relief. I do not say that your Lordships have no jurisdiction in the

(2) 16 Ind. Cas. 257 at p. 300; 16 C. W. N. 1105 at p. 1136; 13 Cr. L. J. 609; 15 C. L. J. 517.

(3) 39 Ind. Cas. 465; 44 C. 816; 25 C. L. J. 193; 21 C. W. N. 269; 18 Cr. L. J. 497.

(4) 25 C. 630; 2 C. W. N. 225; 13 Ind. Dec. (N. S.) 414.

(5) (1871) 3 P. C. 465 at pp. 474, 475; 40 L. J. P. C. 1; 24 L. T. 111; 19 W. R. 449; 7 Moo. P. C. (N. S.) 314; 17 E. R. 120.

(6) 27 Ind. Cas. 152; 16 Cr. L. J. 104; 1 L. W. 1032.

(7) 30 Ind. Cas. 1002; 37 A. 654; 18 A. L. J. 932; 16 Cr. L. J. 714.

(8) 32 C. 602; 9 C. W. N. 862; 2 Cr. L. J. 552.

(9) 7 C. L. J. 369; 7 Cr. L. J. 336.

(10) 56 Ind. Cas. 4; 31 C. L. J. 48 at p. 51.



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present matter. I am glad, and so are the litigants generally, to have your Lordships' pronouncement that the arm of this Court is long enough to reach any form of judicial injustice.

There can be no doubt that the property is in safe custody.

[MOOKERJEE, A. C. J.—The District Magistrate ought not to have touched the property in defiance of the order of this Court.

There is a *bona fide* dispute with regard to the property. Your Lordships should not pass any order which would prejudice my right to the property.

[MOOKERJEE, A. C. J.—The tenants were in possession of the trees. If you claim the *lae* grown on these trees, it is for you to go to the Civil Courts.]

[FLETCHER, J.—The best thing to be done is to institute an interpleader suit with a formal plaintiff.]

Under section 88, Civil Procedure Code, the Magistrate or any other officer of the District may institute the interpleader suit.

Mr. U. N. Sen Gupta, for the Adhyars :—I have bestowed considerable labour and skill and the property should not be restored to the petitioners to my prejudice.

[FLETCHER, J.—You must stand or fall along with the Zemindar.]

Babus Manmathanath Mukherjee in reply :—It has not been seriously disputed before your Lordships that this Court has jurisdiction to deal with the matter. The whole question is, what should be the nature of your Lordships' order in the matter. Section 517 or section 523, Criminal Procedure Code, would not apply. The proper order is one of restitution. It cannot be suggested that this Court has to embark on a judicial enquiry. In the absence of express legislation it must go back to the party from whom it was taken. See *Ratanlal Rangildas, In re* (11). See also *Annapurnabai, In re* (12), *Devidin Durgaprasad, In re* (13) and *Kuppammal, In the matter of* (14).

#### JUDGMENT.

MOOKERJEE, A. C. J.—The events which have led up to the present Rule have been fully narrated in the judgment delivered by Mr. Justice Chatterjea and Mr. Justice Cuming on the 2nd July 1920, in the case of *Ali*

(11) 17 B. 748; 9 Ind. Dec. (N. S.) 491.

(12) 1 B. 630; 1 Ind. Dec. (N. S.) 418.

(13) 22 B. 844; 11 Ind. Dec. (N. S.) 1146.

(14) 29 M. 375 at pp. 376, 377; 4 C. L. J. 233,

*Mohammad Mondal v. Fakiruddi Munshi (Piggot)* (15), and need not be recapitulated at length for our present purpose. It is sufficient to state that proceedings under section 145 of the Criminal Procedure Code were initiated by the District Magistrate of Malda on the ground that a dispute likely to cause a breach of the peace existed between the Mathurapur Zemindary Concern and the tenants, relating to the right to grow and collect *lae* on plum trees standing on lands comprised in the holdings of the tenants. The District Magistrate considered the case to be of such emergency that he proceeded to attach the disputed trees with the *lae* thereon, pending his decision under section 145. At a later stage, by order of the District Magistrate, the *lae* was collected and stored in the godowns of the first party and a portion thereof was sold by auction. The tenants obtained Rules from this Court with a view to set aside the proceedings on the ground, amongst others, that the District Magistrate had no jurisdiction to take action under section 145 or to make the orders he had passed. This Court stayed further proceedings pending the disposal of the Rule. But notwithstanding such order, the *lae* has been collected and sold in part, an action which has been attempted to be justified in the letter of the Magistrate, on the allegation that the *lae* might otherwise considerably deteriorate in value to the detriment of the rightful owner, whoever he might turn out to be in the end. On the 2nd July 1920, Mr. Justice Chatterjea and Mr. Justice Cuming set aside the proceedings under section 145 as initiated without jurisdiction and added that the question of disposal of the *lae* and the sale proceeds of the portion already sold would be dealt with later. The present Rule was then issued, on the 29th July, 1920, calling upon the District Magistrate of Malda and the opposite party to show cause why the proceeds of sale of the *lae* as also the *lae* yet unsold and stored in the godown of the Mathurapur Zemindary Concern should not be made over to the tenants, or why such other orders should not be passed as might seem proper to the Court. As the Rule involves an important question of law touching the

(15) 59 Ind. Cas. 643; 32 C. L. J. 255; 24 C. W. N. 1039.

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jurisdiction of this Court, it has been placed for disposal before a Special Bench constituted with the concurrence of the Full Court.

The first point which requires consideration is, whether this Court has inherent power to give directions as to the disposal of property which was attached and has been dealt with by a Subordinate Court in the course of proceedings instituted without jurisdiction under section 145 of the Criminal Procedure Code. We are of opinion that the question should be answered in the affirmative. It is now well-settled that a High Court is competent, in the exercise of the power of superintendence vested in it under section 107 of the Government of India Act, 1915, (which re-placed section 15 of the Indian High Courts Act 1861), to set aside proceedings instituted without jurisdiction by a Subordinate Court under section 145 of the Criminal Procedure Code; such power of superintendence can be exercised notwithstanding section 435 (3) Criminal Procedure Code, which lays down that proceedings under Chapter XII (which comprises sections 145-148) are not proceedings within the meaning of that section. This view was affirmed in *Hurbullah Narain Singh v. Luchmeswar Prosad Singh* (16), *Lalhari Singh v. Sukdeo Narain Singh* (17), *Jagmohan Pal v. Ram Kumar Gope* (17), *Kulada Kinkar Roy v. Dadesh* (18) and was subsequently recognised by a Full Bench in the cases of *Sukh Lal Sheikh v. Tara Chand* (19), *Khoor Mahomed Sirkar v. Nazir Mahomed* (20). Section 107 of the Government of India Act, which may thus be invoked to set aside proceedings instituted without jurisdiction, is expressed in perfectly general terms, and, *prima facie*, there is no reason why the High Court should not, when it sets aside the proceedings, proceed to give such consequential directions as may be found necessary in

the interests of justice in the circumstances of the particular case. That the Court is competent to make such consequential or incidental orders when it exercises its appellate or revisional jurisdiction, is clear from section 423 (1) (d) section 439 (1) and section 520. In such circumstances, we may legitimately hold that the High Court may make consequential or incidental orders in the exercise of its power of superintendence over Subordinate Courts, which may be invoked, if occasion should arise, to reach and remedy all forms of judicial high handedness. *Lekhraj Ram v. Debi Pershad* (21). This conclusion harmonises with the view formulated in *Pulin Behary Das v. Emperor* (2) that "Criminal Courts, no less than Civil Courts, exist for the administration of justice, and Courts of both descriptions have inherent power to mould the procedure, subject to the statutory provisions applicable to the matter in hand, to enable them to discharge their functions as Courts of Justice." The same position was re-affirmed in the following terms in *Budhu Lal v. Chattu Gope* (3) "the Criminal Procedure Code does not contain a provision corresponding to section 151 of the Civil Procedure Code; but that section does not lay down any new principle, it merely embodies a legislative recognition of the inherent power of the Court to make such order as may be necessary for the ends of justice. This inherent power is in no sense restricted in application to civil cases; it is equally applicable to criminal matters. The power is not capriciously or arbitrarily exercised; it is exercised *ex debito justitiæ*, to do that real and substantial justice for the administration of which alone Courts exist; but the Court in the exercise of such inherent power must be careful to see that its decision is based on sound general principles and is not in conflict with them or with the intentions of the Legislature as indicated in statutory provisions." This was not a novel proposition nor a new departure, for the inherent power of the Court had been occasionally recognised in earlier cases. Thus, in *Ram Chandra Mistry v. Nobin Mirdha* (4) when the Court was invited to apply, to an order made by a Criminal Court,

(16) 26 C. 188; 3 C. W. N. 49; 13 Ind. Dec. (N. S.) 725.

(17) 28 C. 416.

(18) 33 C. 33; 2 C. L. J. 271; 10 C. W. N. 257; 2 Cr. L. J. 670 (F. B.).

(19) 28 C. 68; 2 C. L. J. 241; 9 C. W. N. 1046; 2 Cr. L. J. 618.

(20) 33 C. 352; 2 C. L. J. 259; 9 C. W. N. 1085; 2 Cr. L. J. 637.

(21) 12 C. W. N. 678; 7 Cr. L. J. 499.

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the elementary principle enunciated by the Judicial Committee in *Rodger v. Comptoir, d'Escompte de Paris* (5) that it is the duty of all Courts to take care that the act of the Court does no injury to any of the suitors. Mr. Justice Hill observed that in a case which the Court considered to be a fit one in all respects for its application, the Court would not hesitate to enforce the principle referred to. The statement of this principle by Lord Cairns in the case before the Judicial Committee just mentioned is couched in terms of great generality and may be usefully re-called in this connection.

"One of the first and highest duties of all Courts, is to take care that the act of the Court does no injury to any of the suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."

Again, in *Ahmed Ali v. Keeno Khan* (22), when Mr. Justice Brett was pressed with the argument that the High Court could not interfere with an order passed by a Magistrate under section 522 of the Criminal Procedure Code, because there was no express provision in that behalf, the learned Judge referred to *Ram Chandra Mistry v. Nobin Mirdha* (4) as showing that the Court had an "inherent jurisdiction," though it became unnecessary for him to invoke the aid of the inherent power of the Court because, as pointed out in *Manki v. Bhagwanti* (23), the provision contained in section 423 (1) (d), read with section 439, was comprehensive enough to include the power required to direct cancellation of the order made under section 522. Again, the decision in *Lakshman Govind Nirgude, In re* (24) contains a clear recognition of the

(22) 1 Ind. Cas. 202; 8 C. 44; 13 C. W. N. 77; 9 Cr. L. J. 244.

(23) 27 A. 415; A. W. N. (105) 1; 2 A. L. J. 64; 2 Cr. L. J. 24.

(24) 26 B. 552; 4 Bom. L. R. 276.

doctrine of inherent power. It has been contended, however, that cases may be found in the books which tend to show that the theory of inherent power of a Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court, has been sometimes, if not actually repudiated, at any rate, overlooked, and reference has been made to *Basudeb Purma Gossain v. Naziruddin* (25), *Queen Empress v. Fateh Ohand* (26), *Prayag Mahaton v. Gobind Mahaton* (8), *Ariu Mea v. Arman Mea* (9), *Surjya Kumar Upadhyaya v. Dinabandhu Pal* (27), *Karimuddi Fakir v. Naimuddi Kamirai* (28), *Tulshi Ram v. Abrar Ahmad* (7), *Annapurnabai, In the matter of* (12), *Ratanlal Rangildas, In re* (11), *Devidin Durgaprasad, In re* (13), *Kunpammal, In the matter of* (14) and *Chenga Reddi v. Ramasamy Gounden* (6) as typical illustrations. No useful purpose would be served by an analysis of the facts of each of these cases and of the opinions expressed thereon, though it may be a question whether all of them really ignore or overlook the doctrine of inherent power. It is sufficient to state that, in some instances the matter was not approached from this point of view, while, in others, even if the doctrine of inherent power were invoked, the result would not have been different; but none of the cases expressly repudiates the doctrine of inherent power, though several proceed on the assumption that a specific provision of the Criminal Procedure Code must be pointed out to justify an order made by a Subordinate Court or an order which the High Court is invited to pass. This narrow view of the powers and duties of a Court of Justice, whether Civil or Criminal, cannot now be maintained. The truth is, that, in respect of Civil Courts, the theory of inherent power, though enunciated by Sir Barnes Peacock, C. J., in 1868 in *Hurro Ohunder Roy v. Shcorodhoney Debia* (29), was lost sight of for many years, and was familiarised only after it had been re stated and reaffirmed in 1903 in *Hukam Ohand Boid v.*

(25) 14 C. 834; 12 Ind. Jur. 152; 7 Ind. Dec. (N. S.) 551.

(6) 24 C. 493; 1 C. W. N. 435; 12 Ind. Dec. (N. S.) 1000.

(2) 15 C. W. N. CCLIV (254 notes).

(28) 3 C. L. J. 573; 3 Cr. L. J. 436.

(29) 9 W. R. 402.



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*Kamalanand Singh* (30) and recognised thereafter in express terms in section 151 of the Civil Procedure Code, 1908. In the case of Criminal Courts, the theory of inherent power has had a still more uncertain career, but, as we have seen, it was welcomed without hesitation in 1898, found some recognition in the Criminal Procedure Code of that year, and was reaffirmed in 1912. We feel no doubt whatever that the doctrine of inherent power, as enunciated in the cases of *Pulin Behary Das v. Emperor* (2) and restated in *Budhu Lal v. Chattu Gope* (3), is well-established on principle and cannot be successfully questioned.

The second point which requires examination is, what are the directions which should be given for the disposal of the lac and the sale proceeds of the portion already sold. It is manifestly impossible to restore the physical condition of things as they existed when the proceedings under section 145 were instituted; for the twigs cannot be re-attached to the trees nor can the lac be replaced on them. The tenants have contended that as *restitutio in integrum* is impossible, the lac yet unsold should be sold and the entire sale-proceeds divided amongst them rateably, in proportion to the number of trees on the holding of each tenant. This course cannot be adopted for an obvious reason. Such a distribution as that suggested must be made on the assumption that, apart from possible questions of title, all the lac when attached and removed was in the possession of the tenants. This, however, is strenuously controverted on behalf of the Zemindars and Adhyars, and the Court is not in a position to make an assumption in favour of either party, because there has been no enquiry, summary or otherwise, in the proceedings which have been cancelled as instituted without jurisdiction. It is equally plain that the lac and the money should not remain in the custody of the Zemindars and Adhyars who are the other party to the proceedings. In such circumstances, the best course to adopt is to keep the property in the custody of the Court pending decision by a Civil Court on the question of title to the lac. [*Of. Ohenga Beddi v. Ramasamy Gounden* (6)]. Such a course was commended by

Lord Maenaghten in *Hood Barrs v. Heriot* (31) where he regretted that the Court of Appeal had not thought it proper to hold a fund *in media* pending appeal to the House of Lords on the question of title thereto; see also the judgment of Lord Watson in *Peruvian Guano Co. v. Dreyfus* (32).

The result is that the Rule is made absolute. The lac and the net sale-proceeds of the lac already sold (after deduction of incidental charges) will forthwith be placed in the custody of the Subordinate Judge of Malda, who will take steps, as early as practicable, to have the lac sold. The entire sale-proceeds will constitute one fund which will remain in the custody of the Court of the Subordinate Judge. The first party will be at liberty to institute a suit in the Court of the Subordinate Judge of Malda for declaration of their right to the lac and for incidental reliefs. If such a suit is instituted on or before the 1st December 1920, the fund will continue to be held by the Subordinate Judge to await the result of the suit. If, on the other hand, the suit is not instituted by the first party on or before the 1st December 1920, the Subordinate Judge will distribute the fund amongst the tenants on the basis of the record prepared by the Police Authorities as to the number of trees on the holding of each tenant from which the lac was taken. The distribution will be made rateably, in proportion to the number of trees on each holding; but this will not affect the right of the tenants *inter se* to have the question of apportionment amongst themselves decided by a Civil Court.

FLETCHER, J.—I agree.

CHATTERJEA, J.—I agree.

RICHARDSON, J.—I agree.

GHOSH, J.—I agree.

*Rule made absolute.*

(31) (1896) A. C. 174 at p. 186; 65 L. J. Q. B. 252; 74 L. T. 853; 44 W. R. 481; 60 J. P. 612.

(32) (1892) A. C. 166; 61 L. J. Ch. 749; 66 L. T. 536; 7 Asp. M. C. 225.

TEKA AHIR v. EMPEROR.

## PATNA HIGH COURT.

CRIMINAL APPEAL No. 157 OF 1920.

September 13, 1920.

*Present*:—Mr. Justice Jwala Prasad  
and Mr. Justice Sultan Ahmad.

TEKA AHIR—APPELLANT

*versus*

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), ss. 287, 310—Evidence Act (I of 1872), s. 54—Previous conviction, evidence of, when may be tendered—Prosecution witnesses, re-call of, for cross-examination—Discretion, improper exercise of.*

Where the statement of an accused person to a Committing Magistrate contains an admission as to his previous conviction, that portion of his evidence should not be read at the close of the prosecution evidence at his trial in the Court of Session, before the assessors have given their opinion, as, to do so is to contravene the principle of section 310 of the Criminal Procedure Code and is sufficient to vitiate the trial. [p. 331, col. 2.]

It is illegal, during the course of the trial of an accused person for a substantive offence, to record evidence of a previous conviction. Such evidence amounts to evidence of bad character and is expressly forbidden by section 54 of the Evidence Act, unless and until the accused offers evidence of good character [p. 332, col. 1.]

The refusal of a Judge to re-call prosecution witnesses for cross-examination, amounts to an improper exercise of discretion, sufficient to vitiate the trial. [p. 332, col. 2.]

Criminal appeal from an order of the Additional Sessions Judge, Chapra, dated the 23th June 1916.

Mr. Haque (with him Mr. W. H. Akbari), for the Appellant.

Mr. Monohar Lall (Assistant Government Advocate), for the Crown.

## JUDGMENT.

JWALA PRASAD, J.—The appellants, Teka Ahir, Abhilakh Ahir and Ramdhani Ahir, were tried by the Sessions Judge of Saran on charges under sections 395 and 402 of the Penal Code. Abhilakh was further charged under section 325 of the Code of having caused grievous hurt to Moti Nonia. Teka and Ramdhani were also charged with previous convictions under section 400 of the Code. The learned Sessions Judge has convicted the accused of the charges laid against them and has sentenced Teka and Ramdhani to transportation for life and Abhilakh to 10 years' rigorous imprisonment.

The trial commenced on the 14th June and terminated on the 23rd when the

opinion of the assessors was taken. A note in the order-sheet of the 14th of June shows that the charges were read to the accused and they were asked to plead to them. On the 23rd June there is a note that the accused Teka and Ramdhani admitted previous convictions. None of these notes in the order sheet shows as to whether and when the charges relating to the previous convictions were read out and explained. If that was done on the 14th of June it was illegal and in direct contravention of section 310 of the Code which requires that the charge of previous conviction shall not be read out nor the accused be asked to plead thereto unless and until the accused was convicted of the subsequent offence. If it was read out on the 23rd after the opinion of the assessors was recorded, there should have been a clear note in the order-sheet to that effect. After the close of the prosecution evidence the statement of the accused made in the Commitment Court was read to the assessors and was admitted under section 287 of the Code. It contained an admission of the accused as to their previous conviction. The portion of the statement relating to the previous conviction should not have been allowed to be read until the assessors had given their opinion. To do that was to contravene the principle of section 310 of the Code. No doubt section 287 permits a previous statement of the accused before the Committing Magistrate to be read as a part of the prosecution case. This refers only to the statement relating to the subsequent offence. The portion relating to the previous conviction can be read under this section only when the accused is put on his trial for the previous conviction after the close of the trial for the subsequent offence. That stage had not arisen in the present case and hence the admission of the accused contained in the statement relating to the previous conviction was illegally read to the assessors before they had given their opinion on the subsequent offence. Not only that, but the actual evidence of the previous conviction was permitted to be recorded on the 17th June during the course of the trial of the accused for the substantive offence. The objection of the accused to the ad-

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mission of this evidence was overruled by the learned Sessions Judge upon the ground that it was relevant to prove the state of the mind of the accused under sections 6 and 14 of the Evidence Act. The view taken by the learned Sessions Judge was entirely erroneous. No question of the state of the mind of the accused pertinently arose in the trial of the present case under section 395 and 402. In any event, the evidence of the previous conviction amounted to evidence of bad character of the accused which is expressly forbidden by section 54 of the Evidence Act unless and until the accused had offered evidence of good character. Under this section as well as under section 310 the evidence of the prosecution witness No. 17 was illegally admitted.

The reason for not permitting the previous conviction to be proved or even to be made known during the trial of the accused for the main offence is that the fact of the previous conviction may prejudice the accused by creating an adverse opinion in the mind of the Judge, Jury or the assessors. Upon this principle the reading of the charge, the previous statement of the accused and the evidence relating to the previous conviction are scrupulously suspended till the accused is convicted of the substantive offence, or the opinion of the assessors has been obtained. The learned Judge has contravened the aforesaid principle and the express provision of the Code. This has vitiated the trial of the accused and is sufficient to set aside the conviction.

But the learned Sessions Judge has further prejudiced the accused in not giving them an opportunity to cross-examine six principle witnesses on behalf of the prosecution who were examined on the 14th of June when the trial commenced. On that date the accused, no doubt, themselves put a few questions to the witnesses. The next day (15th June) a petition was filed by a Pleader on behalf of the accused stating that wrong information was given to their man in the village by the Police, that the date fixed was the 17th, and not the 14th and consequently they could not be ready to cross-examine the witnesses on the latter date. The learned Sessions Judge disbelieved the allegation and refused to recall the witnesses for cross-examination. To our

mind the learned Sessions Judge did not use his discretion properly, and the result has been that the trial of the accused of serious offences has been without cross-examination of the principal witnesses on behalf of the prosecution. The trial must, therefore, be set aside.

The question then arises whether there should be a re-trial in the present case. To our mind, upon the evidence recorded in the case, the conviction of the accused under section 402 of the Penal Code is not sustainable. That section makes it penal for five or more persons to assemble together for the purposes of committing dacoity and every one among them is liable to the penalty of the section. The accused are said to have been seen together at two places: (1) Nautan Bazar, and (2) Pathphera. For each of these places two witnesses have been examined. Sheo Tahal and Harihar Koeri speak as to the accused having been seen assembling with others at an old school building near the Bazaar. The first says five or six persons; the second says four or five including the accused. These witnesses are doubtful as to the number not being less than five. The benefit of this doubt must be given to the accused and, hence, the principal element of the section, which requires the number to be not less than five, is wanting.

Again, it is admitted that Nautan Bazar is a big Bazaar, and is situated on a public road, a place not far off from the villages of the accused. The fact that they were seen in a place in the Bazaar does not necessarily lead to the inference that they were there with any criminal intent, and not with the legitimate purpose of doing some bazaar work. The learned Sessions Judge has given the respective dates on which these persons identified the accused as having been seen on the Bazaar day. I need not go over the same ground again, but it is clear that the witnesses did not timely disclose to the Police the fact that they had seen the accused persons at the Nautan Bazar on the night of the occurrence. The learned Sessions Judge has not recorded a finding of firm conviction in his mind as to the accused persons having been seen at Nautan Bazar. We regard the evidence as not worthy of any credit and have no hesitation in rejecting it. Equally incredible is the



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testimony of the accused persons having been seen at the other place, Pachphera, on the same evening. It is sufficient to discard the evidence by reading only the evidence of P. W. Nos. 20 and 21, Ram Charitar Rai and Sawdagar Rai. The first man saw ten or twelve persons going from south to north on the *sarkari sarak* (Government road). He had seen Teka and Ramdhani five or six years ago and had not seen them for the last two or three years, still he questioned them as to where they were going and is supposed to have retained in his mind a vivid impression of the faces of these two men seen on a dim twilight evening. We, therefore, reject the evidence of the assembling of the accused at the second place also.

The result is, that we find that there is not sufficient evidence for permitting a re-trial of any of the accused under section 402 of the Penal Code. We set aside the conviction and the sentence of all the accused under that section. Ramdhani was charged only under the section and he is, therefore, acquitted altogether and must be set at liberty. As to accused Teka and Abhilakh, we direct that they be re-tried by the Sessions Judge of Saran of charges other than under section 402 standing against them. In the circumstances, we refrain from going into the merits of the case.

SULTAN AHMED, J.—I entirely agree with the order that has just been passed by my learned brother. But the serious irregularities committed by the Sessions Judge, and the unfairness with which the accused were treated during the course of the trial demand that I should add a few observations of my own.

Subordinate Courts in India ought to remember that in trying cases the reputation not only of the Courts, but also of the law which they have to administer are at stake and they should not by their conduct afford grounds for complaint either by the prosecution or by the accused. This case, however, is one where the learned Sessions Judge has by his orders given occasion to very serious complaint by the accused and I now propose to deal with them *seriatim* and in detail.

The accused were sent up for trial for offences which are heinous and for which serious penalties have been provided by the law. The learned Sessions Judge, therefore, ought to have given legitimate

facilities to the accused to satisfy the Court that the charges against them were not justifiable. Far from doing that, the learned Sessions Judge in this case, in my opinion, committed such irregularities the like of which, I am glad to say, we do not find being committed every day.

The first serious irregularity that the learned Sessions Judge committed was, that he allowed evidence of previous conviction to be placed before him and the assessors who were aiding him, before the trial closed. The learned Sessions Judge, however, tries to justify this procedure under section 14 of the Evidence Act. My learned brother has already pointed out, and I fully agree with him, that that provision of law is not applicable to a case under sections 395, 325 and 402 of the Penal Code. It was held as early as 1849 in the case of *Manjura Bai v. Queen Empress* (1) under section 401 of the Code 'that evidence of the character of the accused not being a fact in issue in the offence of belonging to a gang of persons associated for the purpose of habitually committing theft punishable under section 401 of the Penal Code, evidence of bad character or reputation of the accused is inadmissible for the purpose of proving the commission of that offence,' and it was pointed out by the learned Judges at page 143 that, "it was unnecessary to repeat the grounds upon which the learned Judges held in the case of *Empress v. Naba Kumar Patnaik* (2), on consideration of section 54 of the Evidence Act and section 14 of the Evidence Act as well as the terms of section 310 of the Code of Criminal Procedure, that such evidence is inadmissible as evidence of bad character because we concur in the judgment delivered." The correctness of this decision, I am aware, was doubted in the case of *Bonni v. Emperor* (3). It was pointed out there that such evidence was admissible in a gang case, but I am not aware of any case in which evidence of previous conviction has been held to be admissible in a trial on charges under sections 395 and 402 of the Penal Code. Gang cases stand upon a different footing from cases for offences under sections 395 and 402

(1) 27 C. 139; 4 C. W. N. 97; 14 Ind. Dec. (N. S.) 92.

(2) 1 C. W. N. 146.

(3) 9 Ind. Cas 556; 38 C. 408; 15 C. W. N. 461; 12 Cr. L. J. 97.

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of the Code. I am, therefore, clearly of opinion that where the charges against the accused are under sections 402 and 395, evidence of previous conviction is not admissible under section 14 of the Evidence Act. Apart from that, the whole principle of British criminal jurisprudence condemns the prejudice which may be caused to the accused by the admission of previous conviction before he has been found guilty of the offences on which he has been arraigned. Assessors and Jury are human beings and they are sure to be influenced by any previous conviction, which may be proved against the accused. I would, therefore, on general principles, as well as under the provisions of the Evidence Act and the Code of Criminal Procedure, discard this evidence. This evidence, however, having been admitted our course is perfectly clear. The conviction of and sentence upon the accused must be set aside. If that had been all that the learned Sessions Judge had done, I would have held that he had simply committed an error of law; but the learned Sessions Judge denied to the accused that fairness of trial to which they are entitled under the law. The case was begun on the 14th June. On the 15th June an application was filed asking for the recall of the witnesses who were examined in-chief on the previous day on the ground that the accused had not been correctly informed of the date of the trial. The learned Sessions Judge, mainly on the ground that the Public Prosecutor objected to his petition, refused the application. In my opinion, he wrongly surrendered his judicial discretion to the opposition offered by the Public Prosecutor. The learned Sessions Judge was again requested to recall the prosecution witnesses who were examined in-chief on the 15th. That application suffered the same fate. The result was that about ten witnesses examined on behalf of the prosecution were not cross examined at all by the accused except accused No. 1. This improper exercise of judicial discretion has, in my opinion, very seriously affected the trial and on these two grounds I entirely agree with my learned brother that the conviction of, and the sentences on the accused must be set aside.

As regards the accused Ramdhani, my learned brother has fully dealt with the evidence which has been adduced on behalf of the Crown in support of the charge against

him and I would only add that the flimsy evidence which was adduced on behalf of the prosecution against him ought to have been discarded by the learned Sessions Judge. I also agree that the other two accused should now be tried on a charge under sections 395 and 325 of the Penal Code. In doing so, we express absolutely no opinion on the merits of the evidence against them. It is sufficient to say that their case has been prejudiced by the admission of irrelevant and inadmissible evidence and it would be difficult for us to dissect the whole of the evidence in the case and consider only that which is relevant. That we now leave to the learned Sessions Judge to do and we hope and trust that the learned Sessions Judge will bring upon the evidence that judicial consideration which we expect from him.

The result is, that I agree with my learned brother that the conviction of and sentences on Teka Ahir and Abhilakh Ahir be set aside and that they be re-tried on charges under sections 395 and 325 of the Penal Code. The prisoner Ramdhani is acquitted.

*Conviction set aside;  
Retrial directed.*

#### PATNA HIGH COURT.

CRIMINAL REVISION No. 156 OF 1920.

April, 30, 1920.

*Present:*—Mr. Justice Sultan Ahmad.

TANUK LAL MANDAR—PETITIONER

*versus*

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 403—Acquittal under section 147, Penal Code, whether bars trial under section 186—Writ of attachment, execution of, after returnable date—Resistance to execution, whether offence.*

The acquittal of an accused person in a case under section 147 of the Penal Code, is no bar to his trial for an offence under section 186 of the Code. [p. 336, col. 1.]

The execution of a writ of attachment after expiry of the date fixed for its return is illegal, and resistance to such execution is not an offence under section 186 of the Penal Code. [p. 336, col. 1.]

Appeal against an order of the District Magistrate, Bhagalpore, confirming that of the Magistrate, 2nd Class, Madhipura, dated the 12th February 1920.

Messrs. Hasan Imam and Gour Chandra Pal, for the Petitioner.

Mr. B. N. Mitter, for the Opposite Party.

JUDGMENT.—The facts out of which

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this application arises may be shortly stated as follows. In execution of a decree against a minor, who is the nephew of the petitioner, writ of attachment was taken out and the complainant decree-holder, acting as identifier, accompanied the peon to execute the writ but was assaulted and severely injured by the petitioner. The peon fled away and reported the occurrence on the 8th April 1913. The petitioner was tried on the complaint on behalf of the decree-holder under section 147 of the Indian Penal Code and was acquitted. Subsequently, the complainant decree-holder applied for sanction to the Munsif for the prosecution of the petitioner under sections 153 and 186 of the Indian Penal Code. The Munsif granted the sanction for prosecution of the petitioner. The order granting sanction was appealed against to the Judge and then to this Court but was maintained. Ultimately, the petitioner was tried and convicted under section 186, Indian Penal Code, and sentenced to two months' rigorous imprisonment. An appeal was preferred to the learned District Judge of Bhagalpur who upheld the conviction and sentence and this application has been filed by the petitioner against his conviction and sentence.

The first point that has been raised by the learned Counsel appearing on behalf of the petitioner is, that the trial of the petitioner under section 186 of the Indian Penal Code was invalid and incompetent as his acquittal in the section 147 case was a bar to his prosecution under section 186. It is pointed out that the common object of the unlawful assembly in the section 147 case was said to be the resistance of the peon in the discharge of his duty which is the offence for which the accused has been tried and convicted in the present case. Section 403, clause (1) runs as follows: "A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236 or for which he might have been convicted under section 237". Admittedly, section 236, Criminal Procedure Code, does not apply

but it is contended that, under section 237, Criminal Procedure Code, he could be convicted for an offence under section 186 though no charge under section 186 has been framed. I regret I cannot accept this contention as sound. In my opinion, section 237 is limited to cognate offences, and it cannot, by any stretch of reasoning, be contended that offences under sections 147 and 186 of the Indian Penal Code are cognate offences. They are distinct offences with absolutely nothing in common and, therefore, in my opinion, section 403, clause (1), does not apply to the case and the acquittal of the accused in the 147, Indian Penal Code case is no bar to his trial for an offence under section 186, Indian Penal Code. In my opinion, this case is fully covered by section 403, clause (2), which lays down that "a person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235 sub-section (1)". This contention of the learned Counsel is, therefore, overruled.

The second objection that he has raised is that the writ is not legal, inasmuch as it is issued against a minor for whom no guardian had been appointed under Order XXXII, rule 3. The learned Vakil appearing on behalf of the complainant who appeared in support of the conviction, with my permission, urged that Order XXXII, rule 3 does not apply to execution proceedings. The point, in my opinion, is not free from difficulty, and, if this had been the only point upon which this application could be disposed of, I would have referred the matter to a larger Bench. I may, however, record, as my opinion, that even if Order XXXII, rule 3, does not directly apply to execution proceedings, the principle underlying Order XXXII, rule 3, must be held to apply to such proceedings. It has been held in the cases reported as *Govindrami Naidu v. Alagirisami Naidu* (1) and *Virupakshappa v. Shidappa* (2) that Order XXXII, rule 7 applies to execution proceedings and I do not see any reason why Order XXXII, rule 3 should not be held to apply to such proceedings. In my opinion, therefore, the writ was not a legal one. But, as I have already said, I do not

(1) 29 M. 104.

(2) 26 B. 109; 3 Bom. L. R. 565.



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propose to base my decision of this application on that ground.

The third ground which, in my opinion, is fatal to the conviction of the accused is that the returnable date fixed in the writ was the 2nd April, but the attachment was sought to be made on the 8th of April. I have examined the ordersheet in the execution case and also the writ and it is perfectly clear that the date fixed for the return of the writ originally was the 2nd and by some manipulation that date has been altered, both in the writ and in the ordersheet, by some one other than the Court, and it is also clear that this alteration took place after the occurrence. I cannot conceive that the alteration made in the ordersheet was made by the Munsif, because there is no provision of law under which he can make subsequent alterations in his order-sheet without even initialling such alteration. A perusal of the order of the Munsif, dated the 19th March 1918, will show clearly that the writ of attachment was ordered to be issued and the 2nd of April was fixed for its return. That being so, the writ of attachment was attempted to be served on a date long after the date of return in the writ. This makes the execution of the writ absolutely illegal. It has been held in the case reported in *Jagpat Koeri v. Emperor* (3) that "resistance to a Constable endeavouring to effect an arrest on an invalid warrant did not amount to an offence under section 353 of the Indian Penal Code." The same view of the law has been laid down in the cases reported in *Emperor v. Ganeshi Lal* (4) and *Empress v. Amar Nath* (5). If, however, in resisting the peon in execution of an invalid writ the accused had exceeded the right of private defence he would have been held guilty. It appears, however, from the evidence as well as on the findings arrived at by the Trial Court that the peon was not even touched, as regards the attack on the decree holder, that point is not a matter for consideration in this case. That was the subject-matter of the trial under section 147 of the Indian

Penal Code in which the accused were acquitted. The result, therefore, is that the conviction and sentence of the accused must be set aside on the ground that the writ, the execution of which he had resisted, was not a valid writ.

*Conviction set aside.*

## CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 423 OF 1920.

June 9, 1920.

Present:—Mr. Justice Walmsley and  
Mr. Justice Greaves.

AMULYA CHARAN SARKAR AND OTHERS—  
PETITIONERS

VERSUS

AMRITA LAL MUKHERJEE—OPPOSITE  
PARTY

*Criminal Procedure Code (Act V of 1898), ss. 109, 145, 439—Magistrate, discretion of—Revision—High Court, whether will interfere.*

Where in exercise of his discretion a Magistrate elects to proceed under section 07, and not under section 145, of the Criminal Procedure Code, the High Court is not entitled to interfere in revision with the exercise of his discretion.

Rule against the order of the Sub-Divisional Magistrate, Ranaghat.

Mr. K. N. Ohauthuri, (with him Babu Hamendra Nath Sen), for the Petitioners.

Babus Hemendra Ohandra Sen and Surendra Nath Basu (Sr.), for the Opposite Party.

## JUDGMENT.

WALMSLEY, J.—So far as I can understand the facts of this case, it appears to me that, probably, the provisions of section 145, Criminal Procedure Code, offered the Magistrate the best means of settling the dispute between the two parties. But in view of the Full Bench decision in the case of *Emperor v. Abbas* (1), I do not think it is open to this Court to say that the Magistrate must proceed under section 145 and not under section 107, Criminal Procedure Code. As the Magistrate has exercised his discretion I think we are not entitled to interfere. I, therefore, discharge this Rule.

GREAVES, J.—I agree.

*Rule discharged.*

(1) 12 Ind. Cas. 833; 39 O. L. J. 429; 16 O. W. N. 88; 12 Cr. L. J. 569.

(3) 39 Ind. Cas. 494; 2 P. L. J. 487; 1 P. L. W. 306; (1918) Pat. 48; 15 Cr. L. J. 5-6.

(4) 27 A. 258; 1 A. L. J. 59; A. W. N. (1924) 220; 1 Cr. L. J. 896.

(5) 5 A. 318; A. W. N. (1883) 54; 3 Ind. Dec. (N.S.) 313.

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CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 55  
OF 1919.

June 15, 1920.

Present:—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and  
Justice Sir Ernest Fletcher, Kt.  
Maharaja MANINDRA CHANDRA  
NANDY AND OTHERS—DEFENDANTS—  
APPELLANTS

versus

ASWINI KUMAR ACHARYA—  
PLAINTIFF—RESPONDENT.

*Contract, breach of—Promisee, right of, to sue—  
Contract, renunciation of, before performance—Dam-  
ages, measure of—Costs, award of—Calcutta High  
Court Rules, Ch. XXXVI, r. 93—"Ordinary cause"—  
"Important cause."*

The breach of a contract may take place before the time fixed for the performance of the contract has arrived, as, where the promisor repudiates the contract, in which event the promisee may elect to sue for breach of the contract without waiting for the time fixed for performance, [p. 338, col. 2.]

The damages for breach of contract by renunciation thereof before performance is due, are measured by what the injured party would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself. [p. 339, col. 1.]

Where a plaintiff brings a grossly exaggerated claim and obtains a decree for less than one-fifth of the sum claimed by him, he is entitled to costs as in an "ordinary cause." [p. 343, col. 1.]

Where costs are awarded as in an "important cause," reasons should be recorded for this course. [p. 342, col. 1.]

Appeal against the decree of Mr. Justice Rankin, dated the 9th May 1919.

Mr. A. N. Ohaudhuri, for the Appellants.

Messrs. H. D. Bose and B. K. Lahiri, for the Respondent.

JUDGMENT.

MOOKERJEE, ACCT. C. J.—This is an appeal from the judgment of Mr. Justice Rankin in a suit for recovery of money. The plaintiff-respondent makes his claim in connection with a contract, dated the 22nd December, 1915, entered into by the defendants with the Corporation of Calcutta for the supply of stone metal. The plaintiff was not a party to this contract, but his case is that the defendants agreed to pay him, (1) a sum of Rs. 20,000 if he could secure acceptance of their offer by the Corporation, and defrayed, at his own risk, the preliminary expenses in connection therewith; (2) brokerage at two annas for every hundred

cubic feet of stone metal delivered to the Corporation during the subsistence of the contract, and (3) two-fifths share of the profits of the business which was to be placed under his management for the same period. The plaintiff alleges that he was paid Rs. 5,000 by way of preliminary expenses, but has received nothing under the other two heads. The contract with the Corporation was to be in operation for twenty years, and twenty lakhs cubic feet of stone metal were to be supplied annually. Consequently, the plaintiff would be entitled to receive Rs. 2,500 a year for twenty years on account of brokerage. The profits are calculated by the plaintiff at Rs. 50,000 a year; on this basis, his share of profits would be Rs. 20,000 a year for twenty years. The grievance of the plaintiff is that, although it was mainly through his efforts that the defendants were able to secure the contract, they have repudiated the arrangement made with him and have falsely denied that he was of any assistance to them in the matter. He accordingly claims damages for breach of contract, although no transactions have yet taken place between the defendants and the Corporation; his claim is for nearly three lakhs of rupees; namely, Rs. 15,000 for preliminary expenses, Rs. 50,000 for loss of brokerage during twenty years, and Rs. 2,29,398-6-5 for loss of profits during the same period. Mr. Justice Rankin has given him a decree for Rs. 57,000 in all, with costs on Scale No. 3, that is, Rs. 15,000 for preliminary expenses, Rs. 20,000 for brokerage and Rs. 22,000 on account of loss of profits. The defendants have appealed to this Court, and have disputed the claim as greatly exaggerated, if not entirely unfounded. They have also urged that costs on Scale No. 3 should not have been allowed. In our opinion, the appeal must fail on the merits, but the order for costs cannot be supported.

As regards the first point, namely, the claim for preliminary expenses, the substantial point in controversy is, whether the defendants agreed to pay the plaintiff a sum of Rs. 20,000 for preliminary expenses, or only such sum not exceeding Rs. 20,000 as the plaintiff might find it actually necessary to spend on account of preliminary expenses. Mr. Justice Rankin has accepted the story of the plaintiff that the defend-

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ants agreed to pay him Rs. 20,000 provided the contract was secured, and that a part payment of Rs. 5,000 was made. We are not prepared to dissent from this conclusion. In our view, the plaintiff has carried out his part of the bargain, and is entitled to the balance of the sum agreed upon, that is, Rs. 15,000. It has been faintly suggested, however, on behalf of the appellants that, what is euphemistically called "preliminary expenses" included in a large measure sums of money paid to various influential persons with a view to secure their assistance in the acceptance of the tender of the defendants by the Calcutta Corporation. To put the matter plainly, the imputation is, that this agreement to place Rs. 20,000 at the disposal of the plaintiff for so-called preliminary expenses is against public policy. Now, it cannot be disputed that, as was laid down in *Ledu v. Hira Lal* (1) and *Montefiore v. Menlay Motor Components Co.* (2), it is contrary to public policy to induce public officers, for money or other valuable consideration, to use their position and influence to procure a benefit. An agreement of this character holds out an inducement to Public Officers to act with partiality or from corrupt motives or to bias them in the discharge of their official duties; such conduct, if tolerated, would sap the foundation on which official honesty rests and legalise temptations which would lead away from the path of rectitude many an official who, without such inducements, might perform his duty. These principles are indisputable: but, in the case before us, the materials on the record are not sufficient to justify the application of these rules. Indeed, the evidence does not appear to have been expressly directed to this point, for the obvious reason that, neither the plaintiff nor the defendants would be over anxious to disclose the alleged secrets. The award of Rs. 15,000 for preliminary expenses must, consequently, be confirmed.

As regards the second point, the plaintiff claimed Rs. 50,000 as brokerage at the rate of Rs. 2,500 a year for twenty years. Mr. Justice Rankin has awarded Rs. 20,000

only. The defendants contend that the award is excessive, specially as the plaintiff seeks a decree even before the first instalment has become due. Now, there can be no doubt that a breach of contract may take place before the time fixed for performance of the contract has arrived, where, as here, the promisor has repudiated the contract. In such an event, the promisee may elect to sue him for breach of the contract without waiting for the time fixed for performance. This principle applies where the contract has to be performed in instalments; in such cases, the question may arise, whether the refusal to perform any particular part of the contract amounts to a repudiation of the whole contract or not. No such question, however, arises in the present case, because the defendants have repudiated in its entirety their arrangement with the plaintiff. The point here, consequently, reduces to the proper mode of assessment of damages in the event of what has sometimes been called—felicitously though, perhaps, not logically—"anticipatory breach of a contract." Lord Wrenbury observed in *Bradley v. Newsum Sons & Co.* (3): "The expression (anticipatory breach of contract) is, I think, unfortunate. In *Hochster v. De la Tour* (4), the leading case upon this subject, Lord Campbell made no use of the expression in his judgment. It is used several times by Lord Esher in *Johnstone v. Milling* (5), but not by either of his colleagues. The words used are, of course, immaterial, unless they lead, in course of time, to an erroneous impression. There can be no breach of an obligation in anticipation. It is no breach not to do an act at a time when its performance is not yet contractually due. If there be a contract to do an act at a future time, and the promisor, before that time arrives, says that when the time does arrive he will not do it, he is repudiating his promise which binds him in the present, but is

(3) 1919) A. C. 16 at p. 53; 88 L. J. K. B. 35; 119 L. T. 238; 24 Com. Cas. 1; 14 Asp. M. C. 340; 34 T. L. R. 613.

(4) (1853) 2 El. & Bl. 678; 22 L. J. Q. B. 455; 17 Jur. 972; 1 W. R. 464; 22 L. T. (o. s.) 172; 95 R. R. 747; 18 E. R. 912

(5) 1866) 16 Q. B. D. 481 at p. 474; 55 L. J. Q. B. 162; 54 L. T. 629; 34 W. R. 238; 50 J. P. 694.

(1) 29 Ind. Cas. 625; 21 C. L. J. 537; 43 C. 115; 19 C. W. N. 919.

(2) (1918) 2 K. B. 241; 87 L. J. K. B. 907; 119 L. T. 240; 62 S. J. 555; 34 T. L. R. 493.



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in no default in not doing an act which is only to be done in the future. He is recalling or repudiating his promise, and that is wrongful. His breach is a breach of a presently binding promise, not an anticipatory breach of an act to be done in the future. To take Bowen, L. J.'s words in *Johnstone v. Milling* (5), it is 'a wrongful renunciation of the contractual relation into which he has entered.' The result is, that the other party to the contract has an option either to ignore the repudiation or to avail himself of it. If he does the latter, it is still, by consensus of the parties, and not by some superior force, that the contract is determined."

Where there is such a breach by an unqualified and positive refusal to perform a contract though the performance thereof is not yet due, the injured party may bring his action at once for recovery of damages. The damages for breach of a contract by renunciation thereof before performance is due, are measured by what the injured party would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself. The substance of the matter then is, that the damages are assessed as on the date of the breach; nevertheless, they are to be a compensation for the loss caused by depriving the plaintiff of the benefit of the contract as it was originally made. The doctrine of anticipatory breach is not a doctrine which fictitiously moves the performance ahead to the time of the repudiation, and regards the repudiation as a failure to perform the contract. The anticipatory breach takes effect as a premature destruction of the contract rather than as a failure to perform it in its terms. The damage caused by such a premature destruction is, to be sure, due to the consequent failure to secure performance, but this is a failure to secure performance according to its original terms, that is, performance at the time and place when performance was required according to the terms of the agreement. Since the injury is the destruction of the contract regarded as an article of property, the measure of damages is the value of such property at the time of its

destruction; but since the value of a contract will ordinarily be determined by the benefit which its performance would confer, the exact measure of damages upon an anticipatory breach is, in the ordinary case, precisely the same as it would be if the repudiation were not accepted as a breach and the injured party brought a suit, after the time of performance, for the non-performance at the time set. In other words, though the plaintiff sues at once for an anticipatory breach of the contract his damages are to be assessed according to the cost of performance, not at the time and place of the breach, but at the time and place set for performance. These principles were applied by this Court in the case of *Bilasiram Thakursidass v. Ezekiel Abraham Gubboy* (6), where reliance was placed upon the decisions in *Roper v. Johnson* (7), *Frost v. Knight* (8), *Brown v. Muller* (9).

Now, what is the position of the defendants if the claim for brokerage put forward by the plaintiff is tested in the light of these principles? The essence of the transaction was that the defendants agreed to pay the plaintiff Rs. 50,000 as brokerage on account of services rendered by him in securing them the contract. The sum, however, was not payable in one instalment on a single specified date; the payment was to be distributed over twenty years at the rate of Rs. 2,500 a year. If the defendants had not wrongfully rescinded the contract before the time for performance had arrived, the plaintiff would have received Rs. 2,500 annually for twenty years. The result of the renunciation by the defendants is, that the plaintiff has become forthwith entitled at his election, to sue for damages for breach of the entire contract and the damages must be so calculated that he may be placed, so far as pecuniary benefit is concerned, as nearly as possible in the position he would have occupied if the defendants had carried out the contract. The qualification that the damages are to

(6) 33 Ind. Cas. 1; 43 C. 305; 23 C. L. J. 62; 20 C. W. N. 240.

(7) (1873) 8 C. P. 167; 42 L. J. C. P. 65; 28 L. T. 296; 21 W. R. 384.

(8) (1872) 7 Ex. 111; 41 L. J. Ex. 78; 26 L. T. 77; 20 W. R. 471.

(9) (1877) 7 Ex. 319; 41 L. J. Ex. 214; 27 L. T. 272; 21 W. R. 18.

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be abated to the extent that the plaintiff might have mitigated his loss does not apply in the circumstances of this particular claim where a definite sum was payable by the defendants to the plaintiff as the value of services already rendered by him. Consequently, the plaintiff is *prima facie* entitled to the present value of the annuity of Rs. 2,500 for twenty years; this may easily be shown by calculation to amount to Rs. 31,155 or Rs. 28,674, according as the rate of interest is assumed to be five per cent. or six per cent. per annum. As the plaintiff has been awarded Rs. 20,000 only, that sum is by no means excessive.

As regards the third point, there can be no room for reasonable doubt upon the evidence that the defendants agreed to place the plaintiff in charge of the work for the whole period of twenty years and to pay him for services to be rendered not a fixed salary but a share of the profits. Mr. Justice Rankin has calculated the average annual profit likely to result from the execution of the contract at Rs. 20,000 a year for twenty years. Consequently, it may be taken that if the plaintiff had been entrusted with supervision of the work pursuant to the agreement he would have been in receipt of two-fifths of this sum, that is, Rs. 8,000 a year. The plaintiff in his plaint estimated his share of the net annual profits at Rs. 20,000 and demanded as damages the present value of an annuity of Rs. 20,000 a year for twenty years on the assumption that the rate of interest would be six per cent. per annum. This clearly was a greatly exaggerated claim and has not been allowed by Mr. Justice Rankin, who has given the plaintiff a decree under this head for Rs. 22,000 only. It is manifest that the present claim is covered by the principle previously enunciated, namely, that when repudiation of a contract by the promisor has been acted upon by the promisee who has treated the contract as ended, though damages are to be measured by ascertaining what would have arisen by non-performance at the appointed time, they should be abated by reason of circumstances of which the promisee should have reasonably availed himself. Reference may, in this connection, be made to the decision in *Hochster v. De la Tour* (4). There the plaintiff had agreed to serve the

defendant and the defendant had undertaken to employ the plaintiff, as a courier, for three months; but the defendant subsequently informed him that he had changed his mind and would not require his services. The Court ruled that the refusal of the defendant constituted a breach, giving the plaintiff an immediate right of action. Lord Campbell, C. J. added: "Instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract." To the same effect is the decision of Cockburn, C. J., in *Frost v. Knight* (8) where, after referring to the case of *Danube and Black Sea Railway and Kustendie Harbour Co. v. Xenos* (10), *Avery v. Bowden* (11), *Reid v. Hoskins* (12), *Barrick v. Buba* (13), he added that the promisee who elects to treat the repudiation of the other party as a wrongful putting an end to the contract, may at once bring his action as on a breach of it, "in which he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." The doctrine recognised in these cases has been repeatedly applied by the Supreme Court of the United States. Thus, in *Pierce v. Tennessee Coal, Iron and Railroad Co.* (14) it was held that on discharge from a contract of employment, the party discharged may elect to treat the contract as absolutely and finally broken and recover in an action the full value of the contract to him at the time of the breach, including all that he would have received in the future as well as in the past, deducting any sum that he might have earned or that he might earn thereafter. See also *Rochm v.*

(10) (1863) 13 C. B. (N. S.) 825; 31 L. J. C. P. 284; 8 Jur. (N. S.) 439; 10 W. R. 320; 132 R. R. 527; 143 E. R. 325.

(11) (1855) 5 El. & Bl. 714; 25 L. J. Q. B. 49; 1 Jur. (N. S.) 1167; 4 W. R. 93; 27 L. T. (O. S.) 119; 103 R. R. 695; 119 E. R. 647.

(12) (1856) 6 El. & Bl. 953; 26 L. J. Q. B. 3; 3 Jur. (N. S.) 238; 5 W. R. 45; 28 L. T. (O. S.) 145; 106 R. R. 852; 118 E. R. 653.

(13) (1857) 2 C. B. (N. S.) 583; 26 L. J. C. P. 280; 5 W. R. 665; 29 L. T. (O. S.) 199; 109 R. R. 783; 140 E. R. 536.

(14) (1899) 173 U. S. 1; 43 Law. Ed. 591.

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*Horst* (15). We are not unmindful that in the present case, the plaintiff was to be paid not a fixed salary but a share of the profits. This makes no difference in the application of the principle. As pointed out by Sir Robert Collier in *Cowasjee Nanabhoy v. Lallbhoy Vullubhoy* (16), quoted with approval by Bankes, L. J., in *Reigate v. Union Manufacturing Co.* (17), the man who is paid by a salary is not necessarily affected by the prosperity or adversity of the company or even by its dissolution, while the man who agrees to be paid by a commission upon sales, speculates to a certain extent on the prosperity of the company. But in principle, the rights of the two persons stand on the same footing, subject to the difference that in the one case the amount of loss sustained is certain, in the other it is variable and uncertain. In both cases, however, there is, as Mr. Justice Rankin has pointed out, the inevitable uncertainty of life and health. Consequently, in circumstances like these, the damages cannot be assessed with any approach to mathematical accuracy. In view, however, of the fact that the Court below has assessed the damages at less than three years estimated profits, we are not prepared to hold that the award is excessive.

Finally, we have to consider the question of costs which have been allowed on Scale No. 3. Rule 93 of Chapter XXXVI of the Rules of Court prescribes the fees allowed to the Attorneys with reference to the importance and difficulty of the case, and lays down that, unless the class under which the case falls is determined by the Court, the costs will be taxed under class 1. For the purposes of the rule, cases are classified as short causes, ordinary causes and important causes. The appellants have contended that the present litigation falls within the description "ordinary causes." The respondent has not satisfied us why the suit should be taken out of the category of ordinary causes and classed as an important cause. It is plain that the suit does not cease to be an ordinary cause, merely because witnesses are examined

at inordinate length or because the true agreement between the parties has to be spelt out of a lengthy correspondence. From enquiries made, we have ascertained that, till quite recent years, orders for taxation of costs under Scale No. 3 were, as might be expected, very sparingly made. In the case of *Buldeo Narayan v. Scrymgeour* (18) Paul, J., awarded costs on Scale No. 3 stating that: "This is an important case and the plaintiff has been put to much expense and his legal advisers have been obliged to exert themselves very much." On appeal, it was argued that costs on Scale No. 3 should only be given in very exceptional cases. Norman, C. J., and Phear, J., who heard the appeal set aside the order for costs on Scale No. 3 and directed each party to bear his own costs both of the original suit and of the appeal. Norman, C. J., stated that the award of costs on Scale No. 3 was very unusual, that such costs were rarely given and could only be given in important cases. In the case of *Miller v. Gouripore Company Limited* (19) Paul, J., again awarded costs on Scale No. 3, "to mark his sense of the grossly dishonest defence." On appeal it was contended that costs should not have been awarded on Scale No. 3. Phear and Macpherson, JJ., who heard the appeal reversed the decree and dismissed the suit with costs in both Courts on Scale No. 2. On the 20th February 1883 Pigot, J., allowed costs on Scale No. 3 in the suit of *Prinsep v. Oranburgh* (Suit No. 365 of 1882) for damages for infringement of copyright. It appears that the defence in that case completely collapsed and the decree was made practically by consent. On the 2nd March 1885 Cunningham and Wilson, JJ., allowed costs on Scale No. 3 and three Counsel on each side, in the suit of *Bainath v. Graham* (Suit No. 352 of 1882) and analogous suits, which were heard by a Bench of two Judges on account of their special importance. In a case heard on the Admiralty Side of this Court for 27 days [*Drachenfels, In the matter of the steamship* (20)] Ameer Ali, J., on the 31st January 1900, directed that the costs be allowed on

(15) (1900) 178 U. S. 1; 44 Law. Ed. 953.

(16) 3 L. A. 200 at p. 20; 1 B. 463 (P. C.); 3 Suth. P. O. J. 326; 3 Sar. P. O. J. 645; 11 Mad. Jur. 392; 26 W. R. 73; 1 Ind. Dec. (N. S.) 309.

(17) (1918) 11 K. B. 592; 87 L. J. K. B. 724; 118 L. T. 479.

(18) 6 B. L. R. 581 at p. 594.

(19) 8 B. L. R. 285.

(20) 27 C. 860 at p. 880; 14 Ind. Dec. (N. S.) 502.



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the special scale in respect of three heads, as, in his opinion, the fees ordinarily allowed under those heads would not be sufficient to indemnify the plaintiffs against the costs incurred by them. The same course was followed by Stanley, J., on the 11th July 1900 in the suit of *Nistarini Dassi v. Nundo Lal Bose* (Suit No. 311 of 1898) which is reported upon other points; *Nistarini Dassi v. Nundo Lal Bose* (21) and *Nundo Lal Bose v. Nistarini Dassi* (22) the reason assigned for the order was that the fees ordinarily allowed under three of the headings would not be sufficient to indemnify the plaintiff against the costs necessarily incurred by her. On the 24th February 1903 Ameer Ali, J., allowed costs on Scale No. 3, only with regard to enquiries relating to certain items in the suit of *Sarkies v. North German Fire Insurance Company* (Suit No. 767 of 1901) "having regard to the length of the case and to the other circumstances," all other costs were ordered to be taxed on Scale No. 2. On the 9th December 1909 my learned brother, Mr. Justice Fletcher, allowed costs on Scale No. 3 as between Attorney and client, to be paid out of the estate in a testamentary matter; *In the Goods of Daniel O'Brien, Hoyle v. Grange* (Suit No. 3 of 1908); that case was compromised, but the question of costs was left to the Court. On the 3rd February 1919 Rankin, J., allowed costs on Scale No. 3 as between Attorney and client in the suit of *Layalka v. Solaiman Ariff* (Suit No. 729 of 1918), because "it was a tricky case and the defence was based upon fraud which might, for lack of care and attention, not have been discovered." In the present case, however, no reasons have been assigned in support of the order for the award of costs on Scale No. 3. It is obviously desirable that, when the Trial Court holds that costs should be awarded, not as in an "ordinary cause," but as in an "important cause," reasons should be assigned for what is, in the words of Norman, C. J., a very unusual course, rarely adopted. Such statement of reasons may ensure that the order is not made without adequate consideration, assure the litigant

that the award has not been arbitrarily made, and materially assist the Court of appeal in determining whether judicial discretion has or has not been properly exercised. The appellants have rightly contended that, in this respect at least, the procedure should be analogous to what is followed in England where three Counsel are allowed only when very special reasons are established; *Smith v. Fuller* (23), *Glamorgan County Council v. G. W. Ry. Co.* (24), *Peel v. London and North Western Railway Company* (25), *Wilson v. Wilson* (26), *Mercedes v. F. I. A. T. Co.* (27). We must remember that, whatever the origin of costs might have been, they are now awarded, not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected, or, as Lord Coke puts it, for whatever appears to the Court to be the legal expenses incurred by the party in prosecuting his suit or his defence. We are now far removed from the days when "the plaintiff who failed was punished in amercement *pro falso clamore*, and the defendant, where the judgment was against him, in *miserecordia cum expensis litis*, for his unjust deception of the plaintiff's right." The theory on which costs are now awarded to a plaintiff is that the default of the defendant made it necessary to sue him, and to a defendant is, that the plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in Court, and consequently the party to blame pays costs to the party without fault. These principles apply, not merely in the award of costs, but also in the award of extra allowance or special costs. Courts are authorised to allow such special allowance, not to inflict a penalty on the unsuccessful party, but to indemnify the successful litigant for actual expenses necessarily or reasonably incurred in what are designated

(23) (1875) 19 Eq. 473; 45 L. J. Ch. 69; 31 L. T. 873; 23 W. R. 332

(24) (1895) 1 Q. B. 21; 14 L. J. Q. B. 188; 71 L. T. 736; 9 Ry. & Can. Traff. Cas. 1; 59 J. P. 182.

(25) (1907) 1 Ch. 607; 76 L. J. Ch. 379; 96 L. T. 498

(26) (1911) 28 R. P. C. 741.

(27) (1913) 31 R. P. C. 8.

(21) 26 C. 891; 3 C. W. N. 670; 13 Ind. Dec. (N. S.) 1171

(22) 27 C. 428; 4 C. W. N. 169; 14 Ind. Dec. (N. S.) 282.

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as important cases or difficult and extraordinary cases. The object of the provision plainly is, not to give exemplary damages or smart money by way of punishment to a party for unsuccessfully bringing a difficult or extraordinary question, nor to enable the successful party to make anything in the way of gain or profit over and above the expenses for maintaining or defending such an action. The object and intention of the special scale is to enable the successful litigant to obtain indemnity for his expenses in very special or unusual circumstances, which would not be covered by the ordinary scale prescribed for all actions (other than short causes). It is manifest that no rigid definition of an important case can be framed; this much is clear that the character of a case cannot be determined by any particular phase of it, but various factors, such as the difficult and complicated nature of the questions of law and fact involved, the large amount in controversy, the length of time consumed in the trial, and like matters must be taken into account, not separately but in the aggregate. Finally, apart from all this, it must be remembered that, even though a case may appear important or difficult and extraordinary, the Court is not bound to award costs on the special scale.

The case before us cannot, in our opinion be rightly regarded as an "important case" which can be differentiated on any substantial ground from the typical suit for damages for breach of contract of service. On the other hand, we cannot ignore the fact that the claim was grossly exaggerated and that the amount awarded to the plaintiff is less than one-fifth of the sum claimed by him; indeed, if he had been moderate and reasonable in his demand, it is by no means improbable that the opposition might have been less strenuous and the litigation less protracted.

The result is that this appeal is allowed in part and the decree is varied in the matter of costs which will be allowed on Scale No. 2 instead of Scale No. 3. As regards this appeal, we direct that each party do bear his own costs.

FLETCHER, J.—I agree.

*Appeal partly allowed.*

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 44 OF 1918.

November 26, 1918.

Present:—Mr. Mittra, A. J. C.

Musammât UJARIA AND OTHERS—DEFENDANTS  
—APPELLANTS

versus

ROSHANLAL—RESPONDENT.

*Hindu Law—Widow, transfer by, without written instrument—Reversioner, suit by, for declaratory relief, whether maintainable—Declaration, whether should be granted.*

In the case of a mere transfer of possession [on the part of a Hindu widow without a written instrument, a reversioner should not be given a declaratory decree, and, in any case, not unless there is cogent evidence that the conduct and declarations accompanying the transfer clearly constitute an injury and it is necessary to perpetuate testimony in favour of such reversioner. The reversioner has no such marketable title which can be depreciated by such acts. [p 34, col. 1.]

Appeal against the decree of the District Judge, Chhindwara, dated the 6th of October 1917, confirming that of the Additional District Judge, Seoni, dated the 20th of July 1917.

Messrs. P. S. Kotval and A. C. Ray, for the Appellant.

Mr. A. B. Bhargava, for the Respondents.

**JUDGMENT.**—The plaintiffs sue as the reversioners of Than Singh after the death of his daughter, Musammât Ujaria, defendant No. 1, who has succeeded to the sixteen-annas share of Mauza Gadarwara which was her father's separate property. The material allegations in the plaint are, that defendant No. 1 in March 1914 had mutation effected with regard to four-annas share of the village in the name of Malukchand, who is now represented in the suit by defendants Nos. 4 and 5, and a similar four annas share in the name of defendants Nos. 2 and 3 each. They filed copies of Musammât Ujaria's statement, dated the 29th January 1914, and the mutation order passed thereon. They pray for a declaration that the transfers, by virtue of which defendants Nos. 2, 3, 4 and 5 are in possession of twelve annas share of Mauza Gadarwara, are inoperative after the death of defendant No. 1.

In the statement above referred to defendant No. 1, after stating that she is recorded

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as the *malguzarin* of the entire sixteen-annas share of the village since the death of her mother, adds: "I now wish to give Maluk Chand a four-annas share, Laxmi Chand a four-annas share and Birdhieband a four-annas share and to retain a four-annas share for my maintenance." The order referred to is the usual order passed in such cases. Both the Courts below have granted the plaintiffs the declaration asked for. The question I have to decide is, whether, as a matter of sound judicial discretion, a declaratory relief should have been granted in this case.

The parties are not at issue on any question of fact: hence there is no necessity of perpetuating testimony. The relationship of the plaintiffs is admitted. Defendant No. 1 claims to be only a limited owner. There has been no registered instrument to effect a transfer. It is not the plaintiffs' case, nor has it been found that there was a surrender by a Hindu female in favour of the next reversioner. The mutation order had not the effect of transferring the property. There was only a transfer of possession. It is not argued that the words accompanying the transfer "throw a cloud upon the plaintiffs' title." Defendant No. 1 claims to retain four-annas for her maintenance, meaning, I presume, a Hindu widow's qualified estate. The intended gift does not purport to be anything more than a gift of such interest as she possesses. The attempted transfer is ineffectual in law. It is competent to the defendant No. 1 to resume possession at any time within twelve years of the mutation. Under these circumstances, it seems to me that the plaintiffs have come into Court with a perfectly unnecessary declaratory suit, there being no transfer to be declared void as against the plaintiffs. In the case of a mere transfer of possession on the part of a Hindu widow without a written instrument, a reversioner should not be given a declaratory relief and, in any case, not unless there is cogent evidence that the conduct and declarations accompanying the transfer clearly constitute an injury and it is necessary to perpetuate testimony in favour of such reversioner. The reversioner has no such marketable title which can be depreciated by such acts.

There are cases which show that the Courts will not, as a rule, give declaratory decrees

in the lifetime of the testator in respect of a Will made by a limited owner. The main reason is, that such a Will can be revoked at any time and can scarcely be regarded as a cloud upon the reversioner's title. The same principles apply in this case. It is, however, contended that I should not interfere with the discretion of the Courts below and, in support of this, reliance is placed upon *Jaipal Kunwar v. Indar Bahadur Singh* (1). There the pedigree of the reversioners was disputed and the widow claimed to be absolute owner under an oral Will of her husband. In other words, there was a dispute on matters of fact. Farther, as their Lordships point out, "in both Courts in India it was realized that, under section 42 of the Specific Relief Act, 1877, a claim to a declaratory decree is not a matter of right, but that it rests with the judicial discretion of the Courts." For these reasons, their Lordships refused to interfere with the decree passed. In the case before me, as I have already stated, there was no issue of fact to be decided. The decree has been passed as a matter of course without reference to the question whether a declaratory decree should be given or not. The Courts below did not even realize that there has been no transfer of property as alleged by the plaintiffs but only a transfer of possession. I, therefore, set aside the decrees of the Courts below and dismiss the plaintiffs' suit on the ground that the plaintiffs are not entitled to any declaratory relief. As the objection was not taken in Courts below, I direct each party to bear his own costs throughout.

*Decree set aside.*

(1) 26 A. 238 (P. C.); 31 I. A. 67; 8 O. W. N. 465; 6 Bom. L. R. 495; 14 M. L. J. 149; 8 Sar. P. O. J. 625; 7 O. C. 239 (P. C.).



UTTAM CHAND V. BALLA MAL.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 72 OF 1921,  
(FORMERLY CIVIL APPEAL No. 1019 OF  
1920.)

January 21, 1921.

Present:—Mr. Justice Chevie.

UTTAM CHAND—JUDGMENT-DEBTOR  
—PETITIONER

versus

BALLA MAL—DECREE-HOLDER—  
RESPONDENT.*Amendment of decree—Executing Court, power of—  
Construction of judgment—Costs, interest on, from  
what date to be allowed—Civil Procedure Code (Act V  
of 1908), s. 35.*

An executing Court as such has no power to amend decrees even to bring them in accordance with the judgment of the original Court. [p. 345, col. 2.]

Where the wording of a judgment can be read in either of two ways it would be quite wrong to presume that the correct reading is one which violates the provisions of both law and equity. [p. 346, col. 1.]

Interest should not be allowed to run on costs until such costs have been actually incurred. [p. 346, col. 1.]

A judgment directed that the plaintiff be given a decree for a certain sum, with proportionate costs and future interest from the date of institution of the suit till realisation, at Re. 1 per cent. per mensem :

*Held*, that the correct reading of the judgment was that interest was payable only on the principal sum decreed and not on the costs. [p. 346, col. 1.]

Petition for revision of the order of the Senior Subordinate Judge, Amritsar, dated the 23rd January 1920

Mr. Nanak Chand, for the Petitioner.

Lala Tirath Ram, for the Respondent.

**JUDGMENT.**—In this case the plaintiff obtained a decree on the 13th May 1916. The judgment runs as follows:—"I accordingly pass a decree for Rs. 10,438 with proportionate costs and future interest from the date of institution of the suit till realisation at Re. 1 per cent. per mensem." The decree-sheet, however, says:—"It is ordered that a decree for Rs. 10,438 with proportionate costs is granted in plaintiff's favour and that the sum of Rs. 860 14 0 be paid to the plaintiff on account of the proportionate costs of this suit with interest thereon at the rate of Re. 1 per cent. per mensem from the date of institution to date of realisation." In the course of execution proceedings the judgment debtor paid up the

principal sum due with interest on that principal sum and also the costs of the suit. The decree-holder then applied to realise interest on those costs in execution. The judgment-debtor then applied for amendment of the decree. This application has been rejected by the lower Court by an order which runs as follows:—"The wordings in the judgment are clear, viz., decree is passed for Rs. 10,438 with proportionate costs and future interest from the date of institution of the suit till the realisation. The decree-sheet is in conformity with the judgment. There is no mistake in the decree-sheet." The judgment-debtor has appealed to this Court.

Now, an executing Court as such has no power to amend decrees, even to bring them in accordance with the judgment of the original Court. I must, therefore, regard the order which is now appealed against, as an order of the original Court and not merely as an order of the executing Court. I am, therefore, of the opinion that this is not an appeal from an order under section 47, Civil Procedure Code, and Counsel has failed to point out to me any provision under which an appeal lies from an order refusing to correct a decree. Counsel, however, asks me to interfere on revision, and I think I am justified in doing so, seeing that, in my opinion, the lower Court has simply quoted the words of the judgment and does not seem to me to have given any real thought to the correct decision of the question involved, which is, whether the costs, as well as the principal sum, are to cover interest. The lower Court has given no reasons whatever for its finding and simply says that the wording of the judgment is clear, which is obviously incorrect, seeing that the wording of the judgment is quite ambiguous. The words "decree for Rs. 10,438 with costs and future interest thereon" taken simply by themselves might mean either that the defendant was to pay principal *plus* costs *plus* interest on the principal sum or that he should pay principal *plus* costs *plus* interest on both principal and costs. We must, therefore, go further to consider what the real meaning of the decree is. Now, the interest awarded by the judgment is to run from the date of institution of the suit till realisation at Re. 1 per cent,

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per mensem. Section 34 of the Civil Procedure Code empowers the Court to allow interest on the principal sum adjudged both from the date of the suit to the date of the decree and also from the date of the decree to the date of payment at such rate as the Court deems reasonable. Section 35, however, which deals with costs, gives the Court power to allow interest on costs at any rate not exceeding six per cent. per annum. This section does not say from what date the interest is to run, but it is obvious that interest should not be allowed to run on costs until such costs have been actually incurred. In the present case it certainly cannot be said that all the costs were incurred at the date of the institution, for the costs include not only stamp for plaint and Pleader's fee but also subsistence for witnesses, service of process and other costs which must have been incurred subsequent to institution. It would, obviously, be incorrect to allow interest on such costs until they were actually incurred, and to allow interest on costs at 12 per cent. per annum would be a violation of the provisions of section 35, Civil Procedure Code, which limits interest on costs to a maximum rate of 6 per cent. per annum. In a case where the wording of the judgment can be read in either of two ways, I think it would be quite wrong to presume that the correct reading is one which violates the provisions of both law and equity. I hold, therefore, that the correct wording of the judgment is that interest is payable only on the principal sum decreed and not on the costs.

The appeal as an appeal is dismissed, but on the revision side I direct that the decree be amended so as to make the interest recoverable only on the principal sum decreed and not on the costs. I pass no order as to costs in this Court.

*Decree amended.*

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 527  
OF 1919.

January 4, 1921.

Present:—Mr. Justice Das and  
Mr. Justice Adami.

Babu DINANATH SAHAI—DEFENDANT  
No 6—APPELLANT

*versus*

Musammât MAYAWATI KUER AND OTHERS  
PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XX, r. 12—  
Suit for possession and mesne profits—Decree for  
possession—Mesne profits, claim in respect of, in excess  
of pecuniary jurisdiction of Court, effect of—Appeal,  
forum of—Bengal, U. P. and Assam Civil Courts  
Act (XII of 1887), s. 21 21—Defendants conspiring  
to keep plaintiff out of possession—Liability of  
defendants.

Under Order XX, rule 12, of the Civil Procedure Code, a Court which is competent to pass a decree for possession is also competent to make an enquiry into the mesne profits *pendente lite* and to pass a decree for the mesne profits, even where the sum claimed by the decree-holder and the sum actually found due to him as the result of the enquiry are far in excess of the pecuniary jurisdiction of the Court. [p. 347, col. 2; p. 348, col. 2.]

Where, in such a case, the decree is passed by a Munsif's Court, an appeal lies from it, whatever the amount of the mesne profits decreed, to the Court of the District Judge under section 21 21 of the Bengal, United Provinces and Assam Civil Courts Act. [p. 349, col. 1.]

Where it is found that the defendants had conspired to keep the plaintiff out of the possession of land, a joint decree for mesne profits can be passed against them. [p. 349, col. 2.]

Appeal from a decision of the District Judge, Saran, dated the 12th April 1919, modifying a decision of the Munsif, Chapra, dated the 26th June 1918.

Messrs. Rajendra Prasad, B. N. Mitter and Ram Prasad, for the Appellant.

Messrs. S. S. Mitter and Cambhusaran, for the Respondents.

## JUDGMENT.

DAS, J.—This appeal arises out of an application for ascertainment of mesne profits from the institution of the suit until the delivery of possession to the decree-holder in an action for ejectment against the defendants. The questions which we have to determine in this appeal are, *first*, whether the Munsif was competent to entertain the application, having regard to the fact that the decree-holder valued his claim for mesne profits at Rs. 7,169 5 9, *secondly*, whether, assuming the Munsif was competent

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to entertain the application, an appeal from his judgment lay to the Court of the District Judge, and *thirdly*, whether, in the circumstances of the case, a joint decree for mesne profits could be passed against the defendants.

On the first question, I have come to the conclusion that the Munsif was competent to entertain the application, and that the learned District Judge has taken an entirely correct view of the matter. The original suit, which was for recovery of possession of certain *kasht* lands, was valued at Rs. 921. It is conceded that the Munsif had complete jurisdiction to hear and dispose of the suit, but it is argued that, on the presentation of the application for ascertainment of mesne profits, the Court should have returned the plaint, in so far as it embodied a prayer for ascertainment of mesne profits, for presentation to the proper Court, that is, the Court of the Subordinate Judge.

It cannot, I think, be disputed that proceedings for ascertainment of mesne profits *pendente lite* are proceedings in the suit, and, but for the view expressed by Mookerji, J., in the case of *Bhupendra Kumar Chakravarti v. Purna Chandra Bose* (1), I should not have thought that it could be argued for one moment that a portion of the suit could be disposed of by one Court, and another portion by another Court. I quite agree that it is only by express legislation that the ascertainment of mesne profits *pendente lite* is brought within the scope of the suit. The plaintiff can have no cause of action in respect of mesne profits *pendente lite*, that is to say, mesne profits accruing subsequent to the institution of the suit, and, but for express legislation on the subject, it would be necessary for the plaintiff to institute a separate suit for recovery of such mesne profits. But in order to shorten litigation, and to prevent multiplicity of proceedings, the Legislature has empowered the Court, when passing a decree for possession of property, to direct an enquiry as to mesne profits from the institution of the suit until the delivery of possession to the decree holder. I regard the provision of Order XX, rule

12 of the Code as conferring jurisdiction on the Court having seizin of the action to ascertain the mesne profits accruing to the plaintiff subsequent to the action.

It is worth while reproducing the relevant portions of Order XX, rule 12, of the Code. That rule provides as follows:—  
“Where a suit is for the recovery of possession of immoveable property and for...  
.....mesne profits, the Court may pass a decree—

- (a) for the possession of the property ;
- (c) directing an enquiry as to.....mesne profits from the institution of the suit until
- (i) the delivery of possession to the decree-holder.....”

This is the first paragraph of the rule. The second paragraph provides: “Where an enquiry is directed under.....clause(c) a final decree in respect of.....mesne profits shall be passed in accordance with the result of such enquiry.”

I would respectfully ask, which is the Court that has jurisdiction to direct an enquiry under clause (c) and pass a final decree under the second paragraph of the rule? In my opinion, the section furnishes a complete answer to the question, it is the Court that passes the decree for possession. In my judgment, there is no justification for the view that the Court, having seizin of the case, may pass a decree for possession of the property, and then, if the claim for mesne profits exceeds its pecuniary jurisdiction, solemnly hand over the case to another Court having pecuniary jurisdiction over the subject-matter of the suit. I do not think that we can separate the trial of a proceeding in the suit from the trial of the suit, for that there is no sanction in the Code. The Code, on the other hand, directly authorizes the Court that passes the decree for possession, to deal with the question of mesne profits.

But it was argued that the Court of the Munsif is a Court of restricted jurisdiction and that it is not competent to investigate a claim which exceeds its pecuniary jurisdiction. I do not think that I can accept this proposition in its entirety. I quite agree that the jurisdiction of a Court is, to adopt the words of Mookerji, J., in the case of *Golap Sundari Debi v. Indra*

(1) 8 Ind. Cas. 34; 13 C. L. J. 132; 15 C. W. N. 506.



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*Kumar Hazra* (2) "the authority to hear and determine a cause." The authority conferred on the Munsif is to be found in section 19 of Act XII of 1887, but, in order to properly understand section 19, it is necessary to read section 18 of that Act. Section 18 runs as follows:—"Save as otherwise provided by any enactment for the time being in force, the jurisdiction of a District Judge or Subordinate Judge extends, subject to the provisions of section 15 of the Code of Civil Procedure, to all original suits for the time being cognizable by Civil Courts." Then follows section 19, which is as follows:—"(1) Save as aforesaid, and subject to the provisions of sub-section (2), the jurisdiction of a Munsif extends to all like suits of which the value does not exceed one thousand rupees."

"(2) The Local Government may, on the recommendation of the High Court, direct by notification in the Official Gazette, with respect to any Munsif named therein, that his jurisdiction shall extend to all like suits of such value not exceeding two thousand rupees as may be specified in the notification." Section 19, therefore, when read with section 18, provides as follows:—"Save as otherwise provided by any enactment for the time being in force, and subject to the provisions of sub-section (2), the jurisdiction of a Munsif extends to all original suits for the time being cognizable by Civil Courts of which the value does not exceed one thousand rupees." The argument that the Munsif is incompetent to investigate a claim which exceeds his pecuniary jurisdiction overlooks the saving clause in section 19 which preserves his jurisdiction to act under the Civil Procedure Code as one of the enactments for the time being in force. Section 19, it is true, does not empower the Munsif to entertain an application to investigate a claim which exceeds his pecuniary jurisdiction; but, also, it does not prohibit him. The word deliberately used by the Legislature in section 19 is "suit", and though the word "suit" must include proceedings in the suit, the proceedings must be such as, irrespective of any Statute, could properly be had in the suits. Now, proceedings in connection with the ascertainment of mesne profits *pendente lite*, could not, in my

judgment, (apart from the express legislation on the point) be had in the suit, because the cause of action in regard to such mesne profits did not accrue to the plaintiff at the time of the institution of the suit. Section 19, therefore, by its own force, does not refer to proceedings for the ascertainment of mesne profits *pendente lite*. But it was urged that, by the express provision of Order XX, rule 12, the Court is competent, in a suit for possession of immoveable property, to pass a decree for mesne profits *pendente lite*. But, in my judgment, once we come to Order XX, rule 12, there is no escape from the conclusion that the Court competent to pass a decree for possession is also competent to pass a decree for mesne profits *pendente lite*, whatever may be the amount claimed by the decree-holder. Section 19 of Act XII of 1887 is a general provision that regulates the jurisdiction of the Munsif in regard to all original suits. It does not pretend to legislate in regard to special jurisdiction that may be exercised by the Munsif by virtue of any special enactment for the time being in force. Order XX, rule 2 of the Code confers special jurisdiction on the Court to take cognizance of a cause of action that has arisen subsequent to the institution of the suit, and cannot, in my judgment, be read as subject to the provision of section 19 of Act XII of 1887. On the other hand, section 19 of Act XII of 1887 expressly saves and preserves such jurisdiction as has been or may be conferred by any enactment for the time being in force and I must hold, on a construction of Order XX rule 12 of the Code, that the learned Munsif had jurisdiction to direct an enquiry as to mesne profits *pendente lite* and to pass a final decree in respect of the same.

This conclusion is in conflict with the decision of Mookerji, J., in the case of *Bhupendra Kumar Chakravarti v. Purna Chandra Bose* (1), and it is only due to that learned and distinguished Judge that I should state my reasons for differing from him. Mr. Justice Mookerji gave two reasons in his opinion, weighty and obvious reasons, for holding that the Munsif is incompetent to investigate a claim in excess of his pecuniary jurisdiction; first, because the value of the claim for mesne profits *pendente lite* which the decree-holder now invites the Court

(2) 1 Ind. Cns. 86; 9 C. L. J. 367 at p. 374; 13 C. W. N. 493; 5 M. L. T. 360.

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to investigate is much in excess of the value of a suit which a Munsif is generally competent or may specially be authorized to try; and, secondly, because if the Munsif investigated the claim, there would be insuperable difficulty as to the form of appeal, which could not be either the Court of the District Judge, who can hear appeals only in suits of which the value does not exceed Rs. 5,000, or the High Court, because the Legislature never contemplated an appeal direct from a decision of the Munsif to the High Court.

Speaking with the utmost respect, I am unable to agree with either of the reasons. So far as the first reason is concerned, it is for the Legislature to say whether a Munsif, who has undoubted jurisdiction to try the suit, shall or shall not try a proceeding which, but for the provision of Order XX, rule 12, would not be a proceeding in the suit. The Legislature has stated definitely in Order XX, rule 12 that the Court which passes the decree for the possession of property, has power to direct an enquiry as to mesne profits *pendente lite* and pass a final decree in accordance with the result of such enquiry. This definite statement of the law in Order XX, rule 12, which, it must be remembered, confers special jurisdiction on a Court to take cognizance of a cause of action arising subsequent to the institution of the suit, is not in any way controlled by section 19 of Act XII of 1887 which is a general provision conferring jurisdiction on the Munsif to try civil suits. So far as the second reason is concerned, it is completely answered by section 21 of Act XII of 1887. It is not a correct statement of the law that the District Judge can hear appeals only in suits of which the value does not exceed Rs. 5,000. It is only correct in regard to appeals from a decree or order of a Subordinate Judge. So far as appeals from the decrees or orders of a Munsif are concerned, by the express provision of section 21 (2) they lie to the District Judge, and I can see no difficulty, insuperable or otherwise, as to the form of appeal if the Munsif is allowed to investigate a claim for mesne profits in excess of his pecuniary jurisdiction. It may, of course, be argued on the construction of section 21 that the Legis-

lature never intended a Munsif to entertain a claim in excess of his pecuniary jurisdiction, but such an argument would be founded not on the difficulty as to the forum of appeal, for on section 21 (2) there is no difficulty whatever, but on the fact that the Legislature has shown no confidence in the District Judge in regard to appeals when the value of the original suit exceeds five thousand rupees. But the answer to that argument is that we are here concerned with special jurisdiction, a jurisdiction which, but for Order XX, rule 12, the Court could not have exercised at all, and that the Legislature may well have thought that the trial of a proceeding which by express legislation becomes a proceeding in the suit should be conducted by the Court in seisin of the suit. I am of opinion that the decision of the learned District Judge on this point is right and must be affirmed.

The consideration of the other two questions raised on behalf of the appellant need not detain us long. There can be no doubt whatever that the appeal lay to the Court of the District Judge and not to this Court. Section 21 (2) of Act XII of 1887 is, I think, conclusive on this point. On the last question that has been argued before us, I am of opinion that no valid objection can be taken to the form of the decree passed by the Court. The plaintiff's case against the defendants is, that they illegally offered opposition to him and set up the appellant as one of their *zerpeshgidars*. It is, I think, a case of conspiracy against them, and the Courts below were right in passing a joint decree against the defendants.

I would dismiss this appeal with costs.

ADAMI, J.—I agree.

*Appeal dismissed.*

KALOO v. BIBI RAMZO,

## PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 124  
OF 1918.

December 10, 1920.

Present :—Mr. Justice Das and  
Mr. Justice Adami.Shaikh KALOO—PLAINTIFF—  
APPELLANT

versus

Musammat BIBI RAMZO AND OTHERS—  
DEFENDANTS—RESPONDENTS.*Probate and Administration Act (V of 1881), ss. 4,  
85, 82—Executor, right of, to recover debt due to estate,  
after death of sole legatee.*

An executor or administrator by virtue of his office, or, in other words, in the character merely of executor or administrator, takes an estate in the property of the deceased and a legal character is vested in him. [p. 351, col. 1.]

The property of the deceased vests in the legatee for purposes of enjoyment, but it vests in the executor for the purpose of administration, and the enjoyment of the property must be postponed to the due administration of the property. [p. 351, col. 1.]

Therefore, an executor is competent to maintain a suit for the recovery of a debt due to the estate of the deceased even after the death of a sole legatee. [p. 352, col. 1.]

Appeal from a decision of the First Subordinate Judge, Small Cause Court, Monghyr, dated the 23rd January 1920.

Messrs. Sultan Ahmad, S. P. Sen, P. N. Sinha, Fakhruddin, Khurshed Husnain, D. N. Sircar and Murari Prasad, for the Appellant.

Messrs. Hasan Imam, Jaggernath Prasad and Ragho Prasad, for the Respondents.

## JUDGMENT.

DAS, J.—This was an action by the appellant to enforce a mortgage-bond executed by Musammat Bibi Ramzo and Musammat Bibi Chotan in favour of one Bibi Zohra Bai so far back as the 20th October 1909. That document, on the face of it, shows that the defendants Nos. 1 and 2 borrowed Rs. 8,000 from Musammat Bibi Zohra and executed in favour of Musammat Bibi Zohra a mortgage in respect of three items of properties.

In order to appreciate the points that have been argued before us, it is necessary to deal with certain antecedent events.

It appears that Zohra Bai died on the 26th April 1912, having executed her last Will and testament on the 21st April 1912. She left a daughter Husanara and a husband who is the plaintiff in the action. By

her Will she left the entirety of her estate to her daughter Husanara. The plaintiff applied for Probate of the Will before the District Judge of Patna and obtained grant of Probate on the 14th March 1913.

On the 12th July 1917 the plaintiff as such executor instituted the suit out of which this appeal arises to enforce the mortgage bond executed by the two ladies, whose names I have mentioned, on the 20th October 1909.

The learned Subordinate Judge had found in favour of the appellant that there was good and valuable consideration for the bond, but he has dismissed the action on the ground that the plaintiff, as the executor under the last Will and testament executed by Zohra Bai, was not competent to maintain the action.

In my judgment the learned Subordinate Judge committed an error, a gross and palpable error, in coming to the conclusion at which he arrived. He conceded to the plaintiff the right to sue as executor, but he denied to him the right to sue for the recovery of the mortgage-debt. I confess that I do not understand the distinction at all. But the view of the learned Subordinate Judge seemed to have been that the property which belonged to the testatrix vested in Husanara, and that the property, having once vested in Husanara, could not be divested by her death which took place before the grant of Probate to the plaintiff, and that as Husanara was solely entitled to the mortgage-money, the plaintiff as executor is not entitled to sue for the recovery of that money at all. This, I think, is the ground upon which the learned Subordinate Judge has come to the conclusion that the plaintiff was not entitled to maintain the action. It is, in my view, amazing that there should be such confusion of thought in the mind of the learned Subordinate Judge. In my judgment, the question has ceased to be even arguable since the Probate and Administration Act. Section 4 and section 82 of the Probate and Administration Act, which it is reasonable to suppose were known to the learned Subordinate Judge, provide as follows :—

"Section 4.—The executor or administrator, as the case may be, of a deceased person, is his legal representative for all



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purposes, and all the property of the deceased person vests in him as such."

"Section 82.—After any grant of Probate or Letters of Administration, no other than the person to whom the same shall have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, throughout the province in which the same may have been granted, until such Probate or Letters of Administration shall have been recalled or revoked."

The effect of these provisions is, that an executor or administrator by virtue of his office, or, in other words, in the character merely of executor or administrator, takes an estate in the property of the deceased and a legal character is vested in him.

Mr. Hasan Imam has argued that the property vested in Husanara as soon as the testatrix died. That proposition may be conceded to him at once. The property did vest in Husanara in the sense that Husanara could transmit a valid title to her heirs, could devise the property by Will, could make a gift of the property, and, in any way she chose, deal with the property, but all that is subject to administration and the title to administer the property vested in the executor and in no other person. In other words, the property vested in Husanara for the purpose of enjoyment but it vested in the executor for the purpose of administration, and it has been conceded by Mr. Imam that the enjoyment of the property must be postponed to the due administration of the property. I can understand no principle at all on which it can be argued that, because Husanara was the legatee, or, it may be, the sole legatee, under the Will, therefore, the executor who is entrusted with the duty of administering the estate, not of Husanara but of the testator, is not competent to maintain an action to recover the debt due primarily to the estate of the deceased. I am of opinion, therefore, that the decision of the learned Judge on this point cannot be supported and must be set aside.

It was next argued by Mr. Imam that in any view of the matter, the administration came to an end with the death of Husanara and for this proposition he relied upon section

35 of the Probate and Administration Act. That section provides as follows:—

"If an executor be appointed for any limited purpose specified in the Will the Probate shall be limited to that purpose, and, if he should appoint an agent to take administration on his behalf, the Letters of Administration with the Will annexed shall accordingly be limited."

Now, it may be pointed out at once that the grant of Probate is, on the face of it, unlimited. But it has been urged by Mr. Imam, and with some amount of reason, that there is no section either in the Probate and Administration Act, or in the Succession Act, which sets out any forms in regard to limited grants. Mr. Imam's argument is, and with this argument I agree, that in order to see whether the grant was limited in character, or unlimited, we must see the Will, not for the purpose of construing the Will but for the purpose of finding out whether the Court of Probate did make a limited grant to the executor or an unlimited one. Now, in going through the Will it appears that the plaintiff was appointed to look after Husanara and to look after the estate on her behalf until her death, and upon this Mr. Imam's argument is that the Administration came to an end with the death of Husanara. But I can find no provision in the Will which curtailed the important power of the executor to realise the debts due to the estate. Realization of debts due to the testator is a statutory power and must remain in the executor until the Will in some way has curtailed that power. The true view, of course, is that the grant is in no way a limited one. It is true that he was appointed the manager of the property belonging to the minor until she attained majority, but there is nothing to limit the power of the executor as regards the administration of the estate left by the testator. There is clearly a distinction between the estate of the testator and the property belonging to the legatee. The estate of the testator continues until Administration is complete. The property belonging to the legatee does not come into existence until the Administration is complete. All that the testatrix does is to limit the power of the plaintiff with regard to his power of management of the minor's estate. There is no limitation whatever on his power to administer

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the estate of the deceased. If the plaintiff was properly appointed an executor of the estate left by the deceased, then, in my view, the grant was an unlimited grant and no argument can be founded upon section 35 of the Probate and Administration Act.

The next point is, assuming that the plaintiff is competent to maintain the action, whether there was collusion between the defendants Nos. 1 and 2 and the testatrix with a view to defeat the interest of defendant No. 3 who, I may state, is the contending party before us as purchaser of a moiety of plot No. 1 mortgaged by defendants Nos. 1 and 2 in favour of the testatrix.

It may be pointed out that defendant No. 3 had a claim against *Musammât Bibi Ramzô* in regard to certain advances made by defendant No. 3 to *Musammât Ramzô* from the 15th August 1908 to 10th August 1911. The defendant No. 3 instituted a suit against *Bibi Ramzô* to realise the moneys from time to time advanced by him to *Bibi Ramzô*; and it is Mr. Imam's contention that the mortgage-bond executed by *Musammât Bibi Ramzô* and *Musammât Bibi Chotan* was a collusive transaction in order to defeat his claim.

Now, it may be pointed out that before the date of the execution of the mortgage, defendant No. 3 had, as a matter of fact, advanced Rs. 1,600 to *Musammât Ramzô*. Therefore, on the date of the execution of the mortgage there was a sum of Rs. 1,600 with interest thereon due to defendant No. 3 from *Bibi Ramzô*. We are asked to come to the conclusion that, in order to defeat a claim of Rs. 1,600 with interest thereon due to the defendant No. 3 from defendant No. 1, both defendant No. 1 and defendant No. 2 executed a mortgage for Rs. 8,000 in favour of the testatrix mortgaging thereby three items of properties. In my view, the story of collusion set up by the defendant No. 3 is antecedently improbable. So far as *Bibi Chotan* is concerned, she had nothing to lose by the decree which defendant No. 3 might get against defendant No. 1, and in my view there is no evidence sufficient to induce us to come to the conclusion that there was collusion between the three ladies in order to defeat the interest of defendant No. 3.

On the question of passing of consideration, we must remember that the witnesses are giving their evidence many years after the

mortgage transaction, and I am not satisfied that the defendants have established that no consideration passed.

In the result, then, I would allow this appeal, set aside the judgment and decree of the Court of first instance, and give the plaintiff a mortgage-decree in terms of the reliefs claimed by him. The plaintiff is entitled to his costs in both the Courts. \*

The defendants will have six months' time for redemption from the date of this judgment.

I ought to mention that Mr. Imam, in the course of his argument, asked us to direct that the plaintiff should proceed to sell in the first instance such properties as have not been purchased by his clients. This is a question which arises under section 81 of the Transfer of Property Act. In my view, the question does not arise now but it is open to Mr. Imam's clients to apply on proper materials and before the proper Court if and when he chooses. I say nothing whether such an application ought to succeed or ought not to succeed, all that I say is, that we have not sufficient materials before us to decide that question at the present moment, and that the question does not arise at this stage.

ADAMI, J.—I agree.

*Appeal allowed.*

LAHORE HIGH COURT.  
CIVIL REVISION PETITION No. 554 OF 1920.  
January 18, 1921.  
Present:—Mr. Justice Le Rossignol.  
RAMJI LAL—PLAINTIFF—  
PETITIONER  
versus  
BUJAN LAL—DEFENDANT—  
RESPONDENT.

*Jurisdiction—Decree passed without jurisdiction, whether nullity—Accounts, suit for—Preliminary decree—Suit, transfer of, to higher Court—Court, whether can ignore preliminary decree.*

A decree passed without jurisdiction is not a nullity but may be set aside by appeal or revision; till it is so set aside, it is good, whatever the defect of jurisdiction may have been. [p 353, col. 1.]

Plaintiff asked for a rendition of accounts and valued his suit at Rs. 130. The Munsif dismissed

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the suit. On appeal the District Judge passed a preliminary decree and remanded the suit to the Munsif for taking accounts. The latter, finding that a sum beyond his pecuniary jurisdiction was disclosed by the account as being due to the plaintiff, transferred the case to the Subordinate Judge, who ignored the District Judge's decree and ordered the case to be tried *de novo* :

*Held*, (1) that all proceedings taken on the valuation furnished by the plaintiff were taken with jurisdiction :

2 that the Subordinate Judge, in any case, could not ignore the decree of the District Judge ;

(3 that the Subordinate Judge must, therefore, take as his starting point the preliminary decree passed by the District Judge.

Petition, under section 44 of Act VI of 1918, for revision of the order of the Senior Subordinate Judge, Delhi, dated the 17th April 1920.

Mr. Nanak Ohand Pandit, for the Petitioner

Mr. Cooper, for the Respondent.

**JUDGMENT.**—The Senior Subordinate Judge's order under consideration amounts, perhaps unintentionally, to insubordination and must be set aside. The plaintiff, valuing his suit at Rs. 130, asked for rendition of accounts. A Munsif rejected the plaint after taking evidence on the merits.

The plaintiff appealed and the District Judge accepting the appeal found on the merits that plaintiff was entitled to an account and gave the plaintiff a preliminary decree for accounts to be rendered.

The Munsif then went into accounts and, finding that a sum far beyond his pecuniary jurisdiction was disclosed by the account as being due to the plaintiff, transferred the case to the Subordinate Judge. That officer has ignored the District Judge's decree and has ordered the case to be tried *de novo*.

A decree passed without jurisdiction is not a nullity but may be set aside by appeal or revision; till it is so set aside, it is good, whatever the defect of jurisdiction may have been.

In this case, there was no patent defect of jurisdiction.

Until accounts were examined, the value of the suit as fixed by the plaintiff himself was Rs. 130 and this gave the Munsif and the District Judge jurisdiction.

When the Munsif found that he was likely to be called upon to pass a decree in

excess of his pecuniary jurisdiction he refused to do so and transferred the case.

He was not competent to pass a decree in excess of his jurisdiction, but all proceedings taken on the valuation furnished by plaintiff himself were within that jurisdiction.

In any case, the District Judge's preliminary decree stands and cannot be ignored.

I accept the petition and direct the Subordinate Judge to decide the case, taking as his starting point the fact that plaintiff is entitled to an account.

Costs to follow final event.

*Petition accepted.*

MADRAS HIGH COURT.  
CIVIL APPEAL No. 303 OF 1919.  
August 3, 1920.

*Present*:—Sir John Wallis, Kt., Chief Justice,  
and Mr. Justice Seshagiri Aiyar.  
Sri Rajah RAVU VENKATA KUMARA-  
MAHIPATHI SURYA ROW BAHADUR  
GARU, RAJAH OF PITTAPUR—  
DEFENDANT No. 1—APPELLANT

*versus*

BALLAPRAGADA PALLAMRAJU  
AND ANOTHER—PLAINTIFF AND DEFENDANT  
No. 2—RESPONDENTS.

*Interest Act (XXXII of 1889), s. 1—Contract for payment for work within reasonable time after inspection and approval—Tender of bill on completion of work—Interest, claim for, from date of tender.*

Under the terms of a building contract it was stipulated that defendant was to pay plaintiff for work done by the latter within a reasonable time after inspection and approval by the defendant. The plaintiff tendered his bill immediately on completion of the work and claimed interest from the date of tender :

*Held*, 1 that interest could not be claimed under the Interest Act as there was no provision for the payment of a sum certain or for the payment of such sum on a certain day : [p. 354, col. 2.]

2 that the claim for interest was not covered by the proviso to the Act. [p. 354, col. 2.]

*Charnal Das v. Brij Bhukan Lal*, A. 511 (P. C.); 22 I. A. 94; 38 P. C. 482; 8 Ind. Dec. N. S. 652; *Hurroopersaud Roy v. Shamapersaud Roy*, 3 C. 654; P. C. ; 1 C. L. R. 499; 1 A. 31; 3 Sar. P. C. J. 782; 3 Suth. P. C. J. 415; 12 Ind. Jur. 281; 1 Ind. Dec. N. S. 101 and *Muhammad Abdul Gaffur Rowther v. Himmala Beeri Ammal*, 52 Ind. Cas. 515; 42 M. 661; 2 M. L. J. 22; 11 M. L. J. 456; (1919) M. W. N. 484, distinguished.



RAJAH OF PITTAPUR v. PALLAPPA GADA PALLABRAJU.

Appeal against the decree of the Court of the Temporary Subordinate Judge, Cocanada, in Original Suit No. 16 of 1918, (Original Suit No. 56 of 1917, on the file of the Sub-Court, Cocanada).

FACTS appear from the judgment.

Mr. S. Srinivasa Aiyangar, (with him Mr. A. Krishnaswami Aiyar), for the Appellant.—The lower Court erred in holding that plaintiff could claim interest under the Interest Act. The contract was to pay for the work within a reasonable time after inspection and approval. This will not amount to a 'debt or sum payable at a certain time,' within the meaning of the Interest Act. The contract does not provide for interest.

See *Hill v. South Staffordshire Ry.* (1) and *Juggomohun Ghose v. Manickchand* (2). Where the contracts are not covered by the Act, interest should not be awarded. In this case the sum payable could be made certain only after the defendant gave his consent. No certain time is specified in the contract for payment and the Interest Act does not refer to legal presumptions.

Mr. P. Narayanamurthi, for the Respondents.—The Interest Act does not apply to all cases of contract but only to cases in which interest is awardable under the Act. There is a written contract in this case and a provision for payment of a sum certain. As to time for payment, the presumption, where no time is fixed by the contract, is that it is payable at once.

In any event, the award of interest can be justified as falling under the proviso to the Act. See *Chajmal Das v. Brij Bhukan Lal* (3), where the Privy Council awarded *post diem* interest not provided in a deed of mortgage as damages for detention of the debt. See also *Hurroopersaud Roy v. Shamapersaud Roy* (4) where interest was allowed on mere profits.

#### JUDGMENT.

WALLIS, C. J.—This is an appeal by the first defendant from a decree of the Temporary Subordinate Judge of Cocanada in a suit brought by the plaintiff to recover from the first de-

fendant money payable for work and labour done under a building contract. One of the points argued before us relates to the price with which the plaintiff has been charged in account with the first defendant for timber supplied by the latter for the building. The first defendant claimed an allowance for the timber supplied by him at the rate of Rs. 3 a cubic foot. The evidence is not very strong on either side and we are not prepared to interfere with the finding of the Subordinate Judge in paragraph 35 of his judgment in favour of the lower figure.

The next objection is to the disallowance of the first defendant's claim for Rs. 1,081 11 0 for stone and sand supplied by the first defendant for the purpose of the building. The first defendant admittedly stored stone and sand on the premises for the purposes of the building erected, without employing a contractor. The interested evidence of the plaintiff that he made no use of these materials, which had been collected for this very building seems highly improbable. The evidence of the first defendant's overseer, whom the Subordinate Judge gives no good reason for discrediting, that he himself measured the stone and sand supplied to the plaintiff seems much more in accordance with the probabilities of the case. We accept the case for the first defendant on this point and allow him Rs. 1,081-11-0 on this account.

The first defendant next objects to so much of the decree as directs him to pay interest on the sum found due to the plaintiff from the date when the building was handed over to him on completion. There is no provision for payment of interest in the contract, nor is there any proof of demand, but the Subordinate Judge has held that the money claimed by the plaintiff under the contract was a 'debt or sum certain payable at a certain time' within the meaning of the Interest Act XXXII of 1839 and that, therefore, the Court had a discretion to allow interest under the Act from the time when the money became payable. The contract provides that 'all work done by the contractor shall be paid for by the Rajah according to the rates herein specified within a reasonable time, after it has been inspected and finally approved and passed.' I do not think that is a provision

(1) (1874) 18 Eq. 164; 43 L. J. Ch. 556.

(2) 7 M. L. A. 263 at p. 280; 4 W. R. P. C. 8; 1 Suth. P. C. J. 257; 1 Sar. P. C. J. (81); 19 E. R. 308.

(3) 17 A. 511 (P. C.); 22 L. A. 198; 6 Sar. P. C. J. 624; 8 Ind. Dec. (N. S.) 662.

(4) 3 C. 654 (P. C.); 1 C. L. R. 499; 5 L. A. 31; 3 Sar. P. C. J. 782; 3 Suth. P. C. J. 496; 12 Ind. Jur. 184; 1 Ind. Dec. (N. S.) 1000.

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for the payment of a sum certain, or for the payment of such sum on a certain day. If authority be wanted, reference may be made to *Hill v. South Staffordshire Ry.* (1) and to the observations of the Judicial Committee in *Juggomohun Ghose v. Manickchund* (2).

The respondent has, therefore, endeavoured to support the decree on the ground that it was open to the Court to award interest in this case independently of the Interest Act, under the proviso to the Act that 'interest shall be payable in all cases in which it is now payable by law.' This contention is opposed to the settled course of decisions of the Court in *Kisra Rukumma Rau v. Oripati Viyanna Dikhatulu* (5), *Kamalammal v. Peeru Meera* (6) and to the earlier decision of the Privy Council in *Juggomohun Ghose v. Manickchund* (2) which proceeded on the view that interest not payable under the terms of the contract could only be awarded under the Act, or as being in accordance with usage as to the particular class of instruments. In that case the claim founded on the Act was rejected and the claim founded on usage was upheld. The English decisions on section 28 of Lord Tenterden's Act, III and IV Will. IV, Ch. 42, are to the same effect and are entirely applicable because the Interest Act, 1839, was passed, as recited in the preamble, to extend this section to India and re-enacted it in substance. The English Act, as pointed out by Lord Watson in *London, Chatham and Dover Railway Company v. South Eastern Railway Company* (7), was passed upon the assumption that Lord Tenterden had correctly laid down the law in *Page v. Newman* (8) where he said: "interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments."

In the Court of Appeal, Lindley, L. J., as he then was, had stated the law as

follows: "As regards interest, it was settled by *Higgins v. Sargeant* (9), *Page v. Newman* (8) and *Foster v. Weston* (10) that at Common Law, interest was not payable on ordinary debts, unless by agreement, or by mercantile usage; nor could damages be given for non payment of such debts." See *London, Chatham and Dover Railway Company v. South Eastern Railway Company* (11). What the Statute does, it is now settled, is to provide for interest being awarded by way of damages in cases covered by it, as held in *Cook v. Fowler* (12) and numerous other cases.

It is, I think, clear that the provisions of section 28 of Lord Tenterden's Act were extended to India upon the same assumption as to the general state of the law in India although there might, of course, be special cases in India coming within the proviso as to the cases in which interest was already payable. We have been referred to a case in which it was held by the Judicial Committee in *Chaimal Das v. Brij Bhukan Lal* (3) that *post diem* interest, not provided for in a mortgage-deed might be awarded by way of damages for the detention of the mortgage debt after it fell due, but this was only an application to India of the decision in *Price v. Great Western Railway Company* (13) where it was held, with reference to the corresponding section of Lord Tenterden's Act, that interest might be awarded by way of damages in such a case, because it had been the constant and invariable practice in cases of mortgage to give such interest by way of damages. That practice was apparently regarded as saved by the proviso to the section, and the rule as to mortgages is treated as an exception to the general rule. Fisher on Mortgages, paragraph 1805. The decision in *Chaimal Das v. Brij Bhukan Lal* (3) is, therefore, no authority for the proposition that, in other cases of contract, interest may be given by way of damages, for detention, when it is not provided for in the contract and cannot be

(9) (1823) 2 B. & C. 348; 3 D. & R. 613; 2 L. J. (o. s.) K. B. 33; 26 R. R. 379; 107 E. R. 414.

(10) (1830) 6 Bing 709; 8 L. J. (o. s.) C. P. 295; 4 M. & P. 589; 130 E. R. 1451.

(11) (1892) 1 Ch. D. 120 at p. 140; 61 L. J. Ch. 294; 65 L. T. 729; 40 W. R. 194.

(12) (1874) 7 H. L. 27; 4 L. J. Ch. 855.

(13) (1847) 16 M. & W. 214; 16 L. J. Ex. 87; 73 R. R. 434; 4 Railw. Cas. 707; 153 E. R. 1179.

(5) 1 M. H. C. R. 369.

(6) 20 M. 431; 7 M. L. J. 233; 7 Ind. Dec. (N. S.) 341.

(7) (1891) A. C. 429 at p. 441; 63 L. J. Ch. 93; 1 R. 275; 63 L. T. 637; 53 J. P. 36.

(8) (1829) 9 B. & C. 378; 4 Man. & Ry. 205; 7 L. J. (o. s.) K. B. 267; 33 R. R. 204; 109 E. R. 140.

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claimed under the Act. That contention, as already pointed out, is opposed to the scheme of the Act and the assumption on which it is based. The decision of the Privy Council in *Hurroopersaud Roy v. Shamapersaud Roy* (4) in favour of allowing interest on mesne profits was based on the long settled practice of the Court and this and other cases in which interest was allowed by the Privy Council, in the absence of contract and independently of the Act, must, in my opinion, be regarded as cases coming within the proviso to the Act saving cases in which interest was payable by law when the Act was passed. The decision of this Court in *Muhammad Abdul Goffur Rowther v. Hamida Beevi Ammal* (14), which has also been cited, does not affect the present case, as that was not a case of contract as to which, in my opinion, the law is clear. It is, therefore, unnecessary to consider it further on this occasion. At the suggestion of the Court, the appeal as to the disallowance of the fines imposed by the first defendant has not been pressed in view of our disallowance of interest and with reference to the position of the parties. The decree will be modified accordingly. Each party to bear his own costs.

SESHAGIRI AIYAR, J.—I agree. This appeal relates to four items allowed in favour of the plaintiff-contractor against the first defendant, the Rajah of Pittapur.

As regards the contention that the contractor was bound to take timber from the Rajah at the rate at which Local Boards supplied their contractors, it is enough to point out that the contract in this case does not contain any such stipulation. In the absence of any agreement to the contrary, the presumption is that the purchase by the plaintiff was at the market-rate and not higher. I, therefore, agree with the conclusion at which the Subordinate Judge arrived on this question.

As regards the claim for the fine levied by the Rajah against the plaintiff, for the delay in finishing the building, Mr. Srinivasa Aiyangar has agreed not to press this claim.

As regards the third item, namely, the value of the sand and stones supplied to the plaintiff, the document establishes very clearly that the appellant's contention is

well-founded. The Subordinate Judge has not given sufficient weight to Exhibit F-8. It was an estimate which was prepared at the spot. When it was sent to the office of the Rajah, it was scrutinised there and the correct units supplied were entered. It was after this that the plaintiff signed the estimate. On his signing it, an order was made that a cheque should be issued for the amount. This by itself is almost conclusive of the quantity of sand and stones which the plaintiff received from the first defendant. There are also Exhibits G and XVII (a). The latter is a measurement spoken to by the plaintiff's overseer and was prepared on the 13th August 1912. That gives the quantity of sand as mentioned in F 8. There is also the oral evidence of the overseer, which there is no reason for not believing. I am clear that the first defendant is entitled to a reduction, as claimed by him in this respect.

Now comes the last question, namely, that relating to the award of interest on the sums decreed. The question arises in this way. The work was finished in November 1914. Soon after, the plaintiff sent in a bill claiming payment. The first defendant, according to Mr. Srinivasa Aiyangar, scrutinised the bill and did not come to a final conclusion, until a year later, and when the amount was fixed and tendered by him, the plaintiff did not accept it. Thereupon this suit was instituted. The question for consideration is, whether, from the date of the tendering of the bill by the plaintiff, the amount should bear interest.

Sitting with Ayling, J., I had to consider the provision of the Interest Act, XXXII of 1839, at some length in *Muhammad Abdul Goffur Rowther v. Hamida Beebi Ammal* (14). In my opinion, unless a claim is within the four corners of the Interest Act, the limitations contained in the Act are not applicable. The language employed by some of the noble and learned Lords in *London, Chatham and Dover Railway Company v. South Eastern Railway Company* (7) shows that the object of 3 and 4 William was to extend the discretion of the Court in favour of awarding interest, in cases of contracts which do not in terms provide for interest, and this view receives considerable support, from *Hill v. South Staffordshire Ry.* (1)

(14) 52 Ind. Cas. 505; 42 M. C. 61; 25 M. L. T. 242; 36 M. L. J. 456; (1919) M. W. N. 464.



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where Mr. Lindley, as he then was, who appeared as Counsel, discussed the history as to interest very fully. Mr. Narayana-moorthi contended that the Act should be held to affect only those cases in which interest is awardable under the Act and not all cases of contract. To accept this contention would amount to saying, that contracts are within the benefit of the Act and not within its mischief. A class of cases cannot come within the protection of a Statute without submitting itself to its mischief. We find the Privy Council in *Juggomohun Ghose v. Manickchand* (2) holding that in a case of contract, which does not come within the Act, interest was not awardable. In this Court, in *Kamalammal v. Peeru Meera* (6) and *Subramania Aiyar v. Subramania Aiyar* (15), it was held that, in cases of contracts which are not covered by the Act, there should be no award of interest. In the case in *Muhammad Abdul Gaffur Rowther v. Hamida Beebi Ammal* (14), we did not differ from these decisions. I am, therefore, of opinion that, where a case is one relating to a contract, the mere fact that the contract does not come within the protection afforded by the Act is not a reason for holding that it is not controlled by the Act.

Now comes the question whether the claim in this case is within the Act. As I began by saying, it was a claim advanced by the plaintiff for money due after rendering accounts of the work which he had done for the first defendant. In such a claim "a debt or sum certain payable by virtue of a written instrument at a certain time" there is no doubt that there was a written instrument, but I am not satisfied that it is a sum certain. It is a sum which is sought to be made certain by the concurrence of the first defendant to the demand. Until that assent is obtained, it is in an unliquidated state. Further, I doubt whether it is a sum payable at a certain time. It may be, as was suggested by the learned Vakil for the respondent, that when no time is fixed for payment, the money becomes payable at once. But I do not understand the Act as referring to such a legal presumption. As at present advised, in my opinion, the words "payable at a certain time" relate to the agreement between the parties and not to a presumption of law. However

(15) 81 M. 250; 3 M. L. T. 278; 18 M. L. J. 245.

that may be, this case is covered by the decision in the Court of Appeal in *Hill v. South Staffordshire Ry.* (1). That was a case where the contractor made a demand in writing for a sum as balance due to him and claimed interest. The Vice-Chancellor held that the claim did not relate to a sum certain, payable at a certain time. The same view was taken by the House of Lords in *London, Chatham and Dover Railway Company v. South Eastern Railway Company* (7). In that case, there was a stipulation between the parties that accounts should be rendered and that a payment of not less than 75 per cent. should be made, on account of the balance appearing to be due on the face of the accounts so rendered. The House of Lords came to the conclusion that there was no debt, or sum certain, payable at a certain time. The present case is an *a fortiori* one. Here there is no agreement to pay any portion of the bill on its being tendered to the appellant; it became due only after the parties had settled the accounts. It follows from the above discussion that the claim in this case is one relating to the contract and not one in which a sum certain is payable on a certain date. The provisions of the Act are, therefore, not complied with and consequently the plaintiff is not entitled to the interest awarded by the lower Court. So much of the decree as relates to the award of the interest up to the date of the suit must be disallowed. In this appeal each party will bear his own costs.

M. C. P.

*Decree modified.*

# PATNA HIGH COURT. FULL BENCH.

MISCELLANEOUS JUDICIAL CASE No. 102  
OF 1920.

January 6, 1921.

*Present:* — Sir Dawson Miller, Kt.,  
Chief Justice, JUDGE Sir B. K. Mallik, Kt.,  
and Mr. Justice Bicknell.

*In the matter of* the JYOTI PRASAD

SINGH DEO of KASHIPUR, IN THE

DISTRICT OF MANBHUM — PETITIONER.

*Under* The Act (VII of 1918), ss. 5 (iv), 11—  
Regulation, whether profits of business—Amount paid as  
cesses, whether to be deducted in assessing income—  
Income, meaning of.

The owner of a coal mine receiving profits from coal is not a person deriving profits from a business. His income falls under section 10(1), Income Tax

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Act, as an income derived from other sources and should be computed in accordance with the provisions of section 1 of the Act. In assessing such income no deduction can be made in respect of the amount paid as cesses. [p. 160, cols. 1 & 2.]

The term "income" may be described as the annual or periodical yield in money or reducible to a money-value arising from the use of real or personal property or from labour or services rendered but in some cases, e.g., income derived from house property, the yield must be taken as the *bona fide* annual value, and not necessarily as the actual yield [p. 359, col. 2]

Reference against the order of the Deputy Collector, Manbhum.

Messrs. N. O. Sinha and N. O. Ghosh, for the Petitioner.

Mr. Sultan Ahmad (Government Advocate), for the Crown.

### JUDGMENT.

MILLER, C. J.—This case comes before us on a reference by the Board of Revenue under section 51 of the Indian Income Tax Act, 1918. The reference was made upon the petition of Raja Jyoti Prasad Singh Deo of Kasbipur, whose taxable income has been assessed by the Deputy Collector including a sum of Rs. 1,70,706 the amount derived by him from rents and royalties of certain collieries. Road-cess and public works cess amounting to Rs. 10,669 have also been levied on these rents and royalties under the Cess Act. The petitioner claims that this amount should be deducted in assessing his taxable income derived from the source named. The question submitted for our determination is, whether the full amount of the rents and royalties received is subject to income-tax, or whether, as the petitioner contends, the amount paid in respect of cesses should be deducted in ascertaining the taxable income. Section 5 of the Income Tax Act enumerates the classes of income which shall be chargeable to income-tax. They are (i) salaries, (ii) interest on securities, (iii) income derived from house property; (iv) income derived from business, (v) professional earnings, and (vi) income derived from other sources. With regard to each of these sources of income the Act provides how the taxable income shall be arrived at and what allowances shall be taken into account in determining the amount to be taxed. For the purposes of this case, it is only necessary to refer to the provisions made with regard to class (iv) "income derived from business"

and class (vi) "income derived from other sources" as it is under one or other of these heads that the income in question falls. In my opinion, the income in question falls under class (vi), but as the petitioner's first contention is that it falls under class (iv) it is desirable to refer to the sections of the Act which deal with both these classes. Income derived from business is dealt with in section 9 of the Act, which provides that the tax shall be payable by an assessee under the head "income derived from business" in respect of the profits of any business carried on by him. It then sets out the allowances which may be deducted in computing the profits. These include any rent paid for the premises in which the business is carried on, repairs to the premises, interest on capital borrowed for the purposes of business, premiums paid for insurance on the buildings, machinery or plant and repairs to the same, certain sums for depreciation and renewals, sums paid on account of land revenue, local rates or Municipal taxes in respect to the premises, and, lastly, any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits.

Section 11 deals with income derived from other sources and provides: (1) "The tax shall be payable by an assessee under the head 'income derived from other sources' in respect of income and profits of every kind and from every source to which this Act applies (if not included under any of the preceding heads) with the exception of agricultural income. (2) Such income and profits shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making such income or earning such profits, provided that no allowance shall be made on account of any personal expenses of the assessee."

The petitioner contends, in the first place, that the income derived from rents and royalties is income derived from business and that it is only the profits arising from such business that are taxable and the profits can only be arrived at after deducting expenses such as cesses and other expenses chargeable to revenue account which he is bound to pay. He admits that the deductions now claimed are not included amongst those which are prescribed in section 9

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of the Act although that section does provide for the deduction of an allowance in respect of land revenue, local rates or Municipal taxes in respect of business premises. If it is legitimate to draw any inference from the inclusion of local rates and Municipal taxes amongst the allowances permissible under the Act the inference would point to the conclusion that it was the intention of the Legislature to exclude cesses and similar charges other than those mentioned in the section. In fact, if the petitioner's contention be correct that he is entitled, in determining the taxable profits, to exclude all expenditure chargeable to revenue account it would have been unnecessary for the Legislature expressly to include land revenue amongst the allowances to be taken into account in computing the taxable profits. The petitioner contends, however, that the allowances mentioned in section 9 and, indeed, in the other sections dealing with the tax payable are not exhaustive, and that it is only the profits of the business which can be taxed. Although, in the view I take upon the first point raised by the petitioner, it is not necessary definitely to decide this question, I am of opinion that this branch of his argument cannot be supported. If, in assessing the taxable income, cesses must first be deducted it would seem to follow that in determining the amount of cess payable under the Cess Act upon the 'annual net profits' derived from similar property the amount of income tax should first be deducted, but it was held in *Manindra Chandra Nandi v. Secretary of State for India in Council* (1) that an owner of mines is liable to pay both income tax and road cess tax on the same net profits derived, or royalty received, by him from the mines. That case, in so far as it dealt with the liability to pay cesses, was affirmed by the Judicial Committee of the Privy Council. See *Manindra Chandra Nandi v. Secretary of State for India in Council* (2). No case has been called to our attention in which taxes imposed by Statute, unless specially provided for in the Act, have been deducted in computing the amount payable either for cess or income-tax,

(1) 84 C. 257; 5 C. L. J. 148.

(2) 9 Ind. Cas. 311; 38 I. A. 31; 38 C. 372; 15 C. W. N. 201; 8 A. L. J. 140; 13 C. L. J. 124; 9 M. L. T. 196; 13 Bom. L. R. 82; 21 M. L. J. 365; (1911) 2 M. W. N. 53 (P. C.).

but as, in my opinion, the income derived from rents and royalties of collieries does not come under the head of income derived from business, it is unnecessary definitely to determine this point. It seems to me that the income in question is no more income derived from business than is the income derived from the lease of house property or land used for the purpose of carrying on business. The royalties received in the present case do not depend upon the profits earned by the lessees of the mine but upon the quantity of coal raised and the royalty will be payable whether the lessees make a profit or not and section 9 has no application to the present case.

I am of opinion that the case falls under section 11, which refers to income derived from other sources.

The petitioner contends, in the second place, that even if this is so the cess should be deducted from the taxable income. His argument based upon this section is two-fold. In the first place, he points out that the section refers to both income and profits, that income may comprehend something wider than profits but that the royalties in question are profits and can only be ascertained after deducting all out-goings necessarily incurred not only for the purpose of earning the profits but charged thereon by Statute to revenue account. It is true that the section relates to both income and profits. The section, however, is dealing with various kinds of income and includes all those not specially mentioned in the first five classes referred to in section 5, and it is quite conceivable that the word "profits" would be a more apt term than the word "income" to describe some of the cases included. But I can see no reason why royalties received from mines should be regarded as anything other than income in the ordinary sense. There is no definition of the word "income" in the Act itself but its meaning as there used can, I think, be determined with sufficient accuracy from a perusal of the Act. Without giving an exhaustive definition, it may be described as the annual or periodical yield in money or reducible to a money-value arising from the use of real or personal property or from labour or services rendered, bearing in mind that in some cases, as, for example, derived from house property, the yield may



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be taken as the *bona fide* annual value and not necessarily as the actual yield. Investments and rents derived from houses and land are instances of income arising from the use of property whilst salary, wages and professional earnings, including pensions, are instances of income arising from labour or services rendered. Income derived from business may, in certain cases, be a combination of both classes. It is not, however, the gross income so derived that is in all cases the taxable income. Certain allowances from the gross income are provided for by the Act and certain classes of income are exempt, but unless the exemptions or allowances are provided for by the Act there would appear to be no ground for holding that such are permissible. In the present case the only allowance provided for in section 11 is any expenditure, not being in the nature of capital expenditure, incurred solely for the purpose of making such income or earning such profits. As a last resort, the petitioner contends that the amount levied for cesses is an expenditure incurred solely for the purpose of making the income, but it would, in my opinion, be an undue straining of plain language to say that the payment of road cess is an expenditure incurred solely for that purpose. The liability to pay cesses results from the income having been made, and the payment of the cess can hardly be said to form a necessary part in the making of the income which must come into existence before the liability to cess arises. The payment of cess is a necessary expense arising in connection with the ownership of royalties but it is in no sense an expenditure incurred for any purpose incidental to the making of the income.

In my opinion, the question submitted for decision to the High Court, *viz.*, whether payments made by the petitioner on account of the local cess are to be deducted before his income is assessed to income tax under section 11 of the Income Tax Act must be answered in the negative. The petitioner will bear the costs of this reference.

MULLICK, J.—In my opinion, the owner of a coal mine receiving royalty upon coal is not a person earning profits from a business. His income falls under section 5 (vi), Income Tax Act, as an income derived

from "other sources" and should be computed in accordance with the provisions of section 11.

The Act makes a difference between income and profits. Profits are included within the term income, but profits are not synonymous with income. For the purposes of the present case, however, this distinction is not material, the royalties are income and the sole question is, whether the cesses payable under the Cess Act should be deducted before assessing income-tax.

In my opinion, clause (2) of section 11 is exhaustive and no rates or taxes of which the basis of calculation is net profits after such profits have been earned can be deducted in making the computation. A comparison of clause (2) (ix) of section 9, the wording of which is identical with clause (2) of section 11, would seem to make it clear that expenditure incurred for the purpose of earning income or profits means sums paid or liabilities incurred, the purpose of which is to feed the spring from which the income is derived. The expenditure must be incurred as a condition precedent to the production of the income. The payment of a tax which is conditional on the making of an income and which is to be calculated on the amount of such income after it has come into existence cannot be said to be expenditure for the making of such income. For our present purposes, the term "net profits" as used in the Cess Act is synonymous with the term "income" as used in the Income Tax Act.

In the next place, even if payment of road and public works cesses could be called expenditure for the purpose of earning the income, it is clear that it is not expenditure incurred solely for such purpose. In so far as the State, in return for the payment of the cesses, grants *inter alia* to the assessee security for the enjoyment of his income the payment may be said to some extent to be made for the purpose of earning such income, but it cannot be said to be made solely for such purpose. It is for this reason that land revenue, local rates and Municipal taxes do not come under the exception provided in clause (2) (ix) of section 9 and special provision has been made for them in clause (2) (viii). No special pro-

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vision has been made in respect of road and public works cesses and if the royalty receiver had been a person carrying on a business, he could not have claimed a deduction for them.

The same principle must apply to the case of an assessee whose income has to be computed under section 11, and these cesses cannot be deducted in his case also. A tax leviable as a condition precedent to the creation of the source of income, such as a license-fee, would stand on a different footing, but that is not the case here. I agree, therefore, with the view taken by the learned Chief Justice.

BUCKNILL, J.—I agree generally. Cesses under the Cess Act, 1880, are admittedly, leviable upon royalties received from the working of mines, (see section 72). Royalty received from mines is "income derived from other sources" section 5 (vi) Income Tax Act, 1918, and not "income derived from business." Such royalty is liable in respect of both income-tax and road-cess and public works cess.

In considering what is the income derived from business the word *income* means "profits of the business" [see section 9 (1)]. How these profits are to be arrived at, section 9 (2) shows, and there are many deductions which may rightly be made from what may be called the "gross receipts" before the figure of the profits properly assessable for income-tax is arrived at. But in the case of "income derived from other sources" the only abatement contemplated is the broad one expressed thus in sub-section (2): "Such income and profits shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making such income or earning such profits." In this reference this is clearly a case concerning "income" and not "profits". But even if royalty derived from mines could be regarded as falling within the phrase "income derived from business" under section 5 (iv), it does not appear that road or public works cess could be regarded as sums paid on account of land revenue, local rates or Municipal taxes as contemplated under section 9 (2) as being capable of being deducted from gross

receipts in order to arrive at the properly assessable profits which is the synonym for "income derived from business" as designed in section 5 (iv).

It is most difficult to see how in the case of "income derived from other sources", the assessment of which is regulated by section 11 and in which the abatement possible in arriving at the taxable income and profits is confined to a deduction of "any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making such income or earning such profits" it can be argued that "road or public works cesses" are expenditure incurred at all for the purpose of making income or earning profits.

The Board of Revenue in its order of Reference, dated the 17th July 1920 puts forward the tentative suggestion that there is foundation in common sense for an argument that a sum which is levied on the proceeds of a property, before such proceeds are at an owner's disposal and which (I suppose the property is meant) is not at the owner's disposal itself, is not part of his income; but to my mind this is not a logical idea but really an *ad misericordiam* plea. Cases may well be imagined, with thought, in which a person's receipts which fall under section 11 could be diminished by various causes over which it is conceivable he might have no control and which yet might have no connection either with capital expenditure or with producing such receipts; in such I cannot see how the operation of sub-section (2) of section 11 could possibly be invoked in favour of the assessee. It appears to me that though, as regards the person working the mine, the royalty paid by him to the landlord is part of the profits of the mine, yet, that royalty, as regards the landlord, is part of the landlord's income and in no proper sense his "profits."

In my view, the royalty receiver is liable to be assessed (a) for income-tax, (b) for road and public works cess on the same sum, namely, the royalty payable to the royalty receiver by the lessees of the mines; and that the contention of the Board of Revenue is correct.

*Answered in this manner.*

JHANWAR DAS v. BODH RAJ.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1691 of 1920.

January 17, 1921.

Present :—Mr. Justice Chevis.

JHANWAR DAS—DEFENDANT

—APPELLANT

versus

BODH RAJ—PLAINTIFF—

RESPONDENT.

*Costs—Defendant sued in representative capacity—  
Order making defendant personally liable for costs—  
Discretion of Court—Appellate Court, interference  
by.*

The Courts have a discretion to make such orders as to costs as they think fit and, unless that discretion is exercised unreasonably, an Appellate Court should not interfere.

Where a defendant, who is sued in a representative capacity, raises unnecessary defences, the Court has power to make him personally liable for the costs of the plaintiff.

First appeal from the decree of the District Judge, Dera Ghazi Khan, dated the 20th April 1920.

Mr. Kanwar Narain, for Lala Jagan Nath, for the Appellant.

Lala Mukand Lal Suri, for the Respondent.

**JUDGMENT.**—This is an appeal only as regards costs. The plaintiff sued the defendant for a settlement of accounts due by the late father of the defendant. The defendant pleaded not merely that he was not personally liable but he seems to have raised every other plea that could be thought of. Issues were framed and decided all in favour of the plaintiff, except that the defendant was held not to be personally liable. It was finally found, after going through the accounts, that the plaintiff was entitled to Rs. 20,000 odd, but the plaintiff said that he wanted a decree for Rs. 8,000 only. The meaning of this clearly was that, as the plaintiff was only to get a decree against the estate of the deceased, it was useless for the decree to be more than could be recovered from that estate. The plaintiff could only be the loser as he would have to pay enhanced Court-fee. The lower Court gave a decree for Rs. 8,000 to be realised from the estate of the deceased in defendant's hands and directed that, as the defendant raised all sorts of pleas which had been decided against him, the defendant was personally liable for costs. The defendant has appealed urging

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that he should not be made personally liable for costs. The Courts have discretion to make such orders as to costs as they think fit and, unless that discretion is exercised unreasonably, an Appellate Court should not interfere. The reasons given by the lower Court for making the defendant personally liable for costs in the present case seem to me perfectly sound.

On behalf of the defendant it is urged that he had no personal knowledge as to his father's dealing and was not, therefore, in a position to make any admissions; but in such a case it was quite easy for the defendant to say that he had no knowledge as to the real state of affairs and could, therefore, make no admissions and could only ask the Court to require the plaintiff to prove his case. There was, as far as I can see, no need to set up a large number of pleas.

The appeal is dismissed with costs.

*Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 41 OF 1919.

May 31, 1920.

Present :—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice Sir Asutosh  
Chaudhuri, Kt.,

BIRENDRA KUMAR BISWAS—

PLAINTIFF—APPELLANT

versus

HEMLATA BISWAS—DEFENDANT—

RESPONDENT.

*Divorce Act (IV of 1869), s. 19—Divorce—Cruelty—  
Syphilis, when amounts to cruelty—Marriage, breach of  
promise of—Syphilis, whether good defence to action—  
Medical examination, refusal to submit to, effect of.*

In order to sustain a plea of cruelty in an action for divorce on the ground that one of the parties to the marriage is suffering with syphilis it must be shown that the disease has been actually communicated to the complainant, and that the complainant was not only ignorant of the existence of the disease at the time of its communication, but that it was knowingly and wilfully communicated [p. 467, col. 1.]

The existence of syphilis at the time a contract to marry is entered into, or the incurring of the



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disease after such contract is entered into, furnishes a good defence in an action for breach of promise of the contract to marry, even though the disease was acquired after the making of the contract but through no wrongful act of the defendant. [p. 364, col. 2.]

Where a person is alleged to be suffering from a loathsome disease, and refuses to attend for medical inspection, the Court may properly draw an unfavourable inference. [p. 367, col. 2.]

Appeal from the judgment and decree of Mr. Justice Fletcher, dated the 31st March 1919.

Mr. A. A. Avetoom (with him Mr. M. N. Kanjilal), for the Appellant.

Mr. B. C. Bonnerjee (with him Mr. B. C. Ghose), for the Respondent.

#### JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal from a judgment of Mr. Justice Fletcher in a suit by a husband under section 18, read with section 19, of the Indian Divorce Act, 1869, to declare his marriage with the defendant null and void on two grounds, namely, *first*, that the respondent was impotent at the time of the marriage and at the time of the institution of the suit, and *secondly*, that his consent to the marriage was obtained by fraud. The parties are Indian Christians in an humble state of life and were married on the 15th February 1918 at the Baptist Church at Entally in the suburbs of this City. The petitioner alleged that the parents of the respondent, as also the respondent herself, were, at the time of the marriage, suffering from a highly infectious and incurable form of syphilis; that this fact was wilfully concealed from him; that his consent to the marriage was thus brought about by fraud, and that he discovered the condition of his wife only on the second day after his marriage. The petitioner further stated that he had found it impossible to consummate the marriage and had accordingly instituted this suit on the 4th April 1918, so that the marriage might be declared null and void. The respondent denied that she had syphilis at the time of her marriage and asserted that the marriage had been consummated with the result that she had contracted the disease from her husband. The question of fraud does not appear to have been investigated in the Court below; but three medical practitioners who had seen the girl deposed as to her condition, the petitioner and the respondent also testified in support of their respective allegations. Mr. Justice

Fletcher has found on the evidence that the marriage has not been consummated; that the respondent is a virtuous girl, and that she suffers from hereditary syphilis. This is undeniable on the medical testimony and is evidenced by the ulcerated condition of her palate and nose. As there had been no examination of the private parts of the girl, it was impossible to say whether they were in any way diseased. In these circumstances, Mr. Justice Fletcher declined to annul the marriage, although he found that the husband would run a degree of risk if he had sexual intercourse with his wife. On the present appeal, Mr. Avetoom has contended on behalf of the husband that the test to be applied in cases of this description is, whether the condition of one of the parties to the marriage, at the time of the marriage, rendered consummation practically impossible, and if this is established the marriage is voidable. In support of this argument, he has relied upon the decisions in *G. v. G.* (1) and *H. v. P.* (2). In the former case a middle-aged wife had successfully resisted consummation for three years not because of malformation or structural defect, but because she suffered from excessive sensibility; her condition was hysterical and to a certain extent beyond her control. Lord Penzance held that as there was practical impossibility of sexual intercourse, without which the ends of marriage, namely, the procreation of children and the pleasures and enjoyment of matrimony, could not be attained the husband was entitled to a decree for nullity. In the second case, Sir James Hannen ruled that the impediment in the way of intercourse must be physical, and made a decree for nullity, as it was established that, whenever the husband endeavoured to consummate the marriage, the act brought on hysteria, so that he could not effect his purpose without employing such force as, but for the marriage, would have amounted to rape. Mr. Bonnerjee, on behalf of the wife, has contended that the decisions mentioned prescribe the extreme limit of the rule of impotence and should not be extended to cases like the present. In support of his argument, he has referred to the judgment

(1) (1871) 2 P. & D. 287; 40 L. J. Mat. 88; 25 L. T. 510; 20 W. R. 103.

(2) (1873) 3 P. & D. 126.

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of Sir Cresswell in *Stagg v. Edgecombe* (3) where a petition for nullity by a wife was (on the authority of the decision of Dr. Bettsworth in *Welde v. Welde* (4) that the impotence must be a visible incapacity) dismissed, as the alleged impotence of the husband was not due to disease or natural infirmity but was occasioned by the indulgence of a disgusting and degrading habit. None of the cases cited in argument is directly in point, and the question raised is plainly one of first impression, so far as this Court is concerned. The matter consequently requires careful investigation, specially in view of the fact that it is only in comparatively recent times that the true nature of syphilis has been revealed by scientific investigators.

An examination of the cases in the British and American Courts shows that the question of the legal effect of the existence of syphilis on contracts to marry or on the married status has been considered from three stand points, which, though distinct, are mutually related, namely, first is the existence of such a disease a valid defence to an action for breach of a contract to marry, secondly, is the existence at the time of the marriage a ground for annulling the union and, thirdly, is it a ground for divorce.

As regards the first question, namely, whether the existence of syphilis in one of the parties to a contract to marry is a good ground for rescission by the other, we have not been able to trace any reported case in England where the point has been judicially determined. Lord Kenyon in *Atchison v. Baker* (5) is reported to have laid it down as a general rule that if the condition of the parties was changed after the making of the contract, it was good ground for either to break off the engagement. In the case before him, he ruled that where the plaintiff had become afflicted with an abscess in his breast and the defendant had refused to marry him on that ground, an action for breach of contract could not be sustained. The same rule has been applied where the affliction was syphilis; *Kutler v. Grant* (6), *Allen v. Baker* (7),

*Schackelford v. Hamilton* (8). The rule enunciated in these cases may be briefly formulated; where syphilis is contracted, prior to but was not known to exist at the time that the contract to marry was entered into, or where such disease was contracted subsequent to the making of the contract to marry, but through no wrongful act of the defendant, its existence furnished a good defence to an action for breach of promise. It is to be observed that in both the cases just mentioned, the affliction was of a serious type, and, perhaps, incurable; the rule might well be otherwise where the disease is such as to be easily curable and where the plaintiff assents to a postponement of performance. The reason for the rule is best stated in the words of Ruffin, J. in *Allen v. Baker* (7).

"We cannot understand how one can be liable for not fulfilling a contract when the very performance thereof would in itself amount to a great crime, not only against the individual but against society itself. However, once doubted, it is now generally conceded that if the performance of a contract be rendered impossible by the act of God alone such fact will furnish a valid excuse for its non-performance; and such a stipulation will be understood to be an inherent part of every contract. It is likewise true that, whenever the main part of an executory contract becomes impossible of performance from any cause beyond the power of the party to control, it will be treated as having become impossible *in toto*. Why should not the same principle apply to a contract, the fulfilment of which, owing to causes subsequently intervening and altogether independent of any default of the party, can only be productive of consequences disastrous to the parties themselves, and such as may entail misery upon others to come after them?.....The usual, and we may say legitimate, objects sought to be attained by such agreements to marry are the comfort of association, the *consortium vitæ*, as it is called in the books; the gratification of the natural passions rendered lawful by the union of the parties; and the procreation of children. And if either party should thereafter become by the act of God and without fault on his own part, unfit for such relation, and incapable of performing the

(8) (1863) 8 Sw. & Tr. 240; 32 L. J. Mat. 153; 9 Jur. (N. S.) 648; 8 L. T. 643; 12 W. R. 19.

(4) (1731) 2 Lee 580 at p. 586; 161 E. R. 417.

(5) (1796) 2 Peake 03.

(6) (1878) 2 Ill. App. 236.

(7) (1882) 41 Am. Rep. 444; 86 N. O. 91.

(8) (1892) 15 L. R. A. 531; 19 S. W. 5.

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duties incident thereto, then the law will excuse a non-compliance with the promise—the main part of the contract having become impossible of performance, the whole will be considered to be so....The law will constrain no man to assume a position so full of peril, as to have placed within his reach the lawful means of gratifying a powerful passion, at the risk of another's health or life and the possibility of bringing into the world children in whose constitution the seeds of a father's sin shall lurk."

The point, as we have said, has not been directly decided in England. The defendant in *Hall v. Wright* (9) refused to carry out his promise by reason of his having become afflicted with bleeding of the lungs rendering sexual intercourse dangerous to himself. The Court held that this was not a sufficient answer to the petition. The Court of Queen's Bench was equally divided, while in the Court of Exchequer Chamber, the decision was pronounced by a majority of four against three. The rule adopted by the majority is a deviation from the general doctrine that in contracts of a personal nature, illness of the promisor rendering him incapable of fulfilling the terms of his agreement is an excuse for non-performance: *Boast v. Firth* (10), *Robinson v. Davison* (11). It may be noted, however, that the rule in *Hall v. Wright* (9) was approved by Montague Smith, J., in *Boast v. Firth* (10), where he distinguished marriage contracts from other contracts. "In the case of a contract to marry, the man, though he may be in a bad state of health, may nevertheless perform his contract to marry the woman and so give her the benefit of social position so far as in his power, though he may be unable to fulfil all the obligations of the marriage state, and it rests with the woman to say whether she will enforce or renounce the contract." Sir Frederick Pollock, in his *Treatise on Contract*, has adversely criticised this decision and has expressed the opinion that it cannot be maintained except against the common understanding of mankind and the general treatment of marriage by the Law of England

that the acquisition of legal and social position by marriage is a principal and independent object of the contract. It may well be doubted whether the rule will be applied to a case where the disease is of a dangerous and infectious character.

As regards the second question, namely, whether the existence of syphilis in either party at the time of the marriage renders the marriage voidable, the answer must depend primarily on the nature and objects of the marriage relation itself. As observed by Dr. Lushington in *Deane v. Aveling* (12), the two principal ends of matrimony are, a lawful indulgence of the passions to prevent licentiousness and the procreation of children according to the evident design of Divine Providence. Whatever other object theorists may ascribe to the marriage relation, the practical statesman must continue to regard it as a civil institution whose chief purposes are the legalisation of sexual commerce between the parties and the perpetuation of the race. Capacity for sexual intercourse must exist at least *in posse*, at the time that the marriage is entered into. It is for this reason that permanent and incurable impotency existing at such time and of such nature as to render complete and natural sexual intercourse between the parties practically impossible is recognised as a ground for the amendment of the marriage. [See the judgment of Lord Johnston and Lord Dunedin, in *A. B. v. O. B.* (13) and of the House of Lords in *A. B. v. O. B.* (14)]. The capacity for sexual intercourse, it is true, is not necessarily affected by the existence of syphilis and yet such disease may render coition practically impossible. Reference may, in this connection, be made to the following passage from the judgment of Ross, C. J., in *Ryder v. Ryder* (15).

"While there was no malformation which renders complete sexual intercourse impossible, there was a physical condition that rendered her (the defendant) incapable of healthy coition. Every such act, by reason of her physical condition, was attended with great danger of communicating to him incurable disease, a disease endangering his health and life....."

(12) (1845) 1 Robertson Eco. Rep. 279 at p. 298; 163 E. R. 129.

(13) (1906) 8 F. 603; 43 Scot. L. R. 411.

(14) (1885) 12 Rettie 36; 22 Scot. L. R. 46.

(15) (1894) 44 Am. St. Rep. 833; 66 Vermont 154.

(9) (1858) El. Bl. & El. 746; 113 R. R. 581; 27 L. J. Q. B. 845; 5 Jur. (N. S.) 62; 120 E. R. 688.

(10) (1868) 4 C. P. 1 at p. 8; 38 L. J. C. P. 1; 19 L. T. 264; 17 W. R. 29.

(11) (1871) 8 Ex. 267; 40 L. J. Ex. 172; 24 L. T. 755; 19 W. R. 1036.



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.....In the case at Bar the petitioner's organs of generation at the time of the marriage were in an incurably diseased condition, which, while it did not physically render her incapable of copulation, or of bringing into life a child, a mass of syphilitic sores, as good as dead when born, yet it did render copulation and procreation on the part of the petitioner impracticable, because the act endangered both his health and life."

To the same effect is the opinion of a Full Bench of the Supreme Court of Massachusetts in *Smith v. Smith* (16). In that case the action for the annulment of marriage was brought by the wife on the ground that, at the time of the marriage, her husband was constitutionally afflicted with syphilis in such state of development as to render a cure very remote and doubtful; he had knowledge of his condition at the time he entered into the marriage, but concealed the fact from the plaintiff, who immediately upon learning of it and before the marriage was consummated, left him, and refused to live with him as his wife. Knowlton, J., in pronouncing the decree for annulment of marriage, observed as follows:—

"His concealed disease was such as would leave with him no foundation on which the marriage relation could properly rest. It had advanced to such a stage as probably to be incurable. The libellant could not live with him as his wife without making herself a victim for life and giving to her offspring, if she had any, an inheritance of disease and suffering....Few, if any, would be bold enough to say that it was the duty of the libellant on discovery of the fraud before consummation of the marriage to give herself up as a sacrifice and to become a party to the transmission of such a disease to her posterity."

In both the cases just mentioned the persons were, it will be observed, afflicted with an incurable form of syphilis. It can hardly be doubted that sound public policy would not permit an extension of the rule to cases where the disease is easily curable. It is the permanent or probably permanent character of the malady, rendering sexual intercourse impracticable throughout the

continuance of the marriage, that furnishes the reason for the annulment and the maxim should apply *cessante ratione cessat lex ipsa*. The determination of the question, whether in a particular case the disease is or is not curable, may be a matter of considerable difficulty. But it must be remembered in this connection that recent scientific investigations have brought to light the grave injury which as the inevitable consequence of infection, may result to the husband or the wife, as the case may be, and to their progeny. We need refer only to the monographs by Dr. Shillitoe on the Primary Lesions and Early Secondary Symptoms of Syphilis as seen in the female, of Dr. Gow on Syphilis in Obstetrics and of Dr. Atkinson on Medico-Legal Associations of Syphilis (See System of Syphilis, Oxford Series, Volume I, Chapter 18, Volume II, Chapter 26 and Volume VIII, Chapter 15). In these circumstances, the rules enunciated in the American Courts may well be applied. The fact that one spouse is afflicted with syphilis does not necessarily make him or her impotent. Impotency is ordinarily understood to mean incapacity, which admits of neither copulation nor procreation, capacity for sexual intercourse seeming to be the matter chiefly regarded in the adjudged cases on the subject. Hence impotency has been taken to mean physical and incurable incapacity from entering into the marriage, that is, incapacity to consummate the marriage. From this it has been held, in *Ryder v. Ryder* (15), that where at the time of the marriage the wife was afflicted with incurable syphilis, which, though not an absolute bar to copulation, rendered the act impracticable as endangering both the health and life of the husband, there was such incapacity as entitled him to a decree for annulment of marriage. On the other hand, it was ruled in *Vondal v. Vondal* (17) that the concealed existence of such a disease was not a sufficient ground for a decree of nullity of marriage, where it appeared that by medical treatment the danger from intercourse could have been obviated. The distinction appears to us to be based on reason and good sense.

As regards the third question, namely,

(16) (1838) 171 Mass. 404; 68 Am. St. Rep. 440; 41 L. R. A. 800.

(17) (1900) 175 Mass. 383; 78 Am. St. Rep. 502.

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does the existence of syphilis in one of the parties furnish a good ground for divorce to the other; there are cases in the English as also in the American Courts where the matter came up for consideration directly or indirectly. These decisions have in general held that in such cases a divorce may be decreed on the ground of cruelty. To constitute such a ground of cruelty, it is usually required that the disease should have been actually communicated to the complainant, that the complainant should have been ignorant of the existence or nature of the defendant's disease at the time of its communication and that the defendant should have infected the petitioner knowingly and wilfully. If all these facts are established, no question can obviously arise as to the propriety of granting the divorce unless there are facts showing a condonation of the offense [*Popkin v. Popkin* (18), *Collett v. Collett* (19), *Oiucci v. Oiucci* (20), *Jones v. Jones* (21), *N. v. N.* (22), *Brown v. Brown* (23), *Boardman v. Boardman* (24), *Morphett v. Morphett* (25) which were all reviewed by Lord Shand in *Strain v. Strain* (26). Reference may also be made to the decision in *R. v. Bennett* (27), *Reg. v. Sinclair* (28), *Hegarty v. Shine* (29) and *Reg. v. Clarence* (30); in the last mentioned case, the Judges of the Court of Queen's Bench as the Court for consideration of Crown Cases Reserved, held by a majority of nine against four that a husband who had fraudulently concealed from his wife that he was suffering from syphilis and had thereby obtained her consent to sexual intercourse with the result that the disease was com-

municated to her was not guilty of having committed an "assault" upon her, "occasioning actual bodily harm" within the meaning of 24 and 25, Viet., C. 100, sections 20 and 47.

We have finally to consider the allegation of fraud. It may be stated as a general rule that, concealment of a loathsome and incurable form of syphilis is recognised as a fraud sufficient to warrant divorce or annulment, specially where the existence of the disease is discovered by the other party before the marriage is consummated and the parties immediately separate. It seems that such disease must be actually or probably incurable, but annulment has been granted notwithstanding a more remote possibility of a cure [*Smith v. Smith* (16), *Vondal v. Vondal* (17), *Svenson v. Svenson* (1), *Crane v. Crane* (32) see also the notes to *State v. Lowell* (33), *Lyon v. Lyon* (34), *Burger v. Burger* (35)].

In these circumstances, we must hold that there has not been that full investigation of the case which the gravity of the result to the parties concerned required. The appeal must consequently be allowed, and the case remanded for re-trial. The allegation of fraud will be investigated and the question whether the condition of the respondent makes the rule of impotency, as explained above, applicable, will be carefully reconsidered. We may add that it is necessary that there should be a proper medical examination of the person of the respondent. Reference may on this point be made to the following passage from the judgment of Lord Stowell in *Briggs v. Morgan* (36): "It has been said that the modes resorted to for proof on these occasions are offensive to natural modesty: but Nature has provided no other means; and we must be under the necessity either of saying that all relief is denied, or of applying the means within our power. The Court must not sacrifice justice to notions of delicacy of its own,"

- (18) (1794) 1 Hagg. Eco. 733 (note).
- (19) (1838) 1 Curt. 678; 163 E. R. 237.
- (20) (1854) 1 Spink. Eco. 121; 18 Jurist 194.
- (21) (1860) Searle & Smith 148.
- (22) (1862) 3 Sw. & Tr. 234; 9 Jur. (N. S.) 1203; 9 L. T. 265.
- (23) (1865) 1 P. & D. 46; 35 L. J. Mat. 13; 11 Jur. (N. S.) 1027; 13 L. T. 645; 14 W. R. 149.
- (24) (1868) 1 P. & D. 233; 14 W. R. 1024.
- (25) (1869) 1 P. & D. 702; 28 L. J. Mat. 23; 19 L. T. 801; 17 W. R. 471.
- (26) (1885) 18 Rettie 132 at p. 136; 23 Scot. L. R. 90.
- (27) (1865) 4 F. & F. 1105.
- (28) 1867) 13 Cox C. O. 23.
- (29) (1878) 2 L. R. Ir. 273; 4 L. R. Ir. 288; 14 Cox C. O. 145.
- (30) (1888) 22 Q. B. D. 23; 58 L. J. M. C. 10; 53 L. T. 280; 37 W. R. 166; 16 Cox C. O. 511; 58 J. P. 149.

- (31) (1903) 178 N. Y. 54; 70 N. E. 120.
- (32) (1899) 62 N. J. Eq. 21; 49 Atl. 784.
- (33) (1899) 79 Am. St. Rep. 858 at p. 373; 78 Minn. 166; 80 N. W. 877.
- (34) (1907) 230 Ill. 866; 18 L. R. A. (N. S.) 996; 82 N. E. 850.
- (35) (1911) 85 Kan. 564.
- (36) (1820) 3 Phill. 825; 2 Hag. Con. 824; 161 F. R. 1389.

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See also *Norton v. Seton* (37), *Pollard v. Wybourn* (38), *Aleson v. Aleson* (39), *Sparrow v. Harrison* (40), affirmed in *Harrison v. Harrison* (41). Where a party refuses to attend for medical inspections the Court may properly draw an unfavourable inference. This was laid down in the case of a female respondent *F. v. P.* (42) and was extended to the case of a male respondent in *B. v. B.* (43) and was applied again in the case of a female respondent in *W. v. S.* (44). The Courts naturally exercise a wide discretion in ordering physical examination and always do so, subject to such conditions as will afford protection from violence to natural delicacy and sensibility. We understand that the respondent does not object to a proper medical examination.

Costs of this appeal will be costs in the suit.

CHAUDHURI, J.—I entirely agree.

*Appeal allowed.*

- (37) (1819) 3 Phill. 147; 161 E. R. 1283.  
 (38) (1828) 1 Hag. Eco. 725; 162 E. R. 732.  
 (39) (1728) 2 Lee Eco. 576; 161 E. R. 445.  
 (40) (1841) 3 Curt. 6; 163 E. R. 638.  
 (41) (1842) 4 Moo. P. C. 96; 6 Jur. 599; 13 E. R. 238.  
 (42) (1896) 75 L. T. 192.  
 (43) (1901) P. 39; 70 L. J. P. 4.  
 (44) (1905) P. 231; 74 L. J. P. 112; 93 L. T. 456.

### PATNA HIGH COURT.

CIVIL REVISION No. 216 OF 1920.

December 20, 1920.

Present:—Mr Justice Jwala Prasad.

Lala HANUMAN LAL—PETITIONER

versus

Musammam RAM PEARI KOER—

OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 151, 152, O. XXXIV, r. 6—Mortgage-decree—Personal decree against persons not mortgagors—Inherent power of Court to set aside decree.

A Court has inherent power to set aside an *ex parte* decree, passed by oversight under Order XXXIV, rule 6, of the Civil Procedure Code, as against a person who is not the mortgagor.

Appeal from a decision of the Munsif, Arrah.

Mr. H. P. Sinha, for the Petitioner.

Messrs. Sunder Lal and Ragho Prasad, for the Opposite Party.

JUDGMENT.—The Rule must be discharged. The applicant obtained a mortgage decree, dated the 7th of January 1918, against the mortgagor, Balmukund Singh, his son, and the opposite party, defendants Nos. 3 to 5, who were purchasers of the interest of Debi Prasad, in whose *takhta* the mortgaged property by partition had fallen. The defendants Nos. 3 to 5 resisted the mortgage, suit on the ground that the mortgagor had no *jurasta* right in the mortgaged property and that it being the *terast* land of the proprietors and having fallen into the *takhta* of Debi Prasad, the predecessor-in-interest of the defendants Nos. 3 to 5, the mortgagee had no right to make the said property liable for the mortgage debt.

This plea was overruled by the finding of the Court in the mortgage-suit, that the property in dispute was the *kasht* right of the mortgagor, Balmukund Singh, and that their mortgage lien subsisted in it in spite of its having fallen into the *takhta* of Debi Prasad. Accordingly, a preliminary mortgage-decree was passed on the 18th of December 1914 and ultimately a final decree under Order XXXIV, rule 6, was passed on the 7th of January 1918.

The mortgaged property was sold in execution of that decree on the 6th of May 1918, for the sum of Rs. 81. On the 2nd of November 1919, the petitioner applied for a personal decree under Order XXXIV, rule 6, which remained unsatisfied out of the net proceeds of the sale of the mortgaged property on the 13th of January 1919. The Court passed the following order:—"The decree-holder-plaintiff applies for the preparation of a decree under Order XXXIV, rule 6, of the Code of Civil Procedure, as it is said that the whole of the decree money could not be satisfied by the sale of the mortgaged property. Service of notice on the judgment debtors has been proved. Hence it is ordered that let a decree asked for be prepared for the sum of Rs. 253 14-9 inasmuch as the decretal sum amounted to Rs. 334 14-9 while the property fetched only Rs. 81-00. The sale is said to have taken place for that sum on the 6th of May 1918."

In pursuance of this order, the decree was prepared in Form 11, Schedule D, to the Civil Procedure Code, prescribed for the



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preparation of such decrees. In the decrees the names of the mortgagors as well as opposite-party Nos. 3 to 5, the purchasers of the mortgaged property from Dabi Prasad, were included. The names were copied out from the preliminary and the final decrees of 1918. The money and the personal decree thus prepared under Order XXXIV, rule 6, was put into execution and the property of the opposite party defendant's Nos. 3 to 5 was attached.

On the 3rd of February, 1920 an application was made by the defendants Nos. 3 to 5 contesting the legality of the decree passed, on the ground that they were not the mortgagors in the bond of the 25th of May 1896 and hence no personal decree under Order XXXIV, rule 6, could be passed against them. The application purported to have been made under Order IX, rule 13, and under section 151 of the Code of Civil Procedure. The Court held that, inasmuch as the notice of the application for the decree under Order XXXIV, rule 6, was served upon the defendants Nos. 3 to 5, the right to apply under Order IX, rule 13, was barred by time. It accordingly considered their application under the inherent power vested in the Court by section 151 of the Code of Civil Procedure and, by its order of the 2nd August 1920, directed that their names be deleted from the decree under Order XXXIV, rule 6.

The main contention of the learned Vakil on behalf of the decree holder applicant is that the Court was wrong in exercising the inherent power under section 151 of the Code of Civil Procedure, inasmuch as the opposite party had other remedies provided by the Code to set aside the decree passed under Order XXXIV, rule 6, on the 13th of January 1919. It is true that the opposite-party had a right to prefer an appeal from the decree and also to make an application for review of it under Order XLVII of the Code of Civil Procedure, and ordinarily section 151 of the Code would not apply to cases where the aggrieved parties had other remedies provided in the Code. *Vide Muthiah Chettiar v. Bawa Sahib* (1). The facts of that case are

different from those of the present. I have carefully read the decision in that case and certainly, when the applicant came long after his right was barred under Order XXI, rule 90 of the Code of Civil Procedure, and after he had been unsuccessful up to the Appellate Court in his application under Order XXI, rule 89, it would have been unjustifiable to stretch the scope and object of section 151 of the Code of Civil Procedure to apply to that case.

The recent Full Bench case of *Gadi Neslaveni v. Marappareddigari Narayana Reddi* (2), has dealt with the matter very fully and exhaustively and has summarised the decisions of different Courts of India upon the question of inherent jurisdiction of Courts under section 151 of the Code of Civil Procedure. Woodroffe, J., in the case of *Hukam Chand Boid v. Kamalanand Singh* (3) as a result of a review of a number of cases, observed as follows:—"It has thus been held that, although the Code contains no express provision on the matters hereinafter mentioned, the Court has an inherent power *ex debito justitiæ* to consolidate; postpone pending the decision of a selected action; and to advance the hearing of suits; to stay on the ground of convenience cross suits; to ascertain whether the proper parties are before it; to enquire whether a plaintiff is entitled to sue as an adult; to entertain the application of a third person to be made a party; to add (section 32 not being exhaustive) a party; to allow a defence *in forma pauperis*; to decide one question and to reserve another for investigation, the Privy Council pointing out that it did not require any provision of the Code to authorise a Judge to do what in this matter was justice and for the advantage of the parties; to remand a suit in a case to which neither section 562 nor section 566 applies; to stay the drawing up of the Court's own orders or to suspend their operation, if the necessities of justice so require; to stay, apart from the question whether the case falls within section 545, the carrying out of a preliminary order pending appeal; to stay proceedings in a lower Court pending appeal

(1) 28 Ind. Cas. 46; 27 M. L. J. 605; 1 L. W. 969.

(2) 53 Ind. Cas. 547; 43 M. 94; 37 M. L. J. 599; 26 M. L. T. 777; 10 L. W. 606; (1920) M. W. N. 10 (F. B.).

(3) 33 C. 927 at p. 932; 3 C. L. J. 67.

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and to appoint a temporary guardian of a minor upon such stay; to apply the principles of *res judicata* to cases not falling within sections 13 and 14 of the Code and so forth". The aforesaid passage has been referred to with approval in the judgment of almost all the learned Judges who delivered separate judgments in the aforesaid Full Bench Madras case. Referring to the aforesaid passage Abdul Rabim, C. J., said. "There is no instance, so far as I am aware, of an *ex parte* decree being set aside upon an application made for that purpose in cases other than those coming under Order IX, rule 13". Accordingly, it was held in that case that the Court had no power to set aside the *ex parte* decree passed under the inherent jurisdiction referred to in section 151 of the Code of Civil Procedure.

The learned Vakil on behalf of the applicant relies very strongly upon the aforesaid decision and the passage from the judgment of Abdul Rabim, C. J., referred to above. I am in full agreement with the view expressed in the aforesaid Full Bench decision, but each case has to be judged upon its own merits. It cannot be laid down as a hard and fast rule of law that in no circumstances the power of the Court under section 151 of the Code can be exercised in respect of an *ex parte* decree except under the provisions of Order IX, rule 13. The learned Chief Justice of Madras himself observed: "I do not, however, wish to suggest that the inherent power of the Court mentioned in section 151 of the Code is to be limited to cases in which it can be shown to have been already exercised, for that would be unduly limiting the scope of section 151," and I would add "the object for which the scope was enacted and the inherent power was vested in Courts." Because in no previous case the power was exercised with respect to *ex parte* decrees, it cannot be contended that such power should never be exercised in such cases. Woodroffe, J., from whose decision the important passage quoted above has been referred to in the Full Bench Madras decision, continues: "These instances (and there are others) are sufficient to show, firstly, that the Code is not exhaustive and, secondly, that in matters with which it does not deal, the Court will exercise an inherent jurisdiction to do that justice

between the parties, which is warranted under the circumstances and which the necessities of the case require."

In the present case it has been admitted by the Munsif himself, and he very rightly says that no personal decree could be passed against the opposite-party who are not the mortgagors in the bond under Order XXXIV, rule 6" and observes, in connection with the order of the 13th January 1919: "I would not have passed it, had it been brought to my notice that these applicants are not exeutants of the mortgage deed."

The order of the Munsif, therefore, was admittedly passed on a misapprehension on account of the fact not having brought to his notice that the opposite-party were not the exeutants of the bond. It was the duty of the petitioner before us to obtain a decree under Order XXXIV, rule 6, on placing before the Court the true facts and circumstances. He knew very well that the mortgaged property was sold and that none but the exeutants of the bond were liable for personal decree for the balance of the decretal amount unsatisfied by the net proceeds of the sale of the mortgaged property. He had a right only to proceed against the exeutants of the bond under Order XXXIV, rule 6. He was guilty of omission to give correct information to the Court. He cannot be permitted to take advantage of his own lapse, if not of fraud.

The decree under Order XXXIV, rule 6, has to be prepared upon the pleadings in the original suit and the preliminary and the final decrees passed therein. A mere glance at those documents will clearly show that no decree could be passed under Order XXXIV, rule 6, against the opposite-party. It was the mistake of the Court, and the officers of the Court were probably deceived by the decree-holder. Such mistakes cannot be permitted to be continued in spite of the discovery of the mistake, on the ground that the right of the opposite-party was barred by time or upon the ground that the opposite party did not take steps to have the *ex parte* decree set aside. It must be remembered that the opposite-party was not bound to come to Court for they knew full well that the application of the decree-holder was not a real application against them but an appli-

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ation to have a personal decree against the executants of the bond. It is when the decree holder executed the decree and pursued the opposite party in attaching their property that they thought of coming to Court and pointing out that there was a mistake upon the office record in the preparation of the decree.

On no principle of law the power of the Court can be curtailed to set right such mistakes. The inherent power vested in the Court under section 151 of the Code of Civil Procedure is ample to cover the Court's jurisdiction in cases like this. I would go further and hold that section 152 of the Code might well be applied for it is an error arising from the accidental slip of the office in the preparation of the decree, an omission which may at any time be corrected by the Court either of its own motion or on the application of any of the parties. No question of limitation applies either in the application under section 151 or section 152 of the Code.

I may also mention that the form appended to the Code of Civil Procedure for the preparation of the decrees under Order XXXIV, rule 6, mentions on the heading "Decree against mortgagor personally". That is the form which has been employed in the preparation of this decree. In the present case, therefore, it was never intended to pass a decree against persons other than the mortgagor.

For all the aforesaid reasons, I overrule the contention on behalf of the applicant and confirm the order passed by the Mansif. The application is dismissed with costs. Hearing fee one gold mohur.

*Application dismissed.*

### LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 569 OF 1918.

January 24, 1921.

*Present* :—Mr. Justice Chevis.

THE SHOP KNOWN AS BHAGAT RAM-

KALYAN DAS, THROUGH

KALYAN DAS—PETITIONERS

*versus*

MANGAT RAM-SHIBBU RAM

AND OTHERS—RESPONDENTS.

, Civil Procedure Code (Act V of 1908), ss. 73, 115—

*Rateable distribution, order disallowing—Revision, whether lies.*

The High Court will not interfere on revision with orders allowing or disallowing claims to rateable distribution, save in exceptional circumstances. [p. 372, col. 1.]

Petition, under section 44 of Act III of 1914, Punjab Courts Act, and section 115 of the Civil Procedure Code, for revision of the order of the Senior Subordinate Judge, Montgomery, dated the 30th May 1918.

Dr. Nand Lal, for the Petitioner.

Lala Hargopal, for the Respondent.

**JUDGMENT.**—Mangat Ram and Shibu Ram are the judgment-debtors in this case. Three different firms obtained decrees against them. (1) Bhagat Ram-Kalyan Das, (2) Chandu Ram-Tota Ram (now represented by Lala Hargopal Vakil) and (3) Jawahar Mal-Deoki Nandan, who though served have not appeared in this Court. Bhagat Ram-Kalyan Das are the petitioners in this Court. They applied for execution on the 8th March 1918 and by a further application dated the 9th April 1918 they asked to share in a proportionate distribution of assets. The property which had been attached was sold on the 22nd April and assets were realised on the 22nd, 24th and 26th of April. On the 11th of May 1918 the petitioners' application for execution was dismissed for default. Petitioners put in a fresh application on 29th May 1918 which was dismissed on 30th May on the ground that it had been presented long after realization of assets. On the 30th of May 1918 the sale was confirmed, and, as the sale-proceeds were more than sufficient to satisfy the decrees of Chandu Ram-Tota Ram and Jawahar Mal-Deoki Nandan, these two firms were paid off in full. On the 31st of May 1918 the petitioners applied for the balance of the money and got a sum of Rs. 447. This, however, was insufficient to satisfy their decree for Rs. 900, and after an abortive attempt to appeal to the District Judge against the order of 30th May dismissing their application they came to this Court on the revision side. Their petition was put in good time but they named as respondents only the judgment debtors, and though asking for rateable distribution, they never impleaded the rival decree-holders as parties until two years later.



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*Lala Hargopal* on behalf of *Chandu Ram-Tota Ram* raises two preliminary objections; (1) that this Court should not interfere on revision as the petitioners have an alternative remedy under section 73 (2), Civil Procedure Code, and (2) that this Court should not interfere in a case where the persons against whom relief is sought have by negligence not been impleaded for more than two years. Dr. Nand Lal quotes *Sri Krishna Doss v. Ohandook Ohand* (1) as an authority for the proposition that High Courts should interfere on revision in such cases. *Lala Hargopal*, however, points out that the general practice of this Court is not to interfere and he cites *Punjab National Bank v. Salamat Singh* (2), *Fazal Din v. Narain Singh* (3) and *Radhe Kishen v. Bholu Mal* (4). These are all cases of applications for rateable distribution and this Court has consistently declined to interfere on revision with orders allowing or disallowing claims to rateable distribution, save in exceptional circumstances. In the present case I do not see such circumstances as would warrant interference. Counsel on both sides have quoted *Tiruchittambala Ohetti v. Seshayyengar* (5) which lays down that only those persons are entitled to rateable distribution who have applied for execution of their decrees prior to the realisation of assets and whose applications are still on the file and undisposed of. On behalf of the petitioners it is urged that their applications were still pending when the assets were realised and that absence on the 30th May 1918 should not have prevented the Court from making distribution of assets in accordance with the provisions of law. For the respondents it is urged that as the petitioner's application for execution was dismissed for default before the assets were actually distributed, the petitioners have no right to share in the distribution. This is a law point which I am not going to decide as it will probably be put in issue in a regular suit. I may also remark that, even if this application were to be accepted, still, as is pointed out in *Punjab*

*National Bank v. Salamat Sinah* (2) this would apparently not prevent one side or the other from bringing a regular suit under section 73 (2), Civil Procedure Code. Farther, in this particular case, it is obvious that the petition is directed only against the rival decree holders who were by negligence not impleaded as respondents for more than two years. This appears to be an additional ground for refusing to interfere on revision.

The application is dismissed with costs.  
*Application dismissed.*

#### PATNA HIGH COURT.

CIVIL REVISION No. 96 OF 1920.

December 13, 1920.

Present:—Mr. Justice Jwala Prasad.

SUKAN SAHU—PETITIONER

versus

JHARI MAHTO—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), O. VII, rr. 14, 18—Scope and object of rules—Document not produced along with plaint, whether can be relied on subsequently.*

The object of rule 14 of Order VII of the Civil Procedure Code, is to shut out suspicious documents and to afford as little opportunity as possible for the production of false and fabricated documents in Court, but where it is made clear to the Court that, in spite of the document not having been filed or entered in the list along with the plaint, the document cannot be said to have been fabricated on the face of it, there is no reason why the party should be debarred from using such a document in Court. [p 374, col. 1.]

Appeal from a decision of the First Subordinate Judge, Small Cause Court, Monghyr, dated the 23rd January 1920.

Mr. Murari Prasad, for the Petitioner.

Mr. N. N. Sen, for Mr. S. K. Mitter, for the Opposite Party.

**JUDGMENT.**—This is an application under section 25 of the Provincial Small Cause Courts Act (Act IX of 1887) against the decision of the Small Cause Court Judge of Monghyr, dated the 23rd June 1920, dismissing the suit of the plaintiff. The plaintiff claimed Rs. 270 as principal and Rs. 182-9-9 as interest on account of

(1) 4 Ind. Cas. 509; 32 M. 884; 5 M. L. T. 125; 19 M. L. J. 807.

(2) 82 P. R. 1905; 193 P. L. R. 1905; 115 P. W. R. 1905.

(3) 125 P. R. 1906; 119 P. L. R. 1903; 153 P. W. R. 1906.

(4) 17 Ind. Cas. 254; 171 P. W. R. 1912; 176 P. L. R. 1912.

(5) 4 M. 383; 1 Ind. Dec. (N. S.) 1102.

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the loan advanced to the defendants on two dates Rs. 250 on 9th *Aghan Sudi* 1324 and Rs. 20 on 5th *Ohaitra Sudi* 1324. The plaintiff was filed on the 13th of November 1919. The plaintiff's case was that the defendants used to borrow money from time to time and that the loans advanced used to be entered, according to the usual practice, in his *rokar* books and accounts. The defendants denied the liability based upon the *bahi-khata*s and alleged that they had executed a *sudbharna* deed for the money borrowed in cash from the plaintiff. The plaintiff examined two witnesses and the defendant No. 1 was examined on behalf of the defendants. The Court dismissed the suit solely on the ground that the plaintiff failed to produce his *rokar* book in time and "it was not safe to act upon the *lekha* as sufficient to fasten the defendants with the liability."

The *lekha* (ledger) is an abstract of the *rokar* book showing the several advances made to each person. The *rokar* is a daily book of accounts showing the advances made from day to day.

Witness No. 1 for the plaintiff, Misri Lal, the writer of the *rokar* and the *khata*, was examined. He gave oral evidence as to the advances alleged by the plaintiff as having been made to defendant No. 1 in his presence. He also stated that he entered the said advances in the *bahis* and when the *rokar bahi* (daily register) was shown to him in order to be proved by him, the Court refused to admit it on the ground that it was "not filed with the plaintiff." The *khata* (ledger) was, however, allowed to be proved and was marked Exhibit 1, apparently because it appeared to the Court that this was filed with the plaintiff.

The learned Vakil on behalf of the plaintiff contends that the Court was wrong in rejecting the *rokar bahi*. He says that it was filed in Court along with the plaintiff, and it shows the Court seal of the 13th November 1919, the date on which the plaintiff was filed, at pages 61 and 62 of the *rokar*, which he produces in this Court. He says that both the *rokar* as well as the *khata* were filed along with the plaintiff and were taken back with the permission of the Court as they were books of daily use in the plaintiff's business.

Mr. Sen on behalf of the opposite party defendants disputes the correctness of the contention upon the ground that the list of the books filed along with the plaintiff showed that only one book was filed and that was the *khata* book (ledger). It, however, appears from the list that the plaintiff filed a book called "*rokar bahi khata*." A copy of the extract from that book was also filed and is now marked Exhibit I. In the remark column of the list of the documents it is noted that the original was compared with the copy and was allowed to be returned. The copy filed is no doubt a copy of the *khata*. It refers to the pages of the *rokar*, pages 61 and 62. It appears to be clear that both the books go together and the plaintiff classed them as one book '*rokar bahi khata*', and from the seal of the Court it is also clear that both the books were filed in the Court one and the same time. The Court was, therefore, apparently under a misapprehension as regards the non-filing of the *rokar* and I do not know whether the attention of the Court was drawn to the fact that it bore the seal of the Court, nor do I know what would have been the decision of the Court if it were aware of the Court seal being on the book in question. I have read the plaintiff and I more than doubt whether the claim of the plaintiff can be said to be a claim based upon the *bahi-khata* in question. His case is based upon the loan advanced to the defendants. The *bahi-khata* is used as evidence of the loan containing the contemporaneous entries of the payments made. It would have been otherwise if the defendants had signed the book, and the plaintiff's suit were based upon the basis of an acknowledgment of the advances made to him. I, therefore, think that the document in question really comes under subsection (2) of rule 14, Order VII, of the Code of Civil Procedure, namely, a document upon which the plaintiff relies as evidence in support of his claim. The plaintiff in such a case was required to enter such document of evidence in a list to be annexed to the plaintiff. The plaintiff has done so, for the second item clearly indicates that the plaintiff did so. The document in question, therefore, being only a piece of evidence which was entered in the list filed with

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the plaintiff, the requirements of the law were complied with and the Court was, therefore, wrong in not admitting the document in evidence. Even if the document ought to have been filed, and was not filed, along with the plaintiff and that the Court had jurisdiction to refuse it under rule 18 of Order VII, the Court exercised the jurisdiction or the discretion vested in it by law perversely. The object of the rules in Order VII of the Code is to shut out suspicious documents and to afford as little opportunity as possible for the production of false and fabricated documents in Court; but where it is made clear to the Court that, in spite of the document not having been filed or entered in the list along with the plaintiff, the document cannot be said to have been fabricated on the face of it, there is no reason why the party should be debarred from using such a document in Court. The plaintiff was filed on the 13th November and was registered on the 15th of November. There is no dispute that the plaintiff filed at least the *khata* book, a copy of the extract from the book and a list entering therein the said document. The *khata* book as well as the copy of the extract clearly refers to the entries at pages 61 and 62 of the *rokar*. The *rokar* was produced in Court and bears seal of the Court. The writer of the book was produced in Court and there is his oath as to the accuracy and correctness of the entries therein. The Court ought to have, therefore, allowed this document to be admitted and then to decide the plaintiff's claim after considering this document along with the other evidence of the plaintiff. The *rokar* book which was produced in the lower Court would have clearly shown to the Court that it was a huge book containing innumerable entries and the suit having been decided within six weeks it was not very easy for the plaintiff to forge it in such a short time. I am far from saying that the Court ought to have accepted this evidence as true, but the circumstances of each case have to be considered in order to decide whether a document should or should not be entered in evidence though not filed along with the plaintiff or entered in the list under rule 14 of Order VII. The circumstances of this case leave no manner of doubt that this was one of the cases where the Court ought to have

allowed the plaintiff to prove his claim by means of the *rokar* book which he sought to do. The cases of *Ranchhod Hirabhai v. Secretary of State for India* (1) and *Devidas Jogirao v. Firjada Begum* (2) bear me out in the principle enunciated above.

Lastly, the Court acted illegally in omitting to consider the oral evidence offered on behalf of the plaintiff. As already stated the plaintiff examined two witnesses to prove the advances actually made to the defendants in respect of which the plaintiff brought the present suit. The defendants simply denied the loan. Whether the *rokar* book was filed or not, it was the incumbent duty of the Court to consider the oral evidence and to accept or to reject it. If the oral evidence proved the plaintiff's case and it was worthy of credence, there was no reason why the plaintiff should not have succeeded in the Court below on the strength of the oral evidence offered by him.

For all the aforesaid reasons, I am convinced that there has been a failure of justice. I accordingly set aside the order of the Small Cause Court Judge dismissing the suit of the plaintiff and remand the case to him for disposing of it in accordance with law and in the light of the aforesaid remarks, after giving the plaintiff an opportunity to produce the *rokar* book in question. The costs of this appeal will abide the result.

The *rokar* book filed here has been returned to the learned Vakil appearing on behalf of the plaintiff, to be produced in the Court below.

Hearing fee one gold *mohur*.

*Order set aside*

(1) 22 B. 173; 11 Ind. Dec. (N. S.) 697.

(2) 8 B. 577; 4 Ind. Dec. (N. S.) 625.



SULAKHAN SINGH v. SANTA SINGH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2499 OF 1916.

December 7, 1920.

Present:—Mr. Justice Wilberforce

and Mr. Justice LeRossignol.

SULAKHAN SINGH, MINOR, THROUGH

Musammat KARAM DEVI—DEFENDANT

—APPELLANT

versus

SANTA SINGH AND ANOTHER—PLAINTIFFS—

RESPONDENTS.

*Marriage—Muhammadan woman living as wife with Sikh—Presumption—Appeal, second—Legitimacy—Finding of fact, whether binding.*

The law presumes against vice and immorality, and where it is proved that a Muhammadan woman lived with a Sikh for a number of years as his wife, there is a strong presumption in favour of a marriage having taken place between them.

Although a finding on the question of legitimacy is one of fact, it will not be upheld in second appeal where the lower Appellate Court has ignored important pieces of evidence and the strong presumption of the law in favour of legitimacy.

Second appeal from the decree of the Additional District Judge, Gujranwala, at Sialkot, dated the 17th May 1916, reversing that of the Sub-Judge, First Class, Gujranwala, dated the 5th July 1915.

Mr. Gobind Ram, for the Appellant.

Mr. Cooper, for the Respondents during arguments.

**JUDGMENT.**—Sulakhan Singh, the defendant-appellant in this case, is admittedly the son of one Natha Singh by a Muhammadan woman, Musammat Kammon; and the only question before us is, whether he was born in lawful wedlock. Natha Singh died in 1903 and his land was then mutated in favour of Sulakhan Singh. Musammat Kammon had previously been married to a Muhammadan Kamhar named Umar and the lower Appellate Court has refused to recognise Sulakhan Singh as the legitimate son of his parents on the ground that there is nothing whatever to show whether Musammat Kammon had ever been divorced from her first husband.

In the appeal it is urged that the lower Appellate Court has totally ignored a most important piece of evidence, namely, an admission by Deva Singh, the father of the present plaintiff, at mutation in 1903 to the effect that he was willing that the land should be mutated in favour of Sulakhan Singh. It is also pointed out to us that the

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lower Appellate Court also paid no attention to an un rebutted statement by Musammat Kammon herself that her former husband had died some six or seven years before the birth of Sulakhan Singh. The decision of the District Judge was merely based upon the fact that the evidence of a divorce of Musammat Kammon from Umar was not sufficient nor was there adequate proof of an alleged conversion of Musammat Kammon to the Sikh faith. We consider that the District Judge would have come to a different conclusion if he had paid due attention to the evidence which he has disregarded. It is also not denied that Musammat Kammon lived as a wife with Natha Singh for a number of years and, this being the case, as the law presumes against vice and immorality, there is a strong presumption in favour of a marriage having taken place between them. See Amir Ali and Woodroffe's Law of Evidence, 5th Edition, page 72, and the authorities quoted therein. Another authority on the same point is contained in a recent judgment of this Court, namely, Ibrahim Ali Khan v. Mubarak Begam (1).

Although, therefore, the decision of the lower Appellate Court on the question of legitimacy was one of fact, we cannot uphold its decision, as it has ignored important pieces of evidence and the strong presumption of the law in favour of legitimacy.

We, therefore, accept this appeal and dismiss plaintiffs suit with costs throughout.

*Appeal accepted.*

(1) 66 Ind. Cas. 923; 1 L.J. 229; 82 P. L. R. 1920; 20 P. W. R. 1920.

PATNA HIGH COURT.

CIVIL REVISION NO. 217 OF 1920.

January 12, 1921.

Present:—Mr. Justice Das

Hafiz JALALUDDIN—DECREE-HOLDER—

PETITIONER

versus

Musammat MANIRAN OBJECTOR

—OPPOSING PARTY.

*Civil Procedure Code (Act V of 1908), O. XXI, r. 5—Claim proceedings—Limitation, question of, whether can arise.*

## TOMLINSON v. GORAN.

In a proceeding under Order XXI, rule 58 of the Civil Procedure Code, the Court has no jurisdiction whatever to deal with the point whether the execution is barred by time.

Revision from an order of the Munsif, Arrah.

Mr. Lakshmi Narain Singh for Mr. Fakhr-ud-din K. B., and Mr. P. Banerji, for the Petitioners.

Mr. Mahomed Jan, for the Opposite Party.

**JUDGMENT.**—This application is directed against the order of the learned Munsif dismissing the execution case of the petitioner. It is necessary to state that this order was made in a claim case preferred by the opposite party. That claim was put forward on the 28th May 1920. The learned Munsif registered it as Case No. 11 of 1920. Without, however, determining any of the matters in controversy between the decree holder and the claimant to the property, the learned Munsif dismissed the execution case as barred by limitation.

Now, it is quite clear that the question of limitation does not arise in a proceeding under Order XXI, rule 58. The claimant has no *locus standi* at all in the execution proceedings until he establishes his right to the property, and, as soon as he establishes his right to the property, the property must be released from attachment. Either he succeeds in his claim case or he fails in it, in neither case does the question of limitation arise. The order sheet shows that the learned Munsif registered the case as a claim case. He issued notice on the parties, and he directed the claimant to file documentary evidence before him. He issued summonses to the witnesses, but then, without determining the points which it was necessary for him to determine in a proceeding under Order XXI, rule 58, he thought it necessary to deal with the question of limitation first. In my view, he had no jurisdiction whatever to deal with the point whether the execution was barred by limitation in a proceeding under Order XXI, rule 58. I must set aside the order of the learned Munsif and direct him to proceed according to law. If the claimant establishes his claim to the property, then no other question will arise in the matter. If the claimant fails to establish his claim, then the learned Munsif will proceed with the execution case; and, in dealing with

the question of limitation, the learned Munsif will give due weight to two cases which I may bring to his notice: the case of *Sariatolla Molla v. Raj Kumar Roy* (1), and the case of *Lakshmanan Chettiar v. Kannammal* (2).

In the circumstances, I make no order as to costs.

*Order set aside.*

(1) 27 C. 709; 4 O. W. N. 681; 14 Ind. Dec. (N. S.) 466.

(2) 24 M. 185.

**LAHORE HIGH COURT.**  
CIVIL REVISION PETITION No. 588 OF 1920.  
January 28, 1921.

*Present*:—Mr. Justice Martineau.  
MRS. TOMLINSON—PLAINTIFF—  
PETITIONER

*versus*

MUHAMMAD GORAN—DEFENDANT—  
RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. VI, rr. 17, 18—Amendment of plaint—Plaintiff, failure of, to amend, effect of—Suit, whether can be dismissed.*

Order VI, rule 17 of the Civil Procedure Code only provides that the Court may allow an amendment, and if the party to whom the permission is given does not avail himself of it, the only consequence is that, under Order VI, rule 18, he cannot amend his pleading afterwards unless the time allowed for amendment is extended by the Court. [p. 377, col. 1.]

Therefore, where a plaintiff fails to amend his plaint when directed to do so, the Court has no power, merely on this account, to dismiss the suit. [p. 377, col. 1.]

Petition, under section 25 of Act IX of 1887, for revision of the decree of the Judge, Small Cause Court, Kasauli, dated the 16th June 1920.

Lala Dharam Chand, for the Petitioner.  
Lala Mohesh Das, for the Respondent.

**JUDGMENT.**—The plaintiff alleged in the plaint in this case that the defendant and her husband had borrowed Rs. 300 from her on the promissory notes, and had paid nothing except interest up to the end of 1918, and she claimed Rs. 306 for principal and interest

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The defendant pleaded that the plaint should be returned for amendment, on the ground that it ought to give a full statement of the account and to specify the sums of money which the plaintiff had received, with dates. The lower Court, then, on the 2nd June, returned the plaint, which it said was defective, for amendment by the 16th June, and on the latter date, as the plaint had not been amended, the Court dismissed the suit. The plaintiff has applied to this Court for revision.

I cannot agree with the lower Court that the plaint was in any way defective. It gave all the necessary particulars and needed no amendment. In the second place, the Court was not competent to dismiss the suit when the plaintiff failed to amend the plaint as directed, and section 151 of the Civil Procedure Code, under which the lower Court's order purports to have been passed, does not apply in such circumstances as these. Under the old Civil Procedure Code, a plaint could be rejected if the plaintiff failed to comply with the order to amend it, but there is no such provision in the present Code. In fact, the present Code contains no specific provision that the Court may order a party to amend his pleadings, but Order VI, rule 17 only provides that the Court may allow an amendment, and if the party to whom the permission is given does not avail himself of it the only consequence is that, under Order VI, rule 18, he cannot amend his pleading afterwards unless the time allowed for amendment is extended by the Court. I accordingly accept this application for revision, set aside the order of the 16th June 1920, dismissing the suit, as well as the order of the 2nd June 1920 returning the plaint for amendment and awarding Rs. 16 costs against the plaintiff, and remand the case to the lower Court, under Order XLI, rule 23, Civil Procedure Code, for fresh disposal according to law. Court-fee on the application for revision will be refunded. Other costs will be costs in the case.

*Application accepted.*

# PATNA HIGH COURT.

Civil Revision No 150 of 1920.

January 4, 1921.

*Present* :—Mr. Justice Das and

Mr. Justice Adami.

Babu RAMANAND SINGH AND OTHERS

—PETITIONERS

*versus*

CHANDRAMA SINGH AND OTHERS—

OPPOSITE PARTIES.

*Civil Procedure Code (Act V of 1908), O. IX, r. 4—Failure to pay process-fees for attendance of one of several defendants, effect of—Dismissal of suit, whether justified.*

The default of a plaintiff to pay process-fees on the date fixed for the payment in respect of one of the defendants can be no justification for dismissal of the suit as against those defendants who have been served and have filed written statements. [p. 378, col. 1.]

The provisions of Order IX, rule 4 of the Civil Procedure Code are applicable to a date fixed for the hearing of the suit and not to a date fixed for the payment of process-fees. [p. 378, col. 1.]

Appeal from a decision of the Subordinate Judge, Patna.

Mr. P. Banerjee, for the Petitioners.

Mr. Sami, for the Opposite Party.

## JUDGMENT.

ADAMI, J.—This is an application against an order of the Subordinate Judge refusing to restore a suit under Order IX, rule 4. Shortly stated, the facts are these.—

The plaintiff instituted a mortgage suit against several defendants, one of whom was a minor. It was proposed that the defendant No. 1 should be the guardian of the minor, but it was objected that as the defendant No. 1 had executed the bond he could not act as guardian to the minor in the suit. Process-fees had been paid and summons had issued on defendant No. 1 and defendant No. 2; and it was ordered that the defendant No. 2 should be appointed as guardian of the minor, process-fees should be filed and that a copy of the plaint should be served upon him as guardian of the minor. It was further ordered that the extra process-fees should be filed on the 28th February 1920. On that date the plaintiff failed to file the extra process-fees and on the 1st March the Court dismissed the whole suit for default. An application was then made for the restoration of the suit which was rejected.



UDE RAM V. BENI PERSHAD.

It is clear to me that the order of the Court was not correct. The 28th February had been fixed only for the payment of process-fees in respect of one of the defendants who was a minor, and the rest of the defendants who were adults had appeared and filed written statements. The default of the plaintiff to pay process fees on the date fixed for the payment in respect of one of the defendants could be no justification for dismissal of the suit as against the adult defendants. Furthermore, the 28th of February was not fixed for the hearing of the case and, therefore, Order IX, rule 4 could not be applied. The suit is a mortgage-suit and it would not be well to allow the suit to be dismissed as against the one minor defendant while restoring it as against the adult defendants. I would, therefore, order that the suit be restored as prayed for by the petitioners as against all the defendants. Hearing fee two gold mohurs.

DAS, J.—I agree.

*Suit restored.*

### LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 41 OF 1920.

July 5, 1920.

Present:—Mr. Justice Scott-Smith.

UDE RAM—DECREE HOLDER—

PETITIONER

*versus*

Lala BENI PERSHAD AND ANOTHER

—JUDGMENT DEBTORS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 5—  
Mortgage decree—Stay of execution—Procedure.*

The execution of a mortgage-decree to be realized first from the mortgaged property and the balance, if any, from the judgment-debtor and his other property, cannot be stayed simply because a claim by a prior mortgagee is pending. The proper course is to sell the hypothecated property and, after retaining out of the sale-proceeds the amount sufficient to meet the said claim, to pay the balance to the decree-holder.

Petition, under section 44 of Act III of 1914, for revision of the order of the District Judge, Ambala, dated the 21st October 1919, affirming that of Senior Subordinate Judge, Ambala, dated the 28th July 1919.

Mr. Badr-ud Din Qureshi, for the Petitioner.

JUDGMENT.—This is an application for revision of the orders of the lower Courts postponing execution of the petitioner's decree against the respondent until the decision of another dispute between the parties relating to certain hypothecated property has taken place. The sum due to the petitioner is, according to the decree, to be in the first instance realised from the hypothecated property and it is only failing such realisation that it can be recovered from the other property of the judgment debtor. The petitioner says that he does not desire to execute the decree at present against any other property, all he wants to do is to proceed against the hypothecated property. It is stated in the second ground of his petition that Rs. 4,500 has to be paid to Talsi Ram and Rs. 6,000 to Banarsi Das before the amount due to him is paid, and he asks that the hypothecated property be sold and sufficient having been retained to satisfy the claims of these two persons, the balance if any may be used for the payment of his own decree. This appears to be reasonable. There are no materials on the record which show me exactly how much is claimed by Talsi Ram and Banarsi Das, but there is nothing to prevent the executing Court from ascertaining this.

I allow the revision so far as to direct the executing Court to proceed with the execution of the petitioner's decree in accordance with law. It should send for Talsi Ram and Banarsi Das and any others who may be interested, and ascertain from them what is the total amount of their claims. It should then proceed to sell the hypothecated property and, retaining sufficient for the payment of those claims, apply the balance to the discharge of the petitioner's decree. If there is nothing over, or an insufficient amount to pay off the petitioner's decree, then the judgment-debtor's other property can be proceeded against. No order as to costs.

*Revision allowed.*

AMAR NATH v. THE FIRM OF HUKAM CHAND-NATHU MAL.

**PRIVY COUNCIL,**

APPEAL FROM THE PUNJAB CHIEF COURT

January 24, 1921.

Present:—Viscount Cave, Lord Sumner,  
Sir John Edge and Sir Lawrence Jenkins.

AMAR NATH AND ANOTHER—

APPELLANTS

versus

THE FIRM OF HUKAM CHAND-NATHU

MAL AND OTHERS—RESPONDENTS.

Hindu Law—Mitakshara—Joint family—Self-acquisitions—Partible and impartible property—Gains of science, when impartible—"Without detriment to father's estate," meaning of—Burden of proof.

In a joint Hindu family the rule is that the acquisitions of the members are joint property and partible. Gains of science made without any detriment to the father's estate are, however, excepted. [p. 381, cols. 1 & 2.]

It was originally sufficient to make such gains partible, that the earner had been maintained out of family funds during his education. This was later on narrowed down, first to the receipt of the education itself at the family expense, and later still education generally was narrowed to specialised education, which is now the basis of the rule. [p. 384, col. 1.]

The burden of proving that the science was acquired without detriment to the family estate is on the acquirer. [p. 383, col. 2.]

It is not necessary to make gains of science partible that they should result directly from the use of joint family funds. Nor does their partibility depend on *causa proxima*, nor is it negatived by the intervention of the personal element of the individual co-parcener's character. [p. 384 col. 1.]

Once it is found that an unseparated member was originally equipped for the calling in which he made his gains by a special training at the expense of the patrimony, his personal earnings and acquisitions remain partible throughout his life. On the other hand, he can sever from the family at will on the footing of bringing his accumulations into hotchpot and without any liability as to future earnings [p. 382, col. 1; p. 381, col. 2.]

In the present case the earnings of an Indian Civil Servant were held to be partible property and as such liable for the family debts. [p. 383, col. 2.]

Appeal from a decree of the Punjab Chief Court, (LeRoussignol and Shah Din, JJ.) dated the 19th May 1916, reported as 4 Ind. Cas. 714, affirming, with a modification, a decree of the District Judge, Ferozepore.

**FACTS.**—The appellants were brothers, the first a Pleader, and the second a member of the Indian Civil Service. The District Judge held them personally liable on certain *hundis*, given by a firm carried on by the joint Hindu family, governed by the Mitakshara Law, to which they belonged. They appealed. The learned Judges who heard

the appeal (LeRoussignol and Shah Din) agreed that they were liable in respect of the *hundis*, not personally but to the extent of their shares in the joint property: but differed on the question whether their separate earnings formed part of the joint property: LeRoussignol, J., holding that there was a presumption that their special education had been at the expense of the joint funds, while Shah Din, J., held that there was no such presumption and even if there were the first appellant had discharged the burden of proof.

In consequence of this difference of opinion the Division Bench submitted the case for determination to a Full Bench under section 10 of the Punjab Courts Act, but the Full Bench held that the submission was not well founded. In the result, the following point was referred to Mr. Justice Rattigan, under section 98 of the Civil Procedure Code, 1908, for his opinion:—

"In a case where a member of a joint Hindu family has received a special training to qualify himself for a profession or for the service of State, is there an initial presumption, in the absence of all evidence on the point, that he received his training at the expense of the joint family property, or should this fact be alleged and proved like any other fact in a case and be found in the negative if no evidence at all were given on either side?"

The opinion of Mr. Justice Rattigan coinciding with that of Mr. Justice LeRoussignol the appeal was, on its again coming before the Division Bench, dismissed by the judgment of the said Division Bench of the 19th May 1916, and a decree passed in the terms following:—

"That the appellants are liable on the *hundis* in suit to the extent of their shares in the joint family property and that the separate property, of the appellant Gokal Chand shall be held to be joint family property liable for the satisfaction of the decree."

"This decree shall be against the defendants' shares in the joint family property, which shall be deemed to include Gokal Chand's separate property."

An application for review having failed, the appellants applied for a certificate for leave to appeal to His Majesty in Council, but the application was rejected by the Chief Court. Special leave to appeal was sub-

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sequently granted to the appellants by Order in Council.

On this appeal the only party to appear was the second appellant, Mr. Gokal Chand.

Messrs. DeGruyther, E. O., and O'Gorman, for second Appellant, submitted that the education which he had received was an ordinary education, having regard to the position in life of Joti Mal's family, and not a special education within the meaning of that term in Hindu Law. Such a general education does not make the gains of the individual member liable: *Metharam Ramrakhiomal v. Rewachand Ramrakhiomal* (1).

There the gains were made in trade and commerce.

The true test is to ascertain how the joint property is used. Gokal Chand's salary was due not to the use of joint family property but to his own industry and skill. It is only where the use of joint property is the proximate cause of acquisitions that such acquisitions are joint. The gain from the science must be directly attributable to the detriment to the family estate. It could not be said that a man got into Government service by the use of joint funds: labour and industry were the material factors, not education. Moreover, Shah Din, J., was right in holding that it was incumbent on the respondent, firm to prove that Gokal Chand's education was at the expense of the joint family fund and that they had failed to do so.

The tendency of the cases had been steadily to narrow the field within which the gains of science were partible. The view first taken was that if a man were maintained at the expense of the joint family while receiving a special education all his earnings were joint. *Ohalakonda Alasani v. Ohalakonda Ratnachalam* (2).

Next, the view taken was that any education at the expense of the joint family made gains partible, then it was narrowed to a special education. It was submitted that the true view was that the use of the joint

property must be the proximate cause of the gains.

The following cases were referred to. *Dhunookdharee Lall v. Gunput Lall* (3), *Bai Manchha v. Narotamdas Kashidas* (4), *Pauliem Valoo Ohetty v. Pauliem Scoryah Ohetty* (5), *Boologam v. Ewernim* (6), *Lakshman Mayaram v. Jannabai* (7), *Krishnaji Mahadev v. Moro Mahadev* (8), *Lachmin Kuar v. Debi Prasad* (9), *Durga Dutt Joshi v. Ganesh Dutt Joshi* (10).

## JUDGMENT.

LORD SUMNER.—This was a suit, brought to recover the principal amount of four hundis, to which five persons were made defendants. The plaintiffs were successful in both Courts below, and their Lordships' Board gave special leave to appeal to two of the defendants, but one only, Mr. Gokal Chand, now appears.

Sundry points connected with the validity of the hundis and their presentation were pleaded by some of the defendants, but not by the appellant. It has been held in the Courts below that, as a matter of practice, he was not entitled to avail himself on appeal of points which had not been raised by him below. Before their Lordships this decision was but faintly contested, and they see no reason to doubt or to review it.

The real issue in the appeal is one of some importance. Joti Mal and his sons, of whom the appellant is one, constituted a joint Hindu family governed by the Mitakshara Law, which carried on a joint ancestral business as money-lenders under the style of Nagar Mal-Joti Mal at Ferozepore, and the hundis in question were given by this firm in the way of its business for debts due to the plaintiffs, who were near relatives. In the conduct of this business the appellant

(3) 10 W. R. 122; 11 B. L. R. 201 note.

(4) 6 B. H. O. R. A. O. J. 1.

(5) 4 I. A. 109; 1 M. 252; 1 Ind. Jur. 323; 3 Suth. P. O. J. 887; 8 Sar. P. O. J. 698; 1 Ind. Dec. (N. s.) 167.

(6) 4 M. 330; 1 Ind. Dec. (N. s.) 1066.

(7) 6 B. 225 at. pp. 242, 243; 6 Ind. Jur. 869; 8 Ind. Dec. (N. s.) 608.

(8) 15 B. 32; 8 Ind. Dec. (N. s.) 22.

(9) 20 A. 435; A. W. N. (1898) 101; 9 Ind. Dec. (N. s.) 638.

(10) 6 Ind. Cas. 400; 32 A. 303; 7 A. L. J. 216.

(1) 44 Ind. Cas. 263; 45 I. A. 41; 22 C. W. N. 377; 4 P. L. W. 197; 34 M. L. J. 827; 7 L. W. 361; 23 M. L. T. 218; 16 A. L. J. 281; 27 O. L. J. 345; 20 Bom. L. R. 536; (1918) M. W. N. 687; 45 C. 666; 12 S. L. R. 116 (P. O.).

(2) 2 M. H. O. R. 56.



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took no part. He was not privy to the debts incurred. In his youth he was for seven years absent from India for the purpose of being specially trained in England for the Indian Civil Service. He succeeded in entering that service and, returning to India, was posted to the Central Provinces. At the commencement of the suit, he was Joint Magistrate at Sitapur and in receipt of the substantial emoluments of that office, but he has never severed himself from the joint family of which he became a member at his birth.

In a joint Hindu family, such as this, the rule is that the acquisitions of the members are joint property and partible, that is to say, liable to be shared with the other members of the family, and impartibility is the exception.

One of the recognised exceptions is property acquired by the possession of special "science" or "learning." Where, as often happens, this is acquired outside the family and has to be paid for, in one form or another, at the expense of the family, it is described by the accepted writers as acquired "to the detriment of the family property." In that case it is regarded as a family investment, and the emoluments, which its possessor is thus enabled to obtain, are joint property of the family as fruits of the investment thus made in the person of one of its more gifted members. Of the exact meaning of "science" in the original text it is not now necessary to speak, nor need anything be said of the cases of science imparted within the family, or of science obtained by the pupil either by his own exertions or from educational benefactions, or in any other way not detrimental to the family funds.

The question, what is "science" in this connection must be intrinsically one of fact, though the area of discussion has been steadily narrowed by typical decisions, conclusive of numerous cases. The whole doctrine is not without anomalies. If the test is the returns obtained from the family investments, how far are these emoluments the result of the science—the specialising in education at the expense of the family funds—and how far are they the rewards of the learner's brains and industry and good fortune? Many a learned man makes nothing and many a sciolist gets on in his

profession by pertinacity and mother wit. Again, if the specialist education is deemed to be the stock from which success—and income—accrue, this is true of success and income to the end of the learner's life, yet it is unquestioned that the individual can sever from the family at will on the footing of bringing his accumulations into hotchpot as part of the family property and without capitalising future earnings or being under future liability as to what he may make thereafter.

The distinction between acquisitions made by a co-parcener solely by his own exertions and those which have involved the use of the patrimony is as old as the laws of Manu. The text of the Mitakshara gives as an instance of impartible acquisition that which has been gained by "science" or learning. Difficulties in applying this simple distinction are supposed to begin when Vijnaneswara makes the comment on this illustration, that "without detriment to the father's estate" must be implied throughout the passage, so that the gains of this kind, which are impartible, are not gains of science as such, but gains of science made without any detriment to the father's estate and acquired by the co-parcener's exertions independently of patrimonial help. Succeeding commentators developed this point, not always in terms that can be completely reconciled, but the rule itself is simple and logical; though difficulties arise, as with so many rules, in the application. If the substance of the distinction is between acquisitions which have and acquisitions which have not involved the use of the patrimony and, therefore, such detriment to it as use of it or expenditure out of it involves, there is no logical reason for making any further distinction between gains made by science and gains made by labouring on the patrimony or by laying out the family funds and reaping the fruits of the outlay, nor for distinguishing cases where the learning employed is a specialised, and cases where it is a mere ordinary, education. The connection between the outlay and its fruits may be more difficult to trace; for a distinction can be made between the use of family funds in acquiring gain and the use of family funds to qualify a member of the family to acquire gain by his own efforts. I may

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be said to be direct in the one case and remote in the other, but if risk of or detriment to family property is the point in both cases, there appears to be no such merit in "science," recognised by the sages of the Hindu Law, as would warrant the exclusion of gains of sciences as such from the category of partible acquisitions.

Whatever doubt might once have existed, when the Hindu Law was to be gathered from text-writers only, has been removed by a series of decisions, and it is now clear that personal earnings and acquisitions may remain partible throughout the unseparated member's life, if he was originally equipped for the calling or career in which the gains were made, by a special training at the expense of the patrimony. It has been so held in the case of a Prime Minister [*Luzimon Row Sadasew v. Mullir Row Bace* (11)], a dancing girl [*Chalakonda Alisani v. Chalakonda Retnachalam* (2)], and a Pleader, [*Durvasula Gangadharudu v. Durvasula Narasammah* (12)] and *Bai Manchha v. Narolamdas Kashidas* (1), but *secus* of an astrologer [*Durga Dutt Joshi v. Ganesh Dutt Joshi* (10)]. The like distinction is found in the case of a Karkun [*Krishnaji Mahadev v. Moru Mahadev* (8)] and an army contractor [*Lachmin Kuar v. Debi Prasad* (9)]. The grounds on which, in the three last-mentioned cases, however, the gains were held to be impartible serve to define the rule still further. In none of them was it held that the occupation in itself was such that the gains of science could not be said to apply to it. Impartibility rested in every case on the slightness or the peculiar character of the education by which the science was acquired. Thus in the first mentioned case the gains were really due to the astrologer's native talent for that profession. In his early youth its rudiments had been instilled into him by his father, an astrologer likewise, but without expense to the family or anybody else, for the casting of horoscopes seems to be a profession in which the equipment is slender and a gift for inspiring confidence is the main thing. It was not, however, suggested that, if the special training had

been similar to the skill in song and dance, which enhanced the attractions of a nautch girl, the gains of the astrologer would not equally have been partible gains. As a profession, astrology enjoyed no immunity. Still more striking is *Lakshman Mayaram's case* (7) where the family member was actually a Subordinate Judge. At the family expense he had received a slight elementary education of an entirely non professional character. His law he had picked up for himself. His salary was held impartible, not because a Judge stands outside the rule or because a knowledge of law in the nineteenth century is not within the term "learning" as used in the eleventh, but because in these matters a self-taught man has the best of it, for gains are impartible which are not the result, directly or indirectly, of anything but his own exertions.

The present case is the first in which such an official position as that of the appellant has come into question, but, except for its higher respectability, there does not seem to be any ground on which as an occupation it can be taken out of the rule which the earlier cases establish. Mr. J. D. Mayne's well-known work on Hindu Law has, throughout all its editions, contained the statement in section 283 that a post in the Covenanted Civil Service of India is a post to which the rule would apply, and this never seems to have attracted comment, still less to have aroused dissent, among the many judgments which have dealt with this subject. In the case in *Metharam Ramrakhiomal v. Rewachand Ramrakhiomal* (1) the judgment under appeal actually acquiesced in his view, if it did not adopt it, and this passage is recited in the judgment of their Lordships' Board, without dissent or comment. It is true that an Indian Civil Servant is not always what is commonly called a scientific man, but his is certainly a special and, in many cases, an eminently learned profession.

As no distinction in principle can be found between Mr. Gokal Chand's official position and the decided cases, it remains only to consider two questions raised on his behalf. The first, whether in his

(11) (1831) 2 Knapp 60; 12 E. R. 401.

(12) 7 M. H. C. R. 47 at p. 50.

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particular case there is either proof or presumption of the requisite detriment to the patrimony; the second, whether, if so, that detriment is not so remote that the appellant's official salary should be regarded as being wholly acquired by his own personality, integrity and learning and, therefore, as being impartible.

The appellant was not called at the trial nor was any evidence given as to his education and early life, but there is no question here of an ordinary education, which must be the stepping-stone to the acquisition of any learning, such as might be given in a Mission [*Lakshman Mayaram v. Jamnabai* (7)] or a Government School (*Metharam Ramrakhiomal v. Rewachand Ramrakhiomal* (1) (*supra*) still less of a mere provision of "food and apparel." Neither has any question been raised of an equitable distribution of the acquisitions between the separate and the family estates. Admittedly, Mr. Gokal Chand spent seven years in England acquiring that comprehensive and costly education which qualified him to pass with success into this service. The family to which he belongs is a family of hereditary money-lenders, and the ordinary education, which all its male members would naturally and appropriately enjoy, may be taken to be one of considerable extent and to include varied attainments; but there can be no doubt that, alike in the subjects of study, the proficiency to be attained, and the mentality which is formed as the result of it, Mr. Gokal Chand's education must have been very different from that of other members of his family. Mr. Gokal Chand's education was, above all, a specialised education.

Among the unseparated members of a joint Hindu family, possessed of ancestral property by means of which the science, whose gains are in question might itself have been acquired [*Bai Manchha v. Nirodamdas Kashidas* (4)], the presumption, even in the case of such special gains, is that the acquisitions of all members are partible, until the contrary is proved. This was first decided in *Luximon Row Nadasew v. Mullar Row Bajee* (11). Observations have since been made on the slender evidence which connected Luximon's position as Prime Minister to the Peishwa with the

joint family property, either through his education or otherwise, but the rule there laid down as to the presumption, though for a time not always acquiesced in, is now unquestionable and binds their Lordships. It is true that a distinction may be drawn between a presumption in favour of partibility, which is a legal attribute of the gains in question, and a presumption in favour of detriment to the patrimony involved in acquiring the specialised learning, the use of which has produced the gain, which is a question of fact; but, in their Lordships' opinion, if it is in general incumbent upon the joint family member to prove that his case is an exception to the prevailing rule of partibility, it is also incumbent upon him to prove the particular facts which are needed to establish the exception. For this there is the authority of the decision in *Durvasula Gangadharulu v. Durvasula Narasimmaiah* (12) and in *Dhunookdharee Lall v. Gunput Lall* (3). It must accordingly be taken that the whole burden of proof was on Mr. Gokal Chand. If he desired to give evidence to show that his specialised education in England was obtained by the "presents of a friend," the charitable benefactions or the educational foundations of strangers, or by his own self-taught efforts, this should have been done by him at the trial. If, as their Lordships hold, his official position cannot be taken out of the area of partibility, it must now be presumed, in the absence of evidence to the contrary, that his gains, not being in their nature incapable of being family acquisitions, are partible.

Then, can it be said that the gains, which are partible, are such as result only directly from the use of joint family funds, and that emoluments, which are the consideration for the personal services of an official selected for his special personal qualifications, result remotely only and too remotely from any family outlay? Not only is no authority forthcoming for the first part of this contention, but the contrary has been continuously assumed in all the cases which turn on "gains of science." The point of all of them is, that persons qualified for earning money by specialised education, - enjoyed to the detriment of family funds, become, as it were, a con-



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tinuing investment for the family benefit. No decision attempts to distinguish between the personal and the family elements in the ultimate gains; it would probably be impracticable to do so. There is equally little ground for contending that partibility depends on *causa proxima*, or is negatived by the intervention of the personal element of the individual co-parcener's character. It is true that in the very learned judgment of Mr. Collett in *Ohalakonda's case* (2) he expresses the view, that logically the rule should have regard to the use of family property in acquiring the partible gains themselves "during and for the purposes of the acquisition," and not to its use in acquiring the science by means of which they are gained, and he cites Sir T. Strange's opinion that, in order to make the gains in question partible, the common fund must have been directly instrumental in procuring them. There is also an allusion in *Lakshman Mayaram v. Jamnabai* (7) to "the branch of science 'which is the immediate source of the gain,'" a passage, however, intended to distinguish between elementary and specialised education, and not between the direct and indirect fruits of the latter. This view was, however, overruled on appeal in *Ohalakonda's case* (2) and has never been re-established. For fifty years and more, the current of authority has run the other way, and, in any case, in their Lordships' opinion, it is now too late to change it.

It is true that, partly in the hands of the commentators and partly under the decision of the Courts, changes may be traced in the rules laid down with regard to gains of science, and these changes have been in the direction of narrowing the category of partible gains. From maintenance out of family funds during the period of education, the basis of partibility changed to the receipt of the education itself at the family expense, and then education generally was narrowed to specialised education, which is now the basis. No corresponding change, however, is to be traced upon the question, what is science? in the sense in which the text of the *Mitakshara* uses the term. On the contrary, while the principle has remained the same, the application of it has tended to widen, as changing times have brought

up fresh instances of callings, to which special science and not the native wit of man is the means of entrance. It may be difficult to see now why the anomaly should have arisen, by which the gains of a man's own labour or of his own bargains are impartible, because they are the fruits of his own effort, while the gains of his science are partible, though they are the fruits of his effort too. In each case the member of the joint family is indebted to the family funds for something; in the former for the nurture, which has made him strong to labour, in the latter for the professional education in addition, which has made him also skilled in art. Conversely, the dail co-parcener, who learns but turns his learning to poor account, must share his gains such as they are, while his brother, who learns without teaching and acquires professional skill by intuition only, keeps his greater gains for himself. All that can be said is that the rule, if really anomalous, is too old and well-settled to be altered now.

Their Lordships are also fully alive to the incongruity, more striking perhaps to Western than to Indian minds, of applying to such an occupation as Mr. Gokal Chand's an ancient rule, which had its origin in a state of society possibly simpler than and certainly different from the state of society existing in the present day, but this anomaly proceeds largely from the accidental habit of relying on mere analogy in the application of legal rules instead of deducing the application from a logical apprehension of the principle as the best Eastern thinkers do. Be this as it may, they conceive it to be of the highest importance that no variations or uncertainties should be introduced into the established and widely recognised laws, which govern an ancient Eastern civilisation, and least of all in matters affecting family rights and duties connected with ancestral customs and religious convictions.

The appellant's liability is, of course, a liability in respect of his share in the family property, including therein such of his own earnings as are partible under the rules above explained. Questions that may arise in regard to property, not the gains of science or partible on any ground, and also in regard to the statutory rules, which restrict the alienability of an official's emoluments, may

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properly be the subject of decision in execution proceedings if they arise. Their Lordships are of opinion that the appeal fails and should be dismissed, and they will humbly tender this advice to His Majesty.

*Appeal dismissed.*

Solicitors for the Appellant.—Mr. T. L. Wilson & Co.: *Ex parte.*

### PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 40  
OF 1918.

January 26, 1921.

Present :—Mr. Justice Das and Mr.  
Justice Ross.

RAM NARAIN SAHU AND ANOTHER—  
PLAINTIFFS—APPELLANTS

*versus*

LACHMI PRASAD SAHU—DEFENDANT—  
RESPONDENT.

*Hundi, suit on—Hundi not properly stamped—  
Plaintiff, whether can succeed on proof of original con-  
sideration.*

When a cause of action for money is once complete in itself, whether for goods sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note under such circumstances as to make the debtor liable upon it to some third person. [p. 386, col. 1.]

Appeal from a decision of the Subordinate Judge, Shahabad.

Messrs. Susil Madhab Mullick and Narendra Nath Sen, for the Appellants.

Mr. M. N. Huda, for Messrs. Fakhruddin and Sen Saran Lal, for the Respondent.

### JUDGMENT.

ROSS, J.—The plaintiffs are the appellants. They brought a suit against the defendant for money said to have been borrowed by the defendant's father under *sarkhats*. Subsequently, in 1971 Sambat, a *hundi* for Rs. 4,400 was executed by the defendant's father but was not paid after the due date of payment had expired. They, therefore, sued claiming Rs. 5,016-11-6 and the

defence was that the *hundi* was not genuine and that no money was borrowed.

The learned Subordinate Judge, although holding on the merits of the case that the debt had been incurred, dismissed the suit because of the defects in the *hundi* itself. One of the plaintiffs supported the claim by his own evidence saying that the debt originally incurred was, sums of Rs. 1,550 and Rs. 1,500, which were borrowed under two *sarkhats*, Exhibits 1 and 2. These were renewed by Exhibits 3 and 4 and finally the *hundi* in suit acknowledged the total liability which had then amounted to Rs. 4,400.

On behalf of the respondent the evidence of witnesses Nos. 3 and 4 was attacked on the ground that these witnesses were dependant upon the plaintiffs and were chance witnesses and gave no reasonable explanation of their presence at the transaction to which they deposed. The evidence of these two witnesses does not appear to be of any particular value; but, on the other hand, nothing has been said against witness No. 5 who deposed that he saw the defendant's father write the *hundi* with his own hand. The plaintiffs' account-books referred to this *hundi* transaction and the defendant has given no real rebutting evidence. His own account-books have not been produced, nor has any writing of the defendant's father been shown to throw any doubt upon the genuineness of the *hundi*. It must, therefore, be held on the evidence, in agreement with the learned Subordinate Judge, that the debt was incurred and that the money claimed in suit is due.

The question then is, whether there is any good reason why the plaintiffs should not get a decree. The reason which has been given by the Subordinate Judge is that the *hundi* has not been stamped according to law. It is written on two stamp-papers each bearing a stamp of Rs. 2-4-0 instead of on a single stamp paper of Rs. 4-8-0 and the defect is that the document is embodied on one of these papers only while the other, which is pasted on it, has no writing on its face but only an acceptance on the back. I am not prepared to differ from the view of the Subordinate Judge that an instrument executed in this way does not comply with the provisions of section 13 of the Stamp Act. The docu-

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ment may, therefore, not be available as a *hundi*, but I see no reason why it should not be used as an acknowledgment of the existing debt.

It is objected that the suit is not framed in this way but is framed as a suit on the *hundi*, and if the *hundi* itself is defective the claim must fail. But the plaint does refer to the monetary transactions under the *sar-khats* and, fairly construed, it seems to me to be a claim for money evidenced by the *hundi*; whether the *hundi* can be referred to by the Court as a negotiable instrument or merely as an acknowledgment of an existing debt does not appear to be a matter of much material importance.

The principle of the case of *Sheikh Akbar v. Sheikh Khan* (1) is clearly applicable to the facts of the present case. Garth, C. J., there said: "When a cause of action for money is once complete in itself, whether for goods sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person." There is nothing in the present case to bring the facts within the exception here laid down and, in my opinion, the plaintiffs are entitled to succeed on the original consideration. The liability for which was acknowledged in the document described as a *hundi*. The result is that the appeal must be decreed with costs and the suit decreed with costs.

DAS, J. —I agree.

*Appeal accepted.*

(1) 7 C. 256; 8 C. L. R. 528; 3 Ind. Dec. (N. S.) 713.

# CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1456 OF 1918.

June 25, 1920.

Present:—Mr. Justice Tennon and  
Mr. Justice Newbould.

MOHARAJ BAHADUR SINGH—  
PLAINTIFF—APPELLANT

versus

PULIN MAL—DEFENDANT—  
RESPONDENT.

*Adverse possession—Waste land—Deposit of earth followed by other acts, whether amounts to dispossession—Suit for possession—Limitation.*

In excavating a tank A. deposited the earth on a strip of waste land belonging to B., he also removed some trees standing thereon and planted others of more value. In a suit by B. brought more than 12 years afterwards to recover possession it was found that the earth was deposited by A. with the intention of taking possession of the strip of waste land:

*Held*, that A's acts amounted to a dispossession of B., and B's suit, having been brought more than 12 years afterwards, was barred by limitation. [p. 387, col. 1.]

Appeal against the decree of the District Judge, Murshidabad, dated the 20th April 1918, affirming that of the Munsif, first Court, at Jangipur, dated the 19th of March 1917.

FACTS appear from the judgment.

Dr. Sarat Chandra Basak (with him Babu Urukram Das Chackerbutty), for the Appellant:—The disputed land admittedly belonged to the appellant. It abutted on a tank belonging to the respondent. The finding is that, more than twelve years before suit, earth was deposited on the land of the appellant during the re-excavation of the defendant's tank. The land in suit is a piece of waste land. My submission is that mere deposit of earth by the defendant upon the waste land of my client does not necessarily amount to dispossession. Such a deposit of earth is only an act of trespass but cannot amount to dispossession. This finding of dispossession is, therefore, wholly insufficient and cannot justify the conclusion that my client's suit was barred by limitation.

Babu Brojolah Chakravarty (with him Babu Bodhisatya Sen), was not called upon to reply.

JUDGMENT.—This appeal arises out of a suit brought for recovery of possession on establishment of title to a piece of land measuring 1 *bigha* in area. It appears that



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This 1 *bigha* was formerly a strip of land abutting on a tank belonging to the defendant on its north and east banks. It has been found by the Court of first appeal that this strip of land is within the plaintiff's *Mauza*, but it has next come to the conclusion that the plaintiff's suit was barred by limitation, and has, therefore, dismissed the suit. In this appeal it is contended before us by the learned Vakil for the appellant that the finding arrived at by the learned District Judge is insufficient and he bases his contention on the fact that, when in possession of the plaintiff, this land was lying waste. In the plaint the allegation of the plaintiff was in substance that the defendant by re excavating the tank and by depositing upon the land in suit the earth removed from the tank had dispossessed him. The question then, in substance, was when did this re excavation and this deposit take place. Plaintiff's witnesses tried to prove that the re excavation and deposit had occurred nine or ten years before suit, but, some of the plaintiff's own witnesses contradicted this allegation, and both the Courts below have found that the re excavation and deposit of earth upon the plaintiff's land occurred some fifteen years before suit. It is suggested before us that mere deposit of earth upon a person's land does not necessarily amount to dispossession, it may be a mere act of trespass, but the finding is that the earth was deposited with the intention of taking possession of this strip of land, and the throwing of earth upon the land was followed by the removal of *tal* trees and the planting of valuable trees on the same. We think, having regard to the case on which the parties went to trial, the finding arrived at is sufficient. We, therefore, dismiss this appeal with costs.

*Appeal dismissed.*

# PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 411  
OF 1919.

January 10, 1921.

Present:—Mr. Justice Adami and  
Mr. Justice Bucknill.

RAM CHOWDHRY AND OTHERS—  
APPELLANTS

*versus*

TILAK CHOWDHRY AND OTHERS—  
PLAINTIFFS, AND JAI RAM JHA—DEFENDANT  
—RESPONDENTS.

*Hindu Law—Joint family—Mortgage—Necessity,  
proof of—Mortgagee in possession for 25 years without  
objection, effect of—Acquiescence.*

In a suit on a mortgage it was proved that the mortgage had been executed by the ancestors of the defendants to pay off a previous bond and that the mortgagee had been in possession of the mortgaged land for twenty-five years without objection by the defendants:

*Held*, that the conduct of the defendants amounted to acquiescence and that no further proof of necessity was, under the circumstances, required.  
[p. 383, col. .]

Appeal from a decision of the District Judge, Darbhanga.

Mr. *Mohomed Hassan Jan*, for the Appellant.  
Mr. *Murari Prasad*, for the Respondents.

## JUDGMENT.

ADAMI, J.—This second appeal arises out of a suit to enforce a mortgage executed by the ancestors of the defendants in favour of the ancestor of the plaintiffs. The bond was executed in the year 1858 and its object was to enable the defendants-mortgagors, to pay off a debt under a previous bond and an amount due by them under a decree. The bond was a usufructuary bond and the predecessors of the plaintiffs were in possession as usufructuary mortgagees for 25 years. At the end of that time there was a Collectorate partition of the *Mauza* and it happened that the lands covered by the plaintiffs' mortgage-bond fell within the *patti* of co-sharers who were not members of the mortgagors' family. These co-sharers dispossessed the plaintiffs in 1913 of the greater portion of the land. The plaintiffs then sued the defendants to enforce their mortgage.

The Trial Court found that the assertion by the defendants that the mortgage transaction was not a genuine transaction was false, and the lower Appellate Court

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has come to the same conclusion. But while the Munsif held that the plaintiffs had failed to prove binding necessity for the loan, the learned District Judge has differed from him and has found that owing to lapse of time and the present plaintiffs not being the original mortgagees and also by reason of the acquiescence of the defendants in their possession, the plaintiffs had, so far as was possible, satisfied the Court that a family necessity did exist and that it was not necessary for them to prove it further. He decreed the plaintiffs' suit.

Before us a preliminary objection has been taken by Mr. Hasan Jan that, during the pendency of the appeal before the District Judge and before the judgment was written, one of the appellants and one of the respondents died, and that no steps were taken by the present appellants for the substitution of parties. He argues that the decree of the District Judge on appeal is, therefore, a nullity. It appears, however, that both the plaintiff who has died and the defendant who has died were minors and their fathers were on the record as their guardians. There is nothing to show us that the deceased minors had any legal representatives other than their fathers who are already on the record. All that was necessary in this suit was that all the members of the plaintiff's family and all the members of the defendant's family should be on the record as parties, this being a mortgage-suit. The appellant has failed to show in his affidavit that there are any members of the families living who are not now on the record. I do not think that this preliminary objection can be sustained.

Coming to the case, Mr. Hasan Jan points out that the District Judge has mainly, if not altogether, relied on a quotation he has made from the case of *Hunoomanpersaud Panday v. Musammatt Babooee Munraj Koonweree* (1). He contends that that quotation is not applicable in this case in that this is a suit to enforce a mortgage, whereas in *Hunoomanpersaud's* case (1) the passage which is cited dealt

with the question whether a third party was bound to prove the legal necessity of the loan made by a Hindu father; and he argues that the learned District Judge has placed the onus as to necessity wrongly in this case. He has cited many cases before us to show that in this case the onus is heavily upon the person alleging that the debt is owing. This case, however, in my opinion, differs in many respects from the cases in which the decisions cited by Mr. Hasan Jan were given. Here the mortgagees came in possession and were left in possession not only by the original mortgagors but also by the mortgagors' heirs for a period of 25 years and were only dispossessed after the Collectorate partition by persons other than the mortgagors' family. By their conduct it appears to me that the mortgagors' heirs acquiesced in the possession of the plaintiffs and also tacitly agreed that there had been necessity for the mortgage loan. It is argued that the mortgagees were bound in this case to produce all evidence which was available to prove necessity and that it was possible for them to have produced the previous mortgage-bond and also the decrees to meet which a part of the money was taken. There is nothing, however, to show us that this evidence was available to the plaintiffs and, in fact, it is quite probable that when the bond was satisfied the document was returned to the mortgagors' family.

In all the circumstances of the case, it seems to me to have been an almost impossible task for the present plaintiffs to have proved that legal necessity actually existed 39 years before their evidence was given. In my opinion, the appeal was rightly decided by the District Judge and I would dismiss the appeal with costs.

BUCKNILL, J.—I agree.

*Appeal dismissed.*

(1) 6 M. L. A. 393 at p. 418; 18 W. R. 81n.; *Sevestro* 253n.; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

JALADHAR BHOWMIK v. BIRENDRA NATH ROY,

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES Nos 546,  
558, to 562 of 1919.

July 20, 1920.

Present:—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice Sir  
Ernest Fletcher, Kt.

JALADHAR BHOWMIK AND OTHERS—  
DEFENDANTS—APPELLANTS

*versus*

BIRENDRA NATH ROY CHOWDHURY  
AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Res judicata—Record of Rights, whether nullifies  
effect of previous decision as res judicata.*

Where a previous decision operates as *res judicata* the subsequent publication of a Record of Rights cannot nullify the effect of that decision, nor has such publication the effect of sweeping aside all previous decisions between the parties. [p. 389, col. 2; p. 390, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Pabna and Bogra, dated the 9th of December 1911, affirming that of the Officiating Munsif, First Court, at Pabna, dated the 5th of April 1918.

FACTS appear from the judgment.

Babu Surendra Chandra Sen (with him Babu Dwijendra Nath Mookerjee), for the Appellants:—The defendants deny that the plaintiffs have an eight-annas share in the superior interest and admit that their interest is to the extent of seven-annas and odd. The rent payable by the defendants is thus less than that claimed by the plaintiffs. The Courts below are wrong in holding that these questions are *res judicata* by reason of the fact that they were decided in favour of the plaintiffs in a previous suit for rent between the parties. The decision in the rent-suit can have no such effect as in that suit the Court was dealing only with the liability of the defendants to pay rent to the plaintiffs for the period in suit. Moreover, before judgment was finally pronounced by the High Court on appeal in that suit for rent, there was a final publication of the Record of Rights containing entries which support our case. Under such circumstances, the decision of the High Court cannot operate as *res judicata*.

No one appeared for the Respondents.

JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal by the defendants in a suit for arrears of rent. The plaintiffs are *putnidars*, and allege that

they hold an 8-annas odd share in the *putni*. On this basis, they claim from the defendants Rs. 22-10-5 *gandas* as rent annually payable for the holding in their possession. The defendants contend that the share of the plaintiffs in the *putni* is not 8-annas odd, as alleged by them, but only 7-annas odd and that the rent payable by them to the plaintiffs in respect of this 7-annas odd share is Rs. 13-2-6 *gandas*. Two questions are thus in controversy between the parties, namely, *first*, the extent of the share in the superior interest held by the plaintiffs, and, *secondly*, the amount of rent annually payable by the defendants to the plaintiffs. The Courts below have held that these questions are *res judicata* by reason of the decision in a previous litigation between the parties.

It appears that in the previous suit for rent these very questions were raised, not in a limited form as touching the rights and liabilities of the parties during the particular years for which rent was then claimed, but in a general form as affecting the relationship between the parties as landlords and tenants. On the 25th February 1911, the Court of first instance gave a decision thereon in favour of the defendants. On appeal, that decision was reversed by the District Judge on the 13th September 1911 and a decree was made in favour of the plaintiffs. A second appeal was preferred to this Court with the result that the decision of the District Judge was confirmed on the 22nd July 1915. *Prima facie*, the previous decision operates as *res judicata*, in the present suit which was instituted on the 20th April 1917.

The defendants contend, however, that as, on the 29th May 1914, that is, during the pendency of the second appeal in the previous litigation, a Record of Rights was finally published containing entries which support their allegations, the decree of this Court is of no effect. The Courts below have overruled this contention and have held that the Record of Rights cannot nullify the effect of the previous decision as *res judicata*. We are of opinion that the contention of the defendants is untenable. Our attention has not been drawn to any authority, nor has reference been made to any principle which lends support to the view that the effect of the publication of the Record of Rights is to



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sweep away all previous decisions between the parties. Such a consequence would not have followed, even if the entry in the Record of Rights had the effect of a decision in a suit between the parties [*Balkishan v. Kishan Lal* (1)]. We hold accordingly that the view taken by the Subordinate Judge is correct, that the decree must consequently be confirmed and this appeal dismissed.

It is conceded that this judgment will govern the other appeals which are accordingly dismissed.

FLETCHER, J.—I agree.

*Appeal dismissed.*

(1) 11 A. 149; A. W. N. (1889) 42; 13 Ind. Jur. 309; 6 Ind. Dec. (N. S.) 523.

### PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 507  
OF 1919.

January 26, 1921.

Present:—Mr. Justice Das and Mr. Justice  
Rosa.

RAMESWAR PRASAD SINGH—PLAINTIFF  
—APPELLANT

*versus*

RAMJANAK SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

*Bengal Land Registration Act (VII B C. of 1876),  
s. 78, applicability of—Suit for arrears of rent by  
assignee of rent, whether maintainable.*

Section 78 of the Bengal Land Registration Act is no bar to a suit for recovery of arrears of rent by an unregistered assignee of the rent from the landlord. [p. 390, col. 2; p. 391, col. 1.]

Appeal from a decision of the District Judge, Mezzaffarpore.

Mr. Abani Bhushan Mukherjee for Messrs.  
S. A. A. Asghar and H. P. Sinha, for the  
Appellant.

Mr. Harnarain Prasad for Mr. Nirsu Narain  
Sinha, for the Respondent.

### JUDGMENT.

DAS, J.—This was a suit by the appellant for *thika* rent for the years 1322 to 1324. The facts are all stated in the judgment of the lower Appellate Court and need not be recapitulated here. The learned Judge in the Court below came to the conclusion that section 60 of the Bengal Tenancy Act was a bar to the suit. In my judgment, the view expressed by the learned Judge in the Court below is erroneous.

Section 60 of the Bengal Tenancy Act runs as follows: "Where rent is due to the proprietor, manager or mortgagee of an estate, the receipt of the person registered under the Land Registration Act, 1876, as proprietor, manager or mortgagee of that estate, or of his agent authorized in that behalf, shall be sufficient discharge for the rent; and the person liable for the rent shall not be entitled to plead in defence to a claim by the person so registered that the rent is due to any third person. But nothing in this section shall affect any remedy which any such third person may have against the registered proprietor, manager or mortgagee." In this case the defendants do not plead a receipt of the person registered under the Land Registration Act of 1876 or of his agent authorised in that behalf as a discharge for the rent. In my view, therefore, section 60 of the Bengal Tenancy Act has no application.

The learned Vakil appearing on behalf of the respondents has relied on section 78 of the Land Registration Act. His argument is that he is not bound to pay rent to the plaintiff who is not registered under the Land Registration Act. Section 78 of the Land Registration Act provides as follows: "No person shall be bound to pay rent to any person claiming such rent as proprietor or manager of an estate or revenue free property in respect of which he is required by this Act to cause his name to be registered or as mortgagee unless the name of such claimant shall have been registered under this Act." The short answer to the argument is, that the plaintiff does not claim the rent either as proprietor or as manager or as mortgagee. He is claiming the rent as an assignee

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from the registered proprietor. I quite agree that if the plaintiff had claimed the rent as proprietor, then the defendants would have been entitled to withhold rent from him on the ground that, not being a registered proprietor, he is not entitled to sue them for rent, but that is not the position here. The plaintiff is suing for rent, not as proprietor, but as assignee of the rent from the proprietor. If the argument of the learned Vakil be sound then there cannot be a valid assignment of rent. In my view, the judgment of the learned Judge in the Court below cannot be supported and must be set aside.

The next point is, is there a finding of fact by the learned Judge in the Court below on the question whether the defendant No. 1 has paid Rs. 180 to the plaintiff? The learned Judge says that the plaintiff clearly states that 'defendant No. 1 paid me Rs. 180'. The learned Vakil appearing on behalf of the appellant states that that Rs. 180 was paid towards the arrears of rent and not towards the rent for the year 1322.

In my view, it is impossible on the judgment of the lower Appellate Court to come to any satisfactory conclusion on this matter. I would set aside the judgment and decree of the lower Appellate Court and remand the case to that Court for decision according to law. The appellant is entitled to the costs of this appeal. The costs incurred in the Courts below will abide the result and will be disposed of by the lower Appellate Court.

Ross, J.—I agree.

*Decree set aside.*

**CALCUTTA HIGH COURT.**  
**APPEAL FROM APPELLATE DECREE N. 2517**  
**OF 1917.**

May 10, 1920.

*Present:*—Mr. Justice Tennon and  
Justice Sir Anantosh Chaudhuri, Kt.  
**KUMAR ARUN CHANDRA SINHA**  
**BAHADUR—PLAINTIFF—APPELLANT**

**JOGENDRA LAL ROY AND ANOTHER—**  
**DEFENDANTS—RESPONDENTS.**

*Bengal Tenancy Act (VIII of 1895), ss. 104 to 104J, 192—Land formed by accretion—New estate constituted and rent fixed by Revenue Authorities—Tenant, whether bound to pay rate of rent so fixed.*

Where a new estate is constituted by the Revenue Authorities of lands formed by accretion, and a new tenure rent is recorded in the Record of Rights as actually fixed and settled under the provisions of the Bengal Tenancy Act, and no proceedings are taken to obtain a reversal or modification of the decision of the Revenue Authorities, the tenants are bound, under section 92, read with sections 104 to 104J of that Act, to pay the rent so fixed. [p. 392, col. 2.]

Appeal against the decree of the District Judge, Faridpur, dated the 11th of August 1917, affirming that of the Subordinate Judge, First Court of that District, dated the 31st January 1916.

FACTS appear from the judgment.

Babu Jogesh Chandra Roy (with him Babu Gira Prosanna Roy Chowdhury), for the Appellant—The plaintiff is entitled to the rent fixed by the Revenue Authorities as they had full jurisdiction to fix a fair and equitable rent under section 192 of the Bengal Tenancy Act. See *Khirona Kanta Roy v. Akhoy Kumar* (1). The case in *Muktakeshi Dasi v. Srinath Das* (2) relied on by both the Courts below is clearly distinguishable from the facts of the present case. In that case there is nothing to show that proceedings were taken and rent fixed or settled by the Revenue Authorities under the Bengal Tenancy Act. With regard to the Dears lands, the Record of Rights as finally published shows that, as a matter of fact, rent was actually fixed or settled under the provisions of section 192, read with sections 104 to 104J, of the Bengal Tenancy Act. No steps have been taken by the defendants to have the decision of the Revenue Authorities modified or set aside. The defendants are, therefore, bound to pay the rent

(1) 33 Ind. Cas. 423.

(2) 26 Ind. Cas. 215; 19 C. L. J. 614.

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fixed by the Revenue Authorities at least in respect of the Deara lands.

Babu *Bansori Lal Sarkar*, for the Respondent.—The Record of Rights was not prepared under the Bengal Tenancy Act. The Revenue Authorities proceeded under the provisions of Act IX of 1847 and the Bengal Alluvial Land Settlement Act (XXXI of 1858). There is nothing to show that the proceedings were taken under section 192 of the Bengal Tenancy Act. Under the circumstances, the Courts below were perfectly justified in applying the decision in *Muktakeshi Dasi v. Srinath Das* (2) to the present case.

Babu *Jogesh Chandra Roy* replied in brief.

JUDGMENT.—This appeal arises out of a suit for rent. It appears that under the original Zemindari of the plaintiff the defendants or their predecessor-in-interest held a tenure of which the *jama* was originally 1,002 rupees, and at the time of the recent Cadastral Survey and Record of Rights in respect of the District of Faridpur it was found that accretion had taken place to the Zemindari which bore No. 3756. The newly accreted lands were separated from the parent estate and formed into what is spoken of as the Deara Mahal bearing Tonzi Mahal No. 6633. Proceeding under the provisions of Act IX of 1847 and Act XXXI of 1858 and the Bengal Tenancy Act, the Settlement Authorities similarly split up the defendant's tenure into two. In so far as it was comprised within the Deara Mahal No. 6633, the Settlement Authorities assessed upon it as payable by the tenure-holders a rent of Rs. 287.6.3 pies while for the remaining portion comprised within the original estate a rental of Rs. 130 8 annas was fixed or recorded by the Settlement Authorities.

It has been found by the Commissioner for local investigation, whose report has been accepted by the Courts below, that in the defendant's tenure 459 *bighas* 11 *cottas* 13 *chhattaks* were in existence at the time when the suit was brought, and it was further found that out of this 459 *bighas* odd, 405 *bighas* 5 *cottas* and 11 *chhattaks* appertained to the Deara estate No. 6633 and the remaining 54 *bighas* 6 *cottas* 2 *chhattaks* appertained to the original tenure and to the original estate. In a suit brought in the

year 1897 it was arranged on compromise between the parties that the tenure-holders should pay rent to the Zemindar both on the original land and also on additional lands formed of accretion at the rate of 9 annas 7 pies per *bigha*. It was held by the Courts below, on the principle laid down in the case of *Muktakeshi Dasi v. Srinath Das* (2), that notwithstanding what had been done by the Settlement Authorities the plaintiff landlord was not entitled to claim from the tenure-holders anything more than this rate of rent, namely, 9 annas 7 pies per *bigha* on the land found to be in existence on the date of suit.

The plaintiff has appealed to this Court and his contention before us is that, in so far as the accreted lands are concerned, the parties are bound by what has been done by the Settlement Authorities. It is conceded that, in so far as the land included within the original estate is concerned, the plaintiff-appellant is bound by the compromise and arrangement with the defendant, and in so far as that portion of the tenure is concerned, all that the plaintiff can claim is rent for the existing land at that rate. To his contention with regard to the Deara land we are of opinion that there is no answer. It is quite true that, at first sight, the case of *Muktakeshi Dasi v. Srinath Das* (2) might appear to be an authority for the decision arrived at by the lower Courts. But between that case and the present case there is an important distinction which appears to have been overlooked by both the Courts below. In the case of *Muktakeshi Dasi v. Srinath Das* (2) there is nothing to show that proceedings were taken and rent fixed or settled by the Revenue Authorities acting under the Bengal Tenancy Act. Here the Record of Rights as finally published shows that, as a matter of fact, on the accreted land which was constituted into a new estate and a new tenure rent was not recorded as merely existing but as actually fixed or settled under the provisions of the Bengal Tenancy Act, that is to say, under section 192 of that Act read with sections 104 to 104 J. No proceedings have been taken by the defendants under any of those sections to have the decision of the Revenue Authorities modified or set aside. By those



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proceedings under the provisions of those sections the tenants are bound.

It follows that we must modify the decrees of the Courts below in the manner following, that up to the year 1318 the plaintiff is entitled to recover rent at the old rate and for the years 1319-1320 he is entitled to recover at the rate fixed by the Settlement Authorities, namely, Rs. 287-5 annas 3 pies in respect of the accreted land and rent in respect of the original land measuring 54 *bighas* 6 *cottas* 12 *chhataks* at the rate of 9 annas 7 pies per *bigha* with cess at 9 pies in the rupee as shown in the Record of Rights and damages as awarded by the Courts below 3 annas in the rupee and costs on the amount decreed with interest on the total amount adjusted and costs at the rate of six per cent. per annum.

This decree will be only against the defendant-respondent Jogendra Lal Roy.

The defendant respondent Troilakhya Nath Munshi appears to have been unnecessarily made a party. He will have half his costs throughout from the plaintiff-appellant.

*Decree modified.*

### PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 505  
OF 1919.

December 16, 1920.

Present:—Mr. Justice Das and  
Mr. Justice Adami.

RAMAN CHOUBEY AND OTHERS —  
APPELLANTS

*versus*

BACHA MISIR AND OTHERS —  
DEFENDANTS.

Civil Procedure Code (Art V of 1908), s. 11  
Expl. (IV), applicability of—Pl. dngs.—Inconsistent  
pleas, whether can be taken.

Before any argument can be advanced on the language employed in Explanation (IV) of section 11 of the Civil Procedure Code, it must be established to the satisfaction of the Court that the matter which is sought to be concluded on the principle of *res judicata* not only might have been made a ground of defence or attack in such former suit, but further that it ought to have been so made. [p. 394, col. 1.]

Where the evidence in support of one ground is such as might be destructive of the other ground, the two grounds need not be set up in the same suit. [p. 394, col. 1.]

As a matter of law, a defendant can put forward inconsistent pleas, and it is for the Court to take this fact into consideration in coming to the conclusion whether the pleas are well-founded. [p. 394, col. 2.]

Appeal from a decision of the District Judge, Shahabad, dated the 5th May 1919, reversing that of the Munsif, Bazar, dated the 2nd June 1918.

Mr. Parmeshwar Dayal, for the Appellant.

Messrs. Sambhu Saran and Bhagwan Prosad, for the Respondent.

### JUDGMENT.

DAS, J.—This appeal has been argued with great persistence and ability by Mr. Parmeshwar Dayal on behalf of the appellants, but I am unable to say that the judgment of the lower Appellate Court is wrong on any point of law.

The plaintiffs Nos. 1 to 5 are the admitted proprietors of the land in dispute. Plaintiffs Nos. 6 to 10 are the mortgagees and their suit is to recover possession of the disputed land from the defendants who have been recorded in the Record of Rights as mortgagees under an unregistered mortgage of the 13th December 1906.

In order to appreciate the arguments which have been advanced before us, it is necessary to deal with certain antecedent events.

The plaintiffs Nos. 6 to 10 claim that on the 11th July 1911 the plaintiffs Nos. 1 to 5 mortgaged the disputed land and executed a registered mortgage document in their favour. In 1911 there was a suit by the defendants against the plaintiffs for a declaration that the lands of which they were admittedly in possession were their *gurashita* lands. That suit failed. Meanwhile, the Record of Rights was published which recorded the defendants as being in possession of the disputed land under an unregistered mortgage. Although the plaintiffs succeeded in the previous litigation against the defendants, it appears that they failed to get possession inasmuch as the Criminal Court, on the basis of the entry in the Record of Rights, held that the defendants were in possession. The present suit was thereupon instituted in order to eject the defendants.

The lower Appellate Court has come to

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the conclusion that the defendants have a valid title to the land in dispute as mortgagees, the mortgage having been executed in their favour at some time before 1889.

It was urged, in the first place, by Mr. Parmeshwar Dayal on behalf of the appellants that the Court was precluded from trying the issue raised by the defendants by virtue of Explanation IV of section 11 of the Civil Procedure Code.

Mr. Parmeshwar Dayal's argument is, that it was open to the defendants in the previous litigation to put forward their title as mortgagees. They did not put forward their title as mortgagees and, therefore, the issue, whether the defendants are mortgagees in respect of the disputed land, must be held to have been constructively in issue in the former litigation.

Now Explanation IV runs as follows:—

"Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." It will be noticed that the Legislature has deliberately used two expressions "might and ought", and, in my view, before any argument can be advanced on the language employed in Explanation IV of section 11, it must be established to the satisfaction of the Court that the matter not only might have been made a ground of defence or attack in such former suit but further that it ought to have been so made.

The question which we have to determine, therefore, is this. Could the defendants have put forward their claim as mortgagees in the previous litigation? They, of course, might have done so, but ought they to have done so? It seems to me that the evidence in support of one claim, namely, the claim of *kashthars* would have been destructive of the other claim, namely, the claim as mortgagees. I am unable to say that, in such circumstances, the defendants ought to have put forward their claim as mortgagees in the previous litigation.

I fully concur in the view expressed by Mr. Mulla in his well known book on Civil Procedure Code, namely, "where the evidence in support of one ground is such as might be destructive of the other ground, the two grounds need not be set up in the same suit". And it appears to me that this is

supported by a decision of the Bombay High Court in the case of *Mahomed Ibrahim v. Hamja Mahomed Ally* (1). That decision was based upon an earlier decision of the same High Court where the following passage occurred:

"Relative rights and duties of owner and trespasser on the one hand and of mortgagor and mortgagee on the other are wholly different and failure in a suit of simple ejectment does not, in our opinion, in any way bar the plaintiff in a subsequent suit to enforce his right to redeem as mortgagor."

The first contention advanced on behalf of the appellant must accordingly fail.

It was next argued by Mr. Parmeshwar Dayal that the defendants should not have been allowed to take up an inconsistent attitude. The basis of the argument is that one of the original defendants, Ramdhan, in this suit claimed the land as his *guzarhta* land notwithstanding the decision in the previous litigation. Ramdhan died and Bacha was substituted in his place. Bacha put in a written statement in which, for the first time, he claimed the land in dispute as mortgagee.

Now I quite agree that this is a matter which the Courts below could properly have taken into consideration in determining the question whether the claim put forward on behalf of the defendants was well-founded. But I am unable to say that there was no right at all in Bacha to put forward an inconsistent defence in his written statement. So far as I know, inconsistent pleas are allowed, and it was open to Bacha's father Ramdhan to amend the written statement and introduce an inconsistent plea. Ramdhan died and Bacha was substituted in his place and I can see no ground whatever for holding that the Court of first instance was wrong in point of law in allowing Bacha to put forward an inconsistent plea. As I have said before, this is a matter which the Courts below might properly have taken into consideration in determining the question whether the claim put forward was well-founded. But that was a matter entirely for the Courts which have to deal with facts; we are not concerned with that point. I

(1) 12 Ind. Cas. 347; 35 B. 507; 13 Bom. L. R. 895.

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hold that, as a point of law, it was open to Basba to take up an inconsistent position.

The last ground urged by Mr. Parmeshwar Dayal is that, in any event, he has got a registered mortgage document in his favour and is entitled to priority over the defendants who admittedly had an unregistered document in their favour. The action, it must be remembered, is not an action to enforce the mortgage; it is an action in ejectment. Mr. Parmeshwar Dayal has taken us through the relevant sections in the Transfer of Property Act and Registration Act for the purposes of satisfying us that a mortgage above Rs. 100 is compulsorily registrable and is not admissible in evidence unless it is so registered. The point, however, is whether the mortgage upon which the defendant relies was executed since the two Acts upon which Mr. Parmeshwar Dayal relies came into operation. The defendants in their written statement say that the mortgage was executed in their favour more than sixty years ago. If that is right, then the document was executed before either the Transfer of Property Act or the Registration Act was passed. The lower Appellate Court has recorded a finding that it was executed 'sometime before 1889. Mr. Parmeshwar Dayal complains that there is no precise finding on this point. The answer to that argument is that the point has been argued for the first time in this Court. If the point had been taken in the Courts below or in the plaint no doubt it would have been necessary for the learned District Judge to record a precise finding on this point. Mr. Parmeshwar Dayal argued before us that it was open to him to argue a point of law although it was not taken in the pleadings. I quite agree that it is open to him to argue on any points of law before us, but I am of opinion that he can only argue such points of law on the facts found by the lower Appellate Court. His complaint that there is no precise finding on the question when the mortgage bond was executed in favour of the defendants has no substance whatever, in view of the fact that he never took this point in the plaint, nor did he argue this point in any of the Courts below. But assuming that we indulge the appellants to this extent, that we assume in their favour that the document was executed since the Transfer of Property Act and the

Registration Act came into operation, I am of opinion that they are in no better position. It is found by the Courts below that the predecessors-in-interest of the plaintiffs Nos. 1 to 5 put the defendants in possession of the property after executing the unregistered document in their favour. The position of the defendants, therefore, is this. There is an unregistered document in their favour and they are in possession of the property. The law is quite clear and has been settled by the class of cases of which *Walsh v. Lonsdale* (2) is an example. If authority be needed for the proposition, it will be found in the decision of Sir Lawrence Jenkins and Sir Asutosh Mookerjee in the case of *Puchha Lal v. Kuni Behary Lal* (3). In my opinion, the judgment of the learned District Judge is right and must be upheld.

I would dismiss this appeal with costs.

ADAMI, J.—I agree.

*Appeal dismissed.*

(2) (1882) 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 852; 31 W. R. 109.

(3) 20 Ind. Cas. 803; 19 C. L. J. 213; 19 C. W. N. 445.

**CALCUTTA HIGH COURT.**  
**APPEAL FROM APPELLATE DECREE No. 2195**  
**OF 1918.**

July 8, 1920.

*Present*:—Sir Asutosh Mookerjee Kt.,  
 Acting Chief Justice, and Justice  
 Sir Ernest Fletcher, Kt.

**SURENDRA NATH MITRA AND ANOTHER**  
**—PLAINTIFFS—APPELLANTS**

*versus*

**THE SECRETARY OF STATE FOR INDIA**  
**IN COUNCIL—DEFENDANT—RESPONDENT.**  
*Bengal Alluvion and Diluvion Regulation (XI of 1825), s. 4 (3)—Chur thrown up in large navigable river—Parties, rights of, how to be determined.*

The question of title to a *chur* thrown up in a large navigable river must be determined with reference to the condition of things prevailing at the time when the *chur* was first formed, and with reference to the terms of section 4 (3) of Regulation XI of 1825: but before applying this provision the Court must determine whether the bed of the river in which the *chur* is formed is the property of an individual, or is public domain. [p. 896, col. 2; p. 907, col. 1.]



SURENDRA NATH MITRA V. SECRETARY OF STATE FOR INDIA.

Appeal against the decree of the Additional District Judge, Bakargange, dated the 2nd of September 1918, affirming that of the Subordinate Judge, Second Court of that District, dated the 30th of April 1917.

FACTS appear from the judgment.

Babu Dwarkanath Chakravarty (with him Babu Nando Gopal Banerjee), for the Appellant.—We are entitled to the entire *chur*. Reads section 4 clause (3) of Regulation XI of 1825. If the bed of the river whereon the *chur* has been thrown is the property of the plaintiffs, it is clear that the Government can have no claim to it. It has been found that the channel which now separates the *chur* in dispute from the main land runs over land which was originally included in the plaintiff's *taluk*. It is thus clear that a part of the bed of the river is the property of the plaintiffs. Refers to *Ahmadi Begum v. Mahasy Taraknath Ghosh* (1). The question to be gone into in a case like this has not been properly investigated by the Courts below. Refers to *Lopez v. Muddun Mohun Thakoor* (2), *Hursahai Singh v. Syud Lutf Ali Khan* (3) and *Anand Hari Basak v. Secretary of State for India* (4).

Babu Ram Charan Mitter (with him Babu Surendranath Guha), for the Respondent.—The plaintiffs cannot claim the entire *chur*. I do not dispute the title of the plaintiffs to the portion of the *chur* which has been awarded to them on the principle of re-formation *in situ*. Unless the whole of the bed of the river is proved to belong to the plaintiffs, they cannot defeat the title of Government under Regulation XI of 1825.

Babu Dwarkanath Chakravarty replied.

#### JUDGMENT.

MOOKERJEE, ACTG. O. J.—This is an appeal by the plaintiffs in a suit for recovery of possession of land on declaration of title. The plaintiffs are the owners of two *taluks* Nos. 1730 and 1745, called Mauzas Guli and Pakhia, and they claim the disputed *chur* by virtue of their title to these two *taluks*. The Secretary of State for India in Council, who is in possession of the island, claims

(1) 21 Ind Cas 233; 18 C. L. J. 399; 17 C. W. N. 1173.

(2) 13 M. J. A. 467 at p. 475; 5 B. L. R. 521; 14 W. R. P. C. 11; 20 E. R. 625; 2 Suth. P. O. J. 336; 2 Sar. P. C. J. 594.

(3) 2 I. A. 25; 23 W. R. 8; 14 B. L. R. 268.

(4) 2 C. L. J. 316.

it as a *chur* thrown up in the midst of a public navigable river Agarmukha. The *thak* boundaries of the *taluks* owned by the plaintiffs have been re-laid and there is no doubt that a part of the *chur* in dispute has re-formed on the site of what was originally included in the *taluks* held by the plaintiffs. The *chur*, at the time of the institution of this suit, was separated from the main land of the *taluks* by a narrow channel. The Courts below have given the plaintiffs a decree for such portion of the land of the *chur* as has been proved to lie within the *thak* boundaries. The plaintiffs contend, however, that they are entitled to the entire *chur*, and that is the point for determination in the present appeal.

The respective rights of the parties must be determined with reference to the terms of clause (3) of section 4 of Regulation XI of 1825 which is in these terms:—"When a *chur* or island may be thrown up in a large navigable river (the bed of which is not the property of an individual), or in the sea, and the channel of the river or sea, between such island and the shore may not be fordable, it shall, according to the established usage, be at the disposal of Government." It is plain that, before this provision is applied, the Court must determine whether the *chur* or island has been thrown up in a large navigable river the bed whereof is not the property of an individual. Unless it is established that the bed of the river is not the property of an individual, title cannot vest in Government; in other words, title vests in Government if the bed of the large navigable river is public domain.

Now, in the case before us, it has been proved that what is now apparently a part of the bed of the river, was not public domain, because it is included within the *thak* boundaries of the *taluks* held by the plaintiffs, that is precisely the portion in respect whereof a decree has been made in favour of the plaintiffs. In the next place, it is clear that the channel of the river which is mentioned in clause (3) of section 4 is a channel the bed of which is not the property of an individual. The Courts below have overlooked this crucial point in the determination of the rights of the parties. In the present case, it has been found that the channel which now separates the *chur* from the main land runs over land which was

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originally included in the *taluk* held by the plaintiffs. The *chur* has thus formed in a large navigable river, but contrary to what usually happens [*Ahmadi Begum v. Mahasy Taraknath Ghosh* (1)], a part of the bed of that navigable river is the property of an individual, namely, the plaintiffs. From this the plaintiffs contend that the entire *chur* belongs to them. This, however, does not follow. No doubt, the portion of the *chur* formed on that part of the *chur* of the river-bed which is included within the *thak* boundaries of the *taluks* owned by the plaintiffs has been rightly decreed to them, on the principle of re-formation *in situ* enunciated in *Lopez v. Muddun Mohun Thakoor* (2) and extended in *Hursahai Singh v. Syud Lootf Ali Khan* (3), *Anand Hari Basak v. Secretary of State for India* (4), but unless the remainder of the *chur* is proved to have subsequently accreted to the re-formation, there could not be even a plausible foundation for the claim of the plaintiffs thereto. For it is conceivable that the portion of the *chur* which lies outside the boundaries of the *taluks* held by the plaintiffs was formed first and extended westwards on the part of the bed included within those boundaries. In such circumstances, title to the portion which could be rightly regarded and has been properly treated by the Court below as re-formation on the site of the *taluks* held by the plaintiffs would not support a claim to the remainder of the *chur* which had formed first.

A further question, however, will require consideration, namely, does that portion of the bed of the large navigable river in which the *chur* has been formed and which lies outside the limits of the *taluks* held by the plaintiffs, form part of the public domain, or is it also the property of a private individual. This question has not been investigated by the Courts below where the assumption was apparently made that such portion of the river-bed was public domain. It is necessary to investigate this matter before the respective rights of the parties can be determined. We may further point out that, as was laid down by the Full Bench in *Budroonissa Chowthrain v. Prosunno Oommar Bose* (5), the rights of the parties must be

determined with reference to the conditions of things at the time when the *chur* first formed. These are points which have been overlooked, certainly by the District Judge, if not also by the Subordinate Judge. There is thus no escape from the conclusion that the case has not been properly tried.

The result is that this appeal is allowed, the decree of the District Judge set aside in so far as he has dismissed part of the claim and the case remanded to the Court of first instance to be re tried with reference to the observations we have made. The parties will be at liberty to adduce such evidence as they may consider necessary to support their respective allegations. Costs in all the Courts up to the present stage will abide the result. The decree of the District Judge, in so far as it confirms the decree of the Subordinate Judge decreeing part of the claim, will stand unaffected.

FLETCHER, J.—I agree.

*Appeal allowed.*

MADRAS HIGH COURT.  
SECOND CIVIL APPEAL NO. 1368 OF 1918.  
January 15, 1920.  
Present:—Mr. Justice Sadasiva Aiyar  
and Mr. Justice Spencer.  
MUTHU PILLAI AND OTHERS—  
DEFENDANTS NOS. 1 TO 4—APPELLANTS  
versus  
VEDA VYSA CHARIAR (DECEASED)  
AND ANOTHER—PLAINTIFFS—  
RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Previous suit, finding in—Finding, whether necessary for basis of decree—Insertion of finding in decree, effect of—Ejectment, suit for—Finding that parties were mortgagor and mortgagee, whether operates as res judicata in subsequent suit for redemption.*

In order that a finding on a particular issue in a previous suit may operate as *res judicata* in a subsequent suit, it is not necessary that that finding should form the basis of the decree in that suit, but the insertion of the finding in the decree or its omission therefrom as also its bearing on the general result of the suit, naturally form elements in considering whether the matter has been directly and substantially in issue in the previous suit. [p. 401, col. 2.]

In a previous suit the plaintiff sued the defendants in ejectment as trespassers and the latter pleaded

(5) 14 W. R. (F. B.) 25; 6 B. L. R. (F. B.) 255

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that neither the plaintiff nor his predecessors-in-title were owners of the property and that the defendants were usufructuary mortgagees from some third persons who were the real owners. Both the Trial and Appellate Courts found against the defendants' plea but dismissed the plaintiff's suit on the finding that the mortgage to defendants was by the plaintiff's predecessors and an action in ejectment was not maintainable. In the present suit for redemption of the mortgage the defendants controverted the plaintiff's title, pleading that the finding in the prior suit that they were mortgagees from the plaintiff's predecessor was not *res judicata*:

Held, that though the finding was not the basis of the decree, as the question of title was directly and substantially in issue, the finding operated as *res judicata* in the present suit. [p. 400, col. .]

*Rama Krishna Naidu v. Krishnasami Naidu*, 52 Ind. Cas. 34; 9 L. W. 180; (1919) M. W. N. 7; 25 M. L. T. 88; 36 M. L. J. 641, and *Varathayyengar v. Krishnasami*, 10 M. 102; 11 Ind. Jur. 102; 3 Ind. Dec. (N. S.) 821, followed.

*Run Bahadur Singh v. Lucho Koer*, 11 C. 301 (P. O.); 12 L. A. 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec. (N. S.) 960, *Kelu Nambiar v. Chathu Nambiar*, 52 Ind. Cas. 258; 9 L. W. 84; 25 M. L. T. 66; (1919) M. W. N. 34, *Secretary of State v. Saminatha Kownden*, 12 Ind. Cas. 167; 37 M. 25; 10 M. L. T. 291; (1911) 2 M. W. N. 203; 2 M. L. J. 947, *Achanta Venkatasuryanarayana v. Shiva Sankara Narayana*, 27 Ind. Cas. 861; 2 L. W. 101; 17 M. L. T. 85, *Gurdeo Singh v. Chandrika Singh*, 1 Ind. Cas. 913; 36 C. 193; 5 C. L. J. 611, distinguished.

*Mota Haliappa v. Vithal Gopal Habbu*, 38 Ind. Cas. 74; 40 B. 662; 18 Bom. L. R. 712, approved.

*Thakur Magundeo v. Thakur Mahadeo Singh*, 18 C. 647; 9 Ind. Dec. (N. S.) 432, not approved.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Ramnad, at Madura, in Appeal Suit No. 121 of 1917, (Appeal Suit No. 3 of 1917, on the file of the District Court, Ramnad) preferred against the decree of the Court of the Additional District Munsif, Srivilliputhur, in Original Suit No. 17 of 1916, (Original Suit No. 655 of 1913, on the file of the Court of the Principal District Munsif, Srivilliputhur).

FACTS appear from the judgment.

Messrs S. Somasundaram Pillai and N. Vedachalam Pilli, for the Appellants.—The decree in the prior suit by plaintiff, Original Suit No. 211 of 1908, does not operate as *res judicata* against the first defendant. The finding that defendants were usufructuary mortgagees under plaintiff's predecessor-in-title was not the basis of the decree in that suit. Unless the finding was incorporated in the decree and the decree was based on the finding the finding will not operate as *res judicata* in a subsequent suit. It is open to the defendants to plead, as in the prior suit,

that neither the plaintiff nor his predecessor-in-title was the owner of the property. See *Run Bahadur Singh v. Lucho Koer* (1), *Thakur Magundeo v. Thakur Mahadeo Singh* (2), *Kelu Nambiar v. Chathu Nambiar* (3). Though the defendants appealed against that finding it was not necessary for them to have done so as the decree was in their favour. The matter has not been finally decided. There was also no second appeal to the High Court so that there could be no finality.

Mr. O. V. Anantha Krishna Aiyar, for the Respondents:—The finding, though not the basis of the decree in the prior suit, was a finding on a matter directly and substantially in issue between the parties. To allow a matter that has been contested and finally set at rest to be re opened would be in opposition to the principle governing the doctrine of *res judicata*. Two competent Courts have given a decision on the nature of the defendants' possession in a prior suit between the same parties. When the defendants file an appeal against a finding even though the suit was dismissed, that finding on appeal is *res judicata* in a subsequent suit between the same parties. See *Socrjomoness Dayes v. Suddanand Mohapatter* (4). The matter was fully considered by Sadasiva Aiyar, J. in *Rama Krishna Naidu v. Krishnasami Naidu* (5), where the conclusion is reached that a finding on a matter substantially in issue is *res judicata* though the party against whom it was recorded eventually succeeded in the case. See *Achanta Venkatasuryanarayana v. Shiva Sankara Narayana* (6), and *Anusuyabai v. Sakharan Pandurang* (7). This case falls under the fourth class enumerated by Seshagiri Aiyar, J., in *Muthaya Shetti v. Kanthappa Shetti* (8), where the decision on an issue is necessary for the

(1) 11 C. 301 (P. O.); 12 L. A. 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec. (N. S.) 960.

(2) 18 C. 647; 9 Ind. Dec. (N. S.) 432.

(3) 52 Ind. Cas. 258; 9 L. W. 84; 25 M. L. T. 66; (1919) M. W. N. 34.

(4) 12 B. L. R. 304 at p. 815; 20 W. R. 377; L. A. Sup. Vol. 212; 3 Sar. P. C. J. 285.

(5) 52 Ind. Cas. 34; 9 L. W. 180; (1919) M. W. N. 7; 25 M. L. T. 88; 36 M. L. J. 641.

(6) 27 Ind. Cas. 861; 2 L. W. 101; 17 M. L. T. 85.

(7) 7 B. 464; 4 Ind. Dec. (N. S.) 812.

(8) 45 Ind. Cas. 975; 7 L. W. 482; 34 M. L. J. 431; 23 M. L. T. 291; (1918) M. W. N. 334.



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decision of the suit but the party against whom it is given cannot appeal.

#### JUDGMENT.

SADASIVA AIYAR, J.—The defendants Nos. 1 to 4 are the appellants. The suit was brought for the redemption of plaint lands alleged to have been mortgaged with possession by the plaintiff's predecessor-in-title in March 1875 for Rs. 20. The suit was brought on the 14th December 1913.

In a previous suit, Original Suit No. 211 of 1908, the present plaintiff sued the same defendants Nos. 1 to 4 in ejectment on the allegation that the defendants trespassed upon the land sometime in 1900. The defendants contended that the plaintiff's predecessor-in-title and the plaintiff were never owners and they set up title in themselves as usufructuary mortgagees from a third person whom they set up as owner. The District Munsif found in that suit that the mortgagor of the defendants had *othi* right in the property under the plaintiff's predecessor-in-title and though the defendants' case that their mortgagor was the owner was false, they could resist the plaintiff's claim to eject them as trespassers as they were entitled to be paid what was due to their mortgagor (as mortgagee) before possession could be given to the plaintiff in redemption. (The plaintiffs' case in that suit was that, though there was a mortgage for Rs. 20 in favour of the defendants' mortgagor, that mortgage had been redeemed long ago by the plaintiff's predecessor-in-title). That alleged redemption was found against in that suit. Against the decree of the District Munsif dismissing that suit on those two findings, namely (1) that the plaintiff was the owner of the land but he was not entitled to possession, as the lands were outstanding on mortgage and the suit was not brought for redemption of mortgage, and (2) that the defendants were not the mortgagees from an owner but could only claim to be paid the original mortgage-amount due to their mortgagor before parting with possession, there were two Appeals, Nos. 898 and 923 of 1911, filed in the Subordinate Judge's Court of Ramnad by the plaintiff and the defendants respectively, the plaintiff contending in his appeal that the first conclusion of the Munsif that the plaintiff was bound to bring a suit for redemption, because the original mortgage had not yet been redeemed was erroneous,

and the defendants contending in their cross-appeal that the finding that their mortgagor was not the owner but only was himself a mortgagee under the plaintiff's predecessor-in-title and that, therefore, the defendants were liable to be redeemed was erroneous. The Subordinate Judge by his judgment, Exhibit G., paragraphs 7 and 9, upheld both the findings of the District Munsif and dismissed both the appeals.

It was under these circumstances that the present suit was brought to redeem the original *othi* made by the plaintiff's predecessor-in-title to the defendants' mortgagor, the defendants' mortgagor having mortgaged to the defendants for more than the original mortgage amount of Rs. 20 and hence, having practically assigned his original mortgage-right to the defendants for far more than its value.

The lower Appellate Court considered that the defendants having appealed in the former suit to establish that they were not liable to be redeemed and that the plaintiff had no right to redeem and having failed in that appeal, they were barred by *res judicata* from again setting up that the plaintiff was not entitled to redeem them. It, therefore, passed a decree for redemption on payment of the amount of Rs. 20 due under the original *othi* of 1875, that *othi* having been held as existing unredeemed in the former suit.

The contentions in the present second appeal are found in grounds Nos. 2 and 3, namely, "2. The lower Appellate Court should have found that the decree in Original Suit No. 211 of 1908 does not operate as *res judicata* against the first defendant.

"3. The lower Appellate Court ought to have found that the suit is barred by limitation by reason of adverse possession."

As regards the 3rd ground relating to adverse possession, a mortgagee cannot set up adverse possession and hence there is nothing in that ground. The learned Vakil for the appellant set up that, though there may not be limitation by adverse possession, there might be limitation under Article 134 of the Limitation Act. But that Article was not relied on in the lower Court and that Article could only apply if the mortgage to the defendants was made by the original mortgagee Irulappa Pillai purporting to act as owner and not as mere mortgagee,

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The document, Exhibit 5 of 1892, in favour of the defendants does not so purport and we are also not bound to allow a point to be argued not expressly raised in the memorandum of second appeal unless the plaint in its own allegations shows the suit to be barred by limitation, which is not the case here.

The contention most strenuously argued was the other question of *res judicata*. It was argued that though the defendant expressly appealed in the former suit to get rid of the finding of the District Munsif in that litigation the finding, namely, that the defendants were only mortgagees and that the plaintiff could redeem them by paying up the original mortgage-amount, and though they failed in that appeal, they need not and even could not have appealed against the District Munsif's judgment which dismissed the suit, and, therefore, the decision against them was not *res judicata*. But their Lordships of the Privy Council in *Soorjomoni Dayee v. Suddananil Mohapatter* (4) held that where the defendant filed an appeal against a finding notwithstanding the suit itself had been dismissed, that finding on appeal was *res judicata* in a second suit between him and the plaintiff. There is, therefore, nothing in this argument.

As regards the other argument based on *Run Bahadur Singh v. Luchu Koer* (1), *Thakur Magundeo v. Thakur Mahadeo Singh* (2) and other Bombay and Allahabad cases following *Thakur Magundeo v. Thakur Mahadeo Singh* (2), I need only say that I considered the whole question anxiously in *Rama Krishna Naidu v. Krishnasami Naidu* (5), and came to the conclusion that the Full Bench decision in *Niamut Khan v. Phadu Buldia* (9), was wrongly dissented from in the subsequent Calcutta cases and that a statement of their Lordships of the Privy Council in *Run Bahadur Singh v. Luchu Koer* (1) was unduly stretched in those subsequent decisions and I followed *Varathayyanar v. Krishnasami* (10). In fact, the present case is almost exactly on all fours with *Varathayyanar v. Krishnasami* (10), which has never been dissented from in this Court. I have had the advantage

of reading the judgment to be pronounced by my learned brother in this case and I am glad that he supports the decision in *Rama Krishna Naidu v. Krishnasami Naidu* (5).

No decision of this Court subsequent to *Rama Krishna Naidu v. Krishnasami Naidu* (5) has been quoted before us dissenting therefrom.

The learned Vakil for the appellant adopted the criticism of that judgment in *Rama Krishna Naidu v. Krishnasami Naidu* (5), found in 37 Madras Law Journal (Journal part 3) pp. 1 to 15. Having carefully considered those criticisms, I see no reason to change my view, especially as the learned reviewer after vainly trying to distinguish or explain *Varathayyanar v. Krishnasami* (10), finally stated in despair that "it must be treated as bad law."

I, therefore, agree with my learned brother that the second appeal should be dismissed with costs. Time for redemption is extended to three months from this date.

SPENCER, J.—The second appeal has been argued on a question of *res judicata*. The present plaintiff brought a prior suit against the present defendants Nos. 1 to 4 for possession of the northern half of Survey No. 851, which is the subject of the present suit. That suit was dismissed on the ground that the first defendant was holding the property as a usufructuary mortgagee and that the suit in ejectment could not be converted into one for redemption. There was an appeal and a cross-appeal, with the result that the first Court's decree was confirmed. Now that the plaintiff has brought this suit for redemption, the first defendant wishes to deny the original *othi* mortgage under which he got into possession as sub-mortgagee from the mortgagee and to set up a case of absolute title. The Subordinate Judge has held that he cannot do this, and I have no doubt that the Subordinate Judge is right. Undoubtedly, the matter of the mortgage was directly and substantially in issue (to use the words of section 11 of the Code of Civil Procedure) in Original Suit No. 211 of 1908 as the finding of the two Courts that the mortgage was subsisting led to the dismissal of the plaintiff's suit. It is argued by the appellant's Vakil that, because the decree in that suit was in favour of the party against whom the finding was recorded, the

(9) 6 C. 319 (F. B.); 7 C. L. R. 227; 3 Ind. Dec. (N. S.) 209.

(10) 10 M. 102; 11 Ind. Jur. 102; 3 Ind. Dec. (N. S.) 521.

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matter has not been finally decided. It is true that, in the former litigation, there was no second appeal to the High Court but this was because the question as to the existence of a mortgage-right was one purely of fact and consequently the parties had no right of second appeal. In every other sense the matter was finally decided. The decision of this issue was in favour of the defendants in that suit in so far that it had the effect of causing the plaintiff's suits to be dismissed, but it operates against their contentions in this suit in which the relief claimed by the plaintiff is different from what it was before. The rule of *res judicata* has been described by the Privy Council, quoting the maxim *interest reipublice ut sit finis litium* and the commentary of Lord Coke thereupon, in *Sheoparsan Singh v. Ramnandan Prasad Narayan Singh* (11), as being "founded on ancient precedent and dictated by a wisdom which is for all time." To allow the defendants to raise this question of mortgage or absolute title which has once been decided by two competent Courts, and have it decided all over again merely for the reason that it is not now to their advantage, that they should be treated as mortgagees would be to ignore every principle of finality and to treat the doctrine of *res judicata*, as a dead letter. The appellant's Vakil has quoted certain decisions of this and other High Courts which he considers to be in favour of his clients, and it will, therefore, be necessary to deal with them.

First, there is the decision of the Privy Council in *Run Bahadur Singh v. Lucho Koer* (1), which has been much quoted and not always quite understood. My learned brother in *Rama Krishna Naidu v. Krishnaswami Naidu* (5) has distinguished this case, and I agree with his observations. The Privy Council expressed an opinion on the facts of that case that the judgment of a District Munsif in a suit to recover rent was not conclusive upon a point, viz., that of title, which was only incidental and subsidiary to the main question upon which the suit was decided when the finding upon that issue did not form the basis of the Court's decree, and that the decision was not *res judicata*. (11) 33 Ind. Cas. 914; 43 O. 694 at pp. 705, 706; 14 A. L. J. 496; 20 C. W. N. 738; 18 Bom. L. R. 397; 23 C. L. J. 621; (1916) I M. W. N. 419; 20 M. L. T. 1; 8 L. W. 544; 81 M. L. J. 77; 43 I. A. 91 (P. C.).

*judicata* in a subsequent suit upon title in the Court of a Subordinate Judge. My learned brother rightly pointed out in his judgment that there is no condition in section 11 of the Code of the Civil Procedure that the decision of the particular issue should have been the basis of the decree. But the insertion of the finding in question in the decree, or its omission therefrom, as also its bearing on the general result of the suit, naturally from elements in the consideration of the question whether the matter has been directly and substantially in issue in the former suit. *Thakur Magundeo v. Thakur Mahadeo Singh* (2), is one of the cases, which purports to follow *Run Bahadur Singh v. Lucho Koer* (1).

My learned brother and Napier, J., in *Rama Krishna Naidu v. Krishnaswami Naidu* (5) dissented from the view expressed therein by a Bench of the Calcutta High Court. If a landlord sues to eject a tenant and succeeds on the defendant's plea of occupancy right, and if his suit fails for want of a proper notice to quit, the finding on the former issue is *res judicata* in second suit instituted after a due notice being given. So it was held in *Mata Holiappa v. Vithal Gopal Habbu* (12).

In *Thakur Magundeo v. Thakur Mahadeo Singh* (2) this contrary view prevailed, but I prefer the Bombay view. With due respect I consider that *Kelu Nambiar v. Chelhu Nambiar* (3) goes too far in laying down that a decision on an issue in an appealable suit when the decree is in favour of the parties against whom that decision is given is not a final decision and in considering that *Run Bahadur Singh v. Lucho Koer* (1) is an authority for this wide proposition.

In *Muthaya Shetti v. Kanthappa Shetti* (8) it was rightly pointed out by another Bench, with reference to Explanation 2 to section 11 of the Code of Civil Procedure, that the test of *res judicata* does not depend on the right of appeal. In that case the second suit, as in the case before us, was one for redemption and the finding in the first suit whether there had been a mortgage or a sale was held to be *res judicata* between the same parties or their representatives in-interest. Mr. Justice

(12) 36 Ind. Cas. 74; 40 B. 662; 18 Bom. L. R. 712.



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Seshagiri Aiyar, for convenience of consideration, divided cases of *res judicata* into four classes. The fourth class consisted of cases in which the decision upon the issue is necessary for the decision of the suit but the party against whom it is given cannot appeal as the final decree is in his favour. Even so, he held that the decision on the issue would be *res judicata*. The present case would fall in that class.

*Secretary of State v. Swaminatha Koundon* (13) cited by the appellants' Pleader, a case to which I was a party, is not really an authority on the law of *res judicata*. The question we had to decide was whether a party who was not adversely affected by a decree could appeal against an adverse finding recorded in the judgment alone. We answered that question in the negative and a similar question was answered in the negative in *Achanta Venkatasuryanarayana v. Shiva Sankara Narayana* (6) by the learned Chief Justice and Seshagiri Aiyar, J., upon the point whether the decision of a question as to the invalidity of an adoption would operate as *res judicata* there is no discussion of the law but a mere reference to *Ran Bahadur Singh v. Lucho Koer* (1) and *Parbatty Debya v. Mathura Nath Banerjee* (14).

*Parbati Debya v. Mathura Nath Banerjee* (14) is another of the decisions of the Calcutta High Court upon the doctrine of "basis of the decree" which my learned brother declined in *Rama Krishna Naidu v. Krishnasami Naidu* (5) to follow.

In *Anusuyabai v. Sakhararam Pandurang* (7), it was rightly observed that an appeal would not lie against an unfavourable finding in a suit when the decree was in favour of the party appealing. The further observations in the same ruling as to there being no *res judicata* except when the party concerned had an opportunity of appealing are difficult to reconcile with those in *Muthaya Shetti v. Kanthappa Shetti* (8).

In *Ghela Ichharam v. Sankalchand jetha* (15) there was a finding on an issue not necessary or material for the determination of the suit and it was held to lack the force of *res judicata*. This decision is not in point as in the case before us the finding

as to the mortgage being subsisting contributed materially to the dismissal of the former suit.

The cases in *Gurdeo Singh v. Ohandrika Singh* (16) and *Kelu Nambiar v. Chathu Nambiar* (3) were concerned with the finality of adjudication between co-defendants, which stand on rather a different footing from adjudications between plaintiffs and defendants, whose interests are *prima facie* conflicting.

The Privy Council in *Krishna Behari Roy v. Banwari Lall Roy* (17), as to the determination of the status of one party in relation to the other, upon a material issue in a proper suit in a competent Court operating as *res judicata* in a second suit between the same parties, is distinctly against the appellants' present contention. I think that we should dismiss this second appeal with costs.

M. C. P.

*Appeal dismissed.*

(16) 1 Ind. Cas. 913; 36 C. 193; 5 C. L. J. 611.

(17) 10 144 (P. C.); 25 W. R. 1; 2 L. A. 283; 3 Sar. P. C. J. 559; 3 Suth. P. C. J. 213; 1 Ind. Dec. (N. S.) 93.

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 459  
OF 1919.

July 15, 1920.

Present:—Mr. Justice Tennon  
and Mr. Justice Newbould.

KUMARI DASTA, WIDOW OF  
RAM KUMAR DE—PLAINTIFF—  
APPELLANT

versus

Rani HEMANTA KUMARI DEBI, WIDOW  
OF RAJA JATINDRA NARAIN RAI  
BAHADUR—DEFENDANT AND OTHERS  
—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 50 (2).—Rent,  
fixity of, presumption as to—Tenant, status of.

(13) 12 Ind. Cas. 167; 37 M. 25; 10 M. L. T. 291;  
(1911) 2 M. W. N. 302; 21 M. L. J. 247.

(14) 15 Ind. Cas. 413; 40 C. 29; 16 C. L. J. 9; 16 C.  
W. N. 877.

(15) 18 B. 507; 9 Ind. Dec. (N. S.) 907.

Where it is found that a tenant has, for more  
than twenty years, paid a certain rate of rent, and  
there is no proof of any variation in the rent at any  
prior period, the tenant acquires the status of a

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tenant holding at a fixed rent, and is entitled to the benefit of the presumption as to the fixity of the rent arising under section 50 (2) of the Bengal Tenancy Act.

Appeal against the decree of the Special Judge, Mymensingh, dated the 9th of July 1918, reversing that of the Assistant Settlement Officer of that District, dated the 31st of July 1917.

FACTS appear from the judgment.

Babu Birendra Kumar De, for the Appellant.—My husband was the original tenant of the holding. It was transferred to me by way of gift somewhere about the year 1275 B. S. The landlord recognised the transfer. I was thus admitted into the original tenancy with all its incidents and was in fact the successor-in-interest of my husband. See per Teunon, J., in *Abhay Sankar Mozumdar v. Rajani Mandal* (1). It has been found that the rent payable in respect of the holding has not been changed for more than 20 years. I am thus entitled to the presumption arising under section 50 (2) of the Bengal Tenancy Act. This presumption has not been rebutted by the defendant.

Babu Surendra Chandra Sen (with him Babus Amulaya Kumar Bhattacharjee and Ransari Lal Sarkar), for the Respondents.—There is no definite finding that the landlord recognised the transfer to the wife. On the other hand, our case was that the husband surrendered and then the wife took a new settlement of the holding. So that *Abhay Sankar Mozumdar v. Rajani Mandal* (1) does not apply. Refers to *Sarat Chandra Ghose v. Sham Chand Singh Roy* (2).

Babu Birendra Kumar De was not called upon to reply.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff in the Court of an Assistant Settlement Officer under the provisions of section 106 of the Bengal Tenancy Act. In the Record of Rights prepared under Chapter X of the Act the plaintiff was entered as a settled *raiyyat* of the village. Her contention is that this entry is incorrect and that her status is, in fact, that of a *raiyyat* holding at a fixed rent. The decision of the Court of

first instance was in her favour. In the Court of first appeal, i. e., the Court of the Special Judge of Mymensingh the learned Judge held that the plaintiff had succeeded in proving that the rent payable in respect of the holding had remained at Rs. 12-6-0 for more than twenty years and that the defendant had failed to prove any variation in the rent at any prior period. He next proceeded to hold that the predecessor of the present plaintiff, her husband, a person of the name of Ram Kumar, had transferred the holding to his wife somewhere about the year 1275, i. e., some 49 years before suit. According to the plaintiff, the transfer was by way of gift. According to the defendant, the transfer was by way of surrender on the part of the husband and a subsequent settlement in the name or in favour of the wife. The first Court found that the story of surrender remained unproved. The learned Special Judge came to no finding as to whether the transfer was by way of gift or by way of surrender and whether the transaction of surrender and settlement was a real surrender or a *benami* one. On this state of facts, acting under the provisions of section 103, Code of Civil Procedure, we have looked into the evidence and we find that the only evidence adduced with regard to this question of surrender on behalf of the defendant is that of his witness No. 2. The deposition of that witness is to the effect that Ram Kumar surrendered and took re-settlement in the name of his wife, that is to say, his case is that the so-called surrender was merely a *benami* transaction. It follows from this that the transaction was either by way of gift or by way of a fictitious surrender, in either case, with a view to the admission of the wife into the original tenancy as held by him. That is also apparent from the finding that the landlord has failed to prove variation in the rent at any period prior to twenty years before suit. In 1275 the rent was Rs. 12 6-0 and when the re-settlement was made in the name of the wife it was, as in fact the Judge finds, Rs. 12-6-0. In this view of the facts, on the authority of the case reported in *Abhay Sankar Mozumdar v. Rajani Mandal* (1), we must hold that the recognition given by the landlord to the transfer to or re-settlement in the name

(1) 47 Ind. Cas. 359; 29 C. L. J. 371; 22 C. W. N. 904.

(2) 14 Ind. Cas. 701; 33 C. 663; 16 C. L. J. 71

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of the wife had the effect of admitting the wife into the original tenancy held by Ram Kumar with all its incidents and that she, therefore, became the successor-in-interest of her husband. From this it follows that the presumption that arises under the provisions of section 5C (2) of the Bengal Tenancy Act has not been rebutted and that this appeal must, therefore, succeed. We accordingly set aside the decree made by the Special Judge and restore the decree made by the Settlement Officer with costs in all Courts.

*Decree set aside.*

### ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 24 AND 25  
OF 1919.

April 12, 1920.

*Present* :—Mr. Stuart, A. J. C., and  
Pandit Kanhaiya Lal, A. J. C.

TILAK CHAND AND ANOTHER—PLAINTIFFS

—APPELLANTS IN APPEAL NO. 24

REHARI LAL—PLAINTIFF—APPELLANT  
IN APPEAL NO. 25

*versus*

SHAMBHU SINGH AND OTHERS—

DEPENDANTS—RESPONDENTS IN BOTH.

*Adverse possession—Mortgagor and mortgagee—  
Limitation—Res judicata—Wrong decision, whether  
operates as res judicata.*

No question of adverse possession can arise as between mortgagors and mortgagees during the periods of limitation within which either of them can enforce their rights; nor can any acquiescence by the mortgagor not amounting to release of the equity of redemption be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem [p. 406, col 2]

A wrong decision in a previous suit has the force of *res judicata* in a subsequent suit.

Where the Settlement Court, in deciding the question of title as between a mortgagor and his mortgagee, lost sight of the fact that the mortgagor's right of redemption under the deed in suit had not been taken away by proper foreclosure proceedings and declared the mortgagees to have acquired full proprietary rights in the mortgaged property :

*Held*, that the decision of the Settlement Court nevertheless operated as *res judicata*. [p. 406, col 1.]  
*Amanat Bibi v Imdad Husain*, 15 C. 800 P. C.; 15 I. A. 08; 12 Ind. Jur. 255; 5 Sar. P. O. J. 214; *Rafique & Jackson's P. O. No. 103*; 7 Ind. Dec. (N. S.) 1117, distinguished from.

Appeals from the decrees of the First Additional District Judge, Lucknow, dated the 31st October 1918, confirming that of the Munsif, (South), Lucknow, dated the 22nd February 1918.

The Hon'ble Pandit Gokaran Nath Misra and Babu Basudeo Lal, for the Appellants in Appeal No. 24.

Pandit Harkaran Nath Misra, for the Appellant in Appeal No. 25.

Messrs. Ram Ohandra and Har Dhyam Ohandra, for Respondents Nos. 1-3, 5-7 and 12 in both Appeals.

**JUDGMENT.**—The facts are as follows. On the 9th October 1863 a Kurmi of the name of Hulli executed a deed of conditional sale in favour of Fateh Singh for a consideration of Rs. 300. By this deed of conditional sale he transferred an eight-annas share in the village of Jamalpur in the Lucknow District to Fateh Singh. He died shortly afterwards. In the following year, Fateh Singh was represented by Himanehal Kurmi and Hulli was represented by his son Malhu. In the year 1864 the determination of the proprietary title to the village of Jamalpur came before the Settlement Courts whose decision as to title was in those days final. Many persons claimed interests in Jamalpur. Their claims were heard together by Captain Boulderson, Settlement Officer. His words with regard to the relative claims of Himanehal and Malhu are as follows:—

".....Himanehal Singh who throughout opposed the possession of the late Hulli Lambardar (Kurmi) on the strength of deeds of sale and mortgage from the Bhat only gradually purchased out all the interests of Hulli in the half share of the village by making the advances of money in 1862 and 1863 amounting to Rs. 680 for which Hulli executed certain bonds and finally gave Himanehal possession of his half share. Hulli died in November last within a month after executing his last bond of 9th October 1863 on which he borrowed Rs. 300 payable in a month's time with interest. Failing to do this, all



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his rights and interests in the half village were absolutely transferred to the vendor. (sic). All the bonds of Hulli Lambardar are duly engrossed on stamped papers of the proper values which have been carefully registered. They are to all appearance genuine and valid deeds."

This is the statement of the case by Captain Boulderson in his decision on the merits of the 31st August 1864. His decision on the merits is as follows:—

"As to the claim of Malhu, son of the late Hulli Lambardar, I think it is clear that he was never a proprietor in the village. But whatever rights the settlement of 64 *Fasli* and 1858/59 A. D. may have conferred on him he had entirely transferred to Himanchal, as before noticed, and to whom he made over possession. It is also stated in the proceedings of the District Courts that Hulli had disinherited his son Malhu on account of his mother's misconduct. I consider, therefore, that Malhu has now no claim or right in this village".

The matter did not end there. Malhu appealed to the Commissioner, Colonel Barrow. Colonel Barrow decided his appeal with others by a decision of the 18th November 1864. He says with regard to Malhu's claim,—

"But looking to what has passed between the old proprietors and Himanchal there is little doubt but that they sold their rights to him. The loss of Kanungo's records leaves the point of possession doubtful in past years though there have been many *mustajirs* from time to time. In 1264 *Fasli* Durga and Hulli got the settlement as original proprietors but then there was no inquiry into deeds of sale, etc. In 1266 Hulli then maintained his place but Himanchal Kormi superseded Durga and the evidence now before the lower Court shows that Himanchal also purchased Hulli's share in 1862/63 A. D. for which Hulli executed bonds and gave up possession. There is nothing to show that these deeds are fraudulent. They are on stamp-paper of proper value although not registered. Hulli lately died, a year since. His son Malhu, the appellant, was disinherited. So altogether his claim is invalid."

This decision of Colonel Barrow's went on to the Financial Commissioner who upheld it on 2nd May 1866,

Now, persons who have purchased the right of equity of redemption under the deed of 9th October 1863 are claiming redemption of the eight-annas share against the successor-in-interest of Himanchal. The Courts below have decided that their claim cannot be allowed. The present appeals are preferred.

The case appears to us to present no difficulty. We do not consider that this is, as the Courts below found, a case of adverse possession. We find that it is governed by the law of *res judicata*. The Courts below, while dismissing the suits on the question of adverse possession, did not consider that the defendants were entitled to succeed on the principle of *res judicata*. The question is very simple—can the plaintiffs take the plea that the deed of 9th October 1863 is a deed of conditional sale which permits redemption? If we had to interpret this deed *de novo*, we would certainly have come to the conclusion that it was a deed of conditional sale. There have been no foreclosure proceedings and the right of equity of redemption would exist. There can be no question of adverse possession as between mortgagors and mortgagees as was laid down by their Lordships of the Privy Council in *Khierajmal v. Daim* (1). At page 312 it is said,—

"Their Lordships are satisfied that the possession has been that of the mortgagees throughout, and the question at issue is exclusively one between mortgagor and mortgagee. As between them, neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem."

This decision was referred to in *Amir Ali v. Nias Ali* (2). But it is not open to us to look at this deed, for the question was tried out and decided by the Settlement Courts in the years 1864-1866. What was the dispute before the Courts between Malhu and Himanchal? Malhu claimed proprietary rights. Himanchal said, "What-

(1) 82 O. 296 at p. 312; 2 A. L. J. 71; 1 O. L. 584; 7 Bom. L. R. 1; 9 C. W. N. 201; 82 I. A. 28; 8 Ind. P. C. J. 734 (P. C.).

(2) 14 Ind. Cas. 584; 15 O. C. 89.

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ever rights you may have had you have transferred to me." Captain Boulderson refers explicitly to the very deed now before us—the deed of 9th October 1863. He found that under that deed all the rights claimed by Malhu had been entirely transferred to Fateh Singh and from Fateh Singh to Himanehal. Colonel Barrow found that Himanehal had purchased Hulli's share in 1862-1863 and the Financial Commissioner supported these decisions. Undoubtedly, these decisions lost sight of the fact that under the deed of 1863 the executant had a right of equity of redemption, that this right had not been taken away by proper foreclosure proceedings, and that it was still in existence. The decisions lost sight of the fact. But they are nevertheless final on the point. They held that the deed entirely and completely deprived Hulli of all his rights. The facts in this case are very different to the facts in *Amanat Bibi v. Imdad Husain* (3). There their Lordships of the Privy Council found that, where a man sold his rights in 1853 and appeared again as mortgaging the same rights in 1854, the vendee, who was also the mortgagee, could not be held entitled to go behind the mortgage on the ground that the rights had previously been sold to him. Of course, in such a case it was perfectly possible that the vendor after transferring his rights by sale could again acquire them and their Lordships considered that the conclusion must be drawn that he had re-acquired them from the fact that he had mortgaged them and that it must be assumed that such was the case from the fact that the vendee had taken a mortgage from the vendor in the following year of the same property. They further held that it was not open to the vendee to go behind the terms of the mortgage. But here the case is absolutely different. The point was very simple—had Malhu any rights in 1864 under the deed of 1863? The Courts found that he had not any rights. The point was essential for the determination of the case. If Malhu had rights under the deed of 1863 the Settlement Courts should have retained his name as the owner of an eight annas share noting

that the share was mortgaged with possession to Himanehal. They did not do so. They declared that he had no rights of any kind and that Himanehal was the sole proprietor of the share. The matter was directly and substantially in issue in a former suit between parties under whom the present parties claim. They were litigating under the same title in a competent Court. The question was heard and finally decided.

We, therefore, dismiss these appeals with costs.

*Appeals dismissed.*

### CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 51  
OF 1920.

May 12, 1920.

*Present*:—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice Sir  
Ernest Fletcher, Kt.

VIRJIBUN DASS MOOLJI—JUDGMENT-  
DEBTOR—APPELLANT

*versus*

BISSESSWAR LAL HARGOBIND AND  
OTHERS—EXECUTION CREDITORS—RESPONDENTS.  
*Civil Procedure Code (Act V of 1908), O. XXI,  
r. 89, applicability of—Mortgage-decree—High Court,  
Original Side—Judge, whether bound by previous  
decision of Judge on Original Side.*

Order XXI, rule 89 of the Civil Procedure Code applies to sales held in execution of mortgage-decrees, and is applicable to mortgage-sales on the Original Side of the Calcutta High Court [p. 408, col. 1.]

A Judge on the Original Side of the High Court is ordinarily bound to consider with respect the decision of another Judge on the Original Side produced before him, but if he is convinced that the decision is erroneous, he is not under any obligation to follow it against his own judgment. [p. 408, col. 2.]

Appeal from the order of Mr. Justice Greaves, dated the 8th April 1920.

Sir B. O. Mitter and Mr. B. L. Mitter,  
for the Appellant.

Mr B. Chakravarty and Mr. S. M. Bose,  
for the Respondents.

### JUDGMENT.

MOOKERJEE, ACTG. C. J.—This appeal raises an important question of law, namely, whe-

(3) 15 C. 800 (P. C.); 15 I. A. 106; 12 Ind. Jur. 255; 5 Sar. P. C. J. 214; Rafique & Jackson's P. O. No. 103; 7 Ind. Dec. (N. S.) 1117.

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ther Order XXI, rule 89 of the Code of Civil Procedure, 1908, applies to sales in execution of mortgage-decrees on the Original Side of this Court.

Mr. Justice Greaves has stated in the order now under appeal that if the matter were *res integra*, he would be inclined to answer the question in the affirmative. But in view of the long established practice of the Court and the decision of Mr. Justice Woodroffe in *Surendra Kristo Ray v. Goroo Prasad Ghose* (1), he felt constrained to answer the question in the negative, and to dismiss the application of the mortgagor.

The question raises two issues:—First, Whether Order XXI, rule 89 applies to sales held in execution of mortgage-decrees; and, secondly, if it does so apply, whether the rule is applicable on the Original Side of this Court.

As regards the first point, Mr. Chakravarty has contended that rule 89 is applicable only where immoveable property has been sold in execution of a decree after attachment; and, in support of that view, he has invited our attention to various rules embodied in Order XXI. We are of opinion that this contention is wholly unfounded. Rule 11 of Order XXI contemplates, as is clear from sub-rule (2) clause (1), that property may be sold in execution of a decree either after attachment or without attachment.

In the case of execution of a decree for money, the immoveable property intended to be brought to sale must be attached. This is in the interest of the decree holder who requires a prohibitory order in his favour, as otherwise the judgment-debtor might, during the pendency of the execution, transfer the property to a stranger and thus defeat the claim of the execution creditor. On the other hand, in the case of execution of a decree on a mortgage where the decree itself directs the sale of the mortgaged property, an attachment is manifestly unnecessary and the Code does not contemplate that in such a case the execution creditor should proceed to attach the property the sale whereof is directed by the decree itself. Rule 89 is expressed in perfectly general terms and lays down that where

immoveable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court certain prescribed sums. The rule is not limited by its terms to cases where immoveable property has been sold after attachment in execution of a decree; and, we are of opinion that it should not be so restricted.

The history of this matter is well-known. When section 310A was introduced into the Code of 1882, a question arose whether that section was applicable to sales held in execution of a mortgage-decree under the rules framed pursuant to section 104 of the Transfer of Property Act. There was a divergence of judicial opinion on the subject; this Court answered the question in the negative, while all other High Courts answered it in the affirmative; *Kedar Nath Raut v. Kali Ohurn Ram* (2), *Ram Ram Singhji v. Ohunni Lal* (3), *Krishnaji v. Mahalev* (4), *Malikarjunadu Setti v. Lingamurti Pantulu* (5). In order to remove the doubt thus created, the Legislature in 1908 remodelled section 310A and also repealed the sections of the Transfer of Property Act which were inserted with modifications in the new Code of Civil Procedure. We feel no doubt that Order XXI, rule 89 applies to sales in execution of mortgage-decrees.

As regards the second point, namely, whether the rule is applicable to such sales on the Original Side of this Court, we observe that Order XLIX, rule 3, specifies the rules which do not apply to any Chartered High Court in the exercise of its ordinary or extraordinary Original Civil Jurisdiction. Order XXI, rule 89, is not one of the rules so excluded. *Prima facie*, then, Order XXI, rule 89, is applicable to sales in execution of mortgage-decrees on the Original Side of this Court. This view is supported by the provisions of clause 37 of the Letters Patent which authorizes the High Court to frame

(2) 25 O 703; 2 O W. N. 353; 13 Ind. Dec. (N. S.) 470.

(3) 19 A. 205; A. W. N. (1897) 47; 9 Ind. Dec. (N. S.) 135.

(4) 25 B. 104; 2 Bom. L. R. 635.

(5) 25 M. 244 (F. B.); 12 M. L. J. 270.

(1) 59 Ind. Cas. 432; 24 C. W. N. 536.



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rules and directs that the High Court shall be guided in making such rules and orders, as far as possible, by the provisions of the Code of Civil Procedure. Consequently, if the view is put forward that Order XXI, rule 89, does not apply to the Original Side of this Court, notwithstanding its omission from rule 3 of Order XLIX, it must be established that there is some specific provision in the rules framed by this Court which justifies such an inference.

Our attention has been drawn to only one such rule which is to be found in Chapter XXVII of the Rules framed by this Court. Rule 53 provides that, "No bidding shall be opened except with the consent of the purchaser, or unless it be shown that there has been fraud or misconduct in the management of the sale, or that the purchaser by reason of being in a fiduciary position was disqualified from purchasing". We are of opinion that this rule is of no assistance to the respondent. The rule clearly contemplates the re-opening of a bid so as to allow a higher bid to be offered. It has no application to a case where the bid has been accepted and the sale has been completed by the payment of the purchase-money and thereafter an application is made by a person competent to apply under rule 89 to have the sale set aside upon payment of the prescribed amount. There is, in our opinion, no escape from the conclusion that Order XXI, rule 89, applies to mortgage-sales on the Original Side of this Court.

As regards the decision of Mr. Justice Woodroffe in *Surenira Kristo Ray v. Gooroo Prasad Ghose* (1), it is plain that the question was not necessary for decision for the purposes of that case, because, even assuming that rule 89 was applicable, the applicant had not complied with the requirements of the Code. We are further of opinion that that decision attaches undue importance to the previous practice of the Court. There had been a fundamental alteration effected in the law and steps had been taken by the Legislature to negative the decision of the Full Bench in *Kedar Nath Raut v. Kali Churn Ram* (2). We feel no doubt that the practice which at present prevails on the Original Side of this Court is contrary to law, and upon a correct construction of the Civil Procedure Code,

Order XXI, rule 89, must be held applicable to mortgage sales.

We have stated that Mr. Justice Greaves was himself inclined to adopt this view. But he probably felt constrained by the *dictum* in the case of *Chaitram Rambilas v. Bridhichand Kesrichand* (6), to treat himself as bound by a decision which, in his opinion, was not correct. That *dictum*, however, was not intended to be carried to this length. No doubt, when a decision of a single Judge of the Original Side of this Court is produced before another Judge, he is bound to treat it with respect, and ordinarily to follow it, if it is applicable to the circumstances of the case before him. But this does not imply that he cannot examine the matter and that it is not competent to him to take a contrary view, if he is convinced that the decision is erroneous. The answer to the question, what regard is to be had to an earlier decision of a Court of co-ordinate jurisdiction, must depend upon a variety of circumstances. One important factor is the length of time during which it has stood unchallenged. Another factor, possibly of greater importance, is whether the decision gives adequate reasons for the conclusion embodied therein. But the position is indefensible on principle, that, although a Judge may feel absolutely convinced that the decision produced before him is erroneous in law, he is still bound to decide against his own opinion. To take such a view is to hold that the Judge may be reduced to an automaton by the production of an earlier judgment. Reference may, in this connection, be usefully made to the course followed in such circumstances in England.

In *Finlay v. Darling* (7) Mr. Justice Romer observed as follows: "The only other case that has occasioned me any difficulty is that before Kekewich, J., of *Bendy, In re, Wallis v. Bendy* (8). That is a decision of a Judge of first instance like myself. Ordinarily, in these cases I should always follow the decision of a Judge of co-ordinate jurisdiction unless on principle I

(6) 80 Ind. Cas. 681; 42 O. 1140; 21 O. L. J. 584; 19 O. W. N. 820.

(7) (1897) 1 Ch. 719 at p. 723; 66 L. J. Ch. 348; 76 L. T. 461; 45 W. R. 445.

(8) (1895) 1 Ch. 109; 64 L. J. Ch. 170; 18 R. 95; 71 L. T. 750; 48 W. R. 345.

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differed from it." To the same effect are the observations of Lord Alverstone, C. J., in *London County Council v. Schewnik* (9), that "the Court of Appeal have recently recognized that it is desirable in the public interest, and in order that people may know with certainty what their position is, that Courts of co-ordinate jurisdiction should follow their decisions, unless there are strong grounds which enable the Court to say that the previous decisions ought not to be followed." The same view had been taken in 1860 in the case of *Newcastle-Under-Lyne and Turnpike Roads v. North Staffordshire Railway Company* (10) where Pollock, C. B., observed as follows:—"The rule is this: that wherever there is a decision of a Court of concurrent jurisdiction, the other Courts will adopt that as the basis of their decision, provided it can be appealed from. If it cannot be appealed from, they will exercise their own judgment". Baron Martin added, "that is where they think the judgment of the other Court was clearly wrong; not where it is a doubtful matter".

A similar opinion was expressed by Sir George Jessel, M. R., in *Osborne and Roulett, In re* (11) in the following terms: "When I first had the honour of sitting here I used to think myself bound by any decision of a Vice-Chancellor that was twenty years old; but the Court of Appeal in one instance held that I was not so bound, I then reconsidered my position and thought I was not bound by any decision of a Court of co-ordinate authority. Accordingly, I have since frequently declined to follow such authority." In a later case, *Gathercole v. Smith* (12), Sir George Jessel made a similar statement: "That the Courts of Queen's Bench, Common Pleas, and Exchequer followed each other's decisions was a matter of courtesy. The Vice Chancellors did not consider themselves bound by each other's decisions. I have differed frequently from Courts of co-ordinate

jurisdiction." There are, however, dicta of other learned Judges who apparently lay down a more stringent rule; for instance, in *Merry v. Nickalls* (13) Lord Justice James observed: "The whole theory of our system is, that the decision of a superior Court is binding on an inferior Court and on a Court of co-ordinate jurisdiction, in so far as it is a statement of the law which the Court is bound to accept." To the same effect is the observation of Brett, M. R. in *Palmer v. Johnson* (14) and Mr. Justice Joyce in two cases felt disinclined to depart from the decision of concurrent authorities, although he considered them to be doubtful. See *Lyon v. London City and Midland Bank* (15) and *Ravensworth, In re, Ravensworth v. Tindale* (16).

We are of opinion that the rule which should be followed in this Court is that a Judge on the Original Side is ordinarily bound to consider with respect the decision of another Judge on the Original Side produced before him, but that if he is convinced that the decision is erroneous, he is not under an obligation to follow it against his own judgment.

The result is that this appeal is allowed and the order of Mr. Justice Greaves is set aside; the application under rule 89, Order XXI is granted. The appellant-judgment-debtor is entitled to the costs of this appeal and of the hearing before Mr. Justice Greaves.

FLETCHER, J.—I agree.

*Appeal allowed.*

(13) (1872) 7 Ch. App. 733 at p. 751; 20 W. R. 929; 27 L. T. 12.

(14) (1884) 13 Q. B. D. 351 at p. 355; 53 L. J. Q. B. 348; 51 L. T. 211; 33 W. R. 36.

(15) (1903) 2 K. B. 135 at p. 138; 72 L. J. K. B. 465; 88 L. T. 392; 51 W. R. 400; 19 T. L. R. 324.

(16) (1905) 2 Ch. 1 at p. 3; 74 L. J. Ch. 353; 92 L. T. 490; 21 T. L. R. 357.

(9) (1905) 2 K. B. 695; 74 L. J. K. B. 959; 93 L. T. 550; 54 W. R. 168; 69 J. P. 409; 8 L. G. R. 1159; 21 T. L. R. 731.

(10) (1860) 5 H & N. 160; 120 R. R. 524; 29 L. J. M. C. 150; 8 W. R. 216; 1 L. T. 332; 157 E. R. 1140.

(11) (1880) 13 Ch. 774 at p. 779; 49 L. J. Ch. 310; 42 L. T. 650; 28 W. R. 365.

(12) (1881) 44 L. T. 439 at p. 440; 50 L. J. Ch. 671; 17 Oh. 1; 29 W. R. 434.

BALAK RAM v. RAM SUNDAR.

ODDH JUDICIAL COMMISSIONER'S  
COURT.

FIRST CIVIL APPEAL No. 1160F 1918.

April 14, 1920.

*Present* :—Mr. Stuart, A. J. C., and

Pandit Kanhaiya Lal, A. J. C.

Babu BALAK RAM DEAD AND ON HIS

DEATH Babu KAMLAPAT

RAM—DEFENDANT No. 1—

APPELLANT

*versus*

RAM SUNDAR AND OTHERS—

PLAINTIFFS

GAURI SHANKAR AND OTHERS—

DEPENDANTS Nos. 2—4

—RESPONDENTS.

*Hindu Law—Joint family—Manager, loan taken by, for benefit of family—Necessity—Presumption—Loan, previous, for necessity—Subsequent mortgage to re-pay loan, whether can be impeached.*

Where the managing member of a Hindu joint family borrows money, and the loan has the effect of saving the family property and of removing the fear of disturbance likely to be caused in the family business, and there is nothing to indicate that the lender acted otherwise than in good faith, the existence of necessity may be presumed. [p. 411, col. 2; p. 412, col. 1.]

Where a previous loan by the manager of a Hindu joint family upon a promissory-note is good and binding on the family, a subsequent mortgage in lieu of it cannot be impeached. [p. 412, col. 1.]

Appeal from the decree of the Subordinate Judge, Sultanpur, dated the 9th September 1918.

Mr. Mohammad Wasim and the Hon'ble Syed Wazir Hasan, for the Appellant.

Messrs. A. P. Sen, Ali Mohammad and Mahendra Deva Varma, for Respondents Nos. 1 & 3.

**JUDGMENT.**—The dispute in this case relates to certain property which was sold in execution of a decree obtained by Babu Balak Ram against Gauri Shankar, Sheo Prasad and Thakur Prasad, and purchased by Babu Balak Ram himself. Gauri Shankar, Sheo Prasad and Thakur Prasad lived jointly. The plaintiffs, Ram Sundar and Mahadeo Prasad, are the sons of Sheo Prasad. The remaining plaintiff, Raj Bahadur, is the son of Thakur Prasad.

The allegation of the plaintiffs was that the property in question was the joint family property of Gauri Shankar, Sheo Prasad, Thakur Prasad and the plaintiffs and that Gauri Shankar, Sheo Prasad and Thakur

Prasad mortgaged the same with Babu Balak Ram without any legal necessity. They sued for the possession of the said property, offering to pay any amount that the Court might adjudge to be payable by them. The defendant, Babu Balak Ram, denied that the property in dispute was the joint family property of the plaintiffs. He pleaded that the mortgage in question was made to pay certain antecedent debts due by the family and that the plaintiffs, two of whom were born after the mortgage, had no right to maintain the suit. He also asserted that he had made certain improvements after his purchase, the cost of which the plaintiffs were liable to pay.

The Court below held that the grove in dispute was not in the possession of Babu Balak Ram, that the remaining property was the joint family property of the plaintiffs and the mortgagors and that the mortgage in question had not been made for any legal necessity binding on the family. It decreed the claim accordingly for the possession of the disputed property other than the grove, subject to the payment of Rs. 249-6-11 to Babu Balak Ram on account of the cost of repairs and improvements made by him. The present appeal was filed by Babu Balak Ram, who has died since its institution, and has been re-placed by his son, Kamlapat Ram. It is now conceded on behalf of the defendant-appellant that the property in dispute is the joint family property of the plaintiffs and the mortgagors. The main questions for consideration are, whether the mortgage in question was made for legal necessity binding on the family and whether Babu Balak Ram had satisfied himself by due enquiry as to the existence of such necessity when he advanced the loan represented by the mortgage.

It appears from the evidence that Ganesh Prasad, the father of Gauri Shankar, Sheo Prasad and Thakur Prasad, and the grandfather of the plaintiffs, carried on grain-dealing and money lending business. He died in 1883. The business was then continued by Gauri Shankar on behalf of the family. Gauri Shankar and his brothers, Sheo Prasad and Thakur Prasad, were living jointly. Gauri Shankar was the manager of the family. He had borrowed some money from the Ajodhya Bank, Limited,



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in lieu of which he had executed a promissory-note in favour of the Bank on the 15th March 1900. The Bank filed a suit against Gauri Shankar for the recovery of the money due on that promissory-note and obtained a decree for Rs. 4,320-14-0 exclusive of future interest and costs on the 9th October 1900 (Exhibit A-3). In execution of that decree an application for the attachment of moveable property belonging to Gauri Shankar to be pointed out by the Bank was filed, and a warrant of attachment was issued (Exhibit A-5). But before the attachment could be made, a suit was filed by Sheo Prasad and Thakur Prasad for a declaration that the property sought to be attached was the joint family property of the firm of Ganesh Prasad and Gauri Shankar and was not responsible for the payment of the money due on the decree held by the Bank against Gauri Shankar alone (Exhibit 43). Along with this suit an application was made for an injunction to stay the attachment, alleging that the attachment, if made, would interfere with the business of the family (Exhibit A-7). Gauri Shankar, Sheo Prasad and Thakur Prasad eventually borrowed Rs. 3,500 from Babu Balak Ram and paid the money due under that decree (Exhibit A-55). The attachment was not, therefore, carried out. In lieu of the money so borrowed, Gauri Shankar and Sheo Prasad executed a promissory note for Rs. 3,500 in favour of Babu Balak Ram on the 22nd March 1901. Thakur Prasad was a minor at that time. Babu Balak Ram states that Thakur Prasad joined in the execution of the promissory-note but he does not say whether he executed it himself or whether Gauri Shankar signed it on his behalf as his guardian. This promissory-note is not forthcoming. The learned Subordinate Judge considers that it was illusory; but the cheque-book of Babu Balak Ram shows that a cheque for Rs. 3,500 was actually handed over to Babu Sarju Prasad, Banker, Fyzabad, on the 22nd March 1901 (Exhibit A-55). Babu Balak Ram states that Babu Sarju Prasad cashed the cheque at the Oudh Commercial Bank, Fyzabad, and gave its money to Gauri Shankar and his brothers. The report of the process-server, who was entrusted with the warrant of attachment, shows that on the 23rd March 1901 Gauri

Shankar gave that money along with other money he had with him, when he went to his house to make the attachment, in full satisfaction of the decree which the Ajodhya Bank, Limited, held against him (Exhibit A-5). Gauri Shankar does not deny that he had borrowed the money from the Ajodhya Bank, Limited, and that the Bank had obtained a decree against him. He admits that Babu Balak Ram lent him the money required to pay the debt due to the said Bank. His assertion that Babu Balak Ram did so in order to save him from the necessity of voting for Janki Prasad, who was a candidate for the Municipal Commissionership of Fyzabad and belonged to the party of Manohar Lal, the Director of the Ajodhya Bank, Limited, and to enable him to give his vote to Sheo Ghulam, who belonged to the party of Babu Balak Ram, is of little consequence. If the money was actually borrowed from Babu Balak Ram to pay to the Ajodhya Bank, Limited, the motive which might have influenced Babu Balak Ram to lend the money has no material bearing on the question of the plaintiffs' liability for the payment of that debt.

There is no reliable evidence to show for what purpose Gauri Shankar had borrowed the money from the Ajodhya Bank, Limited, for the recovery of which a decree was obtained by the Bank against him, but from the facts that Sheo Prasad joined Gauri Shankar in borrowing Rs. 3,500 from Babu Balak Ram for the payment of that decree by the execution of a promissory-note in his favour, and allowed the suit, filed by him and his brother, Thakur Prasad, to contest the liability of the family property for the payment of the decretal money to be dismissed for default, it may reasonably be presumed that the money due to the Ajodhya Bank, Limited, was a debt which the family had undertaken to pay or was liable to discharge.

The mortgage-bond in suit was executed in lieu of the money due on that promissory-note. Babu Balak Ram states that at the time of the execution of the promissory-note he had enquired as to the necessity for the loan. We see no reason to disbelieve him. The loan had the effect of saving the family property from attachment and of removing the

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fear of disturbance which the attachment of the moveable property was likely to cause to the family business. There is nothing to indicate that Babu Balak Ram acted otherwise than in good faith. The enquiry was made when the original loan of Rs. 3,500 was taken, and, as pointed out in *Anant Ram v. Collector of Etah* (1), the existence of necessity can in such circumstances be presumed. If the previous loan was good and binding on the family, it is not open to the plaintiffs to impeach the mortgage which has been effected in lieu of it. In *Sahu Ram Chandra v. Bhup Singh* (2) their Lordships of the Privy Council emphasized that where a joint family property had been sold out and out, or where a decree in enforcement of a debt had been obtained against the property and in execution of that decree rights had thus sprung up with regard to the joint family estate, those rights were not to be defeated by the members of the joint family simply questioning the transaction entered into by its head. It was open to them to show that the debts, in satisfaction of which the property was sold, were contracted for immoral purposes, and that the purchaser had notice that they were so contracted. There was no such allegation or proof in this case. The Counsel for the plaintiffs states that his clients are prepared to redeem the mortgage but the present suit is not so framed. The plaintiffs do not admit the mortgage or seek to redeem it. They impeach its validity and offer to pay any amount, for which a legal necessity may be found to exist on its avoidance. It is unnecessary to consider how far the plaintiffs' right of redemption is affected by the sale. If the plaintiffs cannot avoid the mortgage, no decree for redemption can be granted in this suit.

The appeal is, therefore, allowed and the claim of the plaintiffs dismissed with costs here and hitherto. The plaintiffs will bear

their own costs throughout. The Court-fees payable by the plaintiffs to the Government shall be noted in the decree.

*Appeal allowed.*

### CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 618  
OF 1919.

July 23, 1920.

Present:—Mr. Justice Walmeley and  
Mr. Justice Greaves.

TARAK NATH SARKAR AND ANOTHER—  
DEFENDANTS—APPELLANTS  
*versus*

SRISH CHANDRA RAI AND OTHERS—  
PLAINTIFFS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), s. 29—Landlord and tenant—Rent, enhancement of—Holding, augmentation of—Increased rent for additional area—Section, whether applicable.*

Where a tenant's holding is augmented upon his taking a settlement of an additional area and a new arrangement is arrived at, and a new rental fixed thereby increasing the rent originally paid, the rent so increased is not an enhancement, and consequently section 29 of the Bengal Tenancy Act does not apply. [p. 414, col. 1.]

Appeal against the decree of the Subordinate Judge, Second Court, Pabna, dated the 11th of January 1919, modifying that of the Munsif, Additional Court at Serajunge, dated the 14th of May 1918.

FACTS appear from the judgment.

Babu Provasch Chandra Mitter, (with him Babu Bireswar Bagchi) for the Appellants:—The original rent was only 78 rupees. The plaintiffs now claim rent at the rate of Rs. 146 on the basis of my agreement. The enhancement claimed is thus more than 2 annas in the rupee. The agreement being in contravention of the provisions of section 29 of the Bengal Tenancy Act cannot be enforced. The new arrangement or new settlement is only a colourable transaction to evade the provisions of section 29. See *Raj Kumar Sarkar v. Faizuddin Tarafdar* (1). Besides, there is no finding

(1) 44 Ind. Cas. 290; 16 A. L. J. 245; 34 M. L. J. 291; 7 L. W. 323; 4 P. L. W. 226; 23 M. L. T. 228; 22 C. W. N. 484; 27 O. L. J. 363; 20 Bom. L. R. 524; 40 A. 171; (1918) M. W. N. 446 (P. C.).

(2) 39 Ind. Cas. 280; 44 I. A. 126 at p. 133; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 O. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437 (P. C.).

(1) 20 Ind. Cas. 282; 22 O. L. J. 81.

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that the additional rent in excess of that allowed by section 29, is in respect of the area which has been added to the area of the original holding. The mere fact that there was some additional land included in the tenancy would not take the case out of the operation of section 29. Refers to *Sonaulla Sardar v. Bhagabati Debya Chowdhurani* (2).

Babu Bepin Behary Ghose (with him Babu Bansori Lal Sarkar), for the Respondents:—The provision of section 29 of the Bengal Tenancy Act has no application to the facts of this case. Here the area of the original holding was 68 *bighas* and odd. An area of 21 and odd *bighas* has been added to the original area and a new settlement was arrived at between the landlord and the tenant for the payment of a consolidated rent in respect of a new holding of 90 *bighas*. Refers to *Kedar Nath Hazra v. Manindra Ohandra Nandi* (3). *Bata Mandal v. Manindra Ohandra Nandi* (4).

Babu Provash Ohandra Mitter, in reply:—

The cases in *Kedar Nath Hazra v. Manindra Ohandra Nandi* (3) and *Bata Mandal v. Manindra Ohandra Nandi* (4) are cases of settlement of bona fide dispute between the landlord and the tenant. Refers to *Prabat Ohandra Gangapadhya v. Chirag Ali* (5), *Manindra Ohandra Nandi v. Upendra Ohandra Hazra* (6). Even if it were a case of consolidation, my original rights would remain. See *Adit Singha v. Sukhraj* (7), *Jagabandhu Saha v. Magnamoyi Dassi* (8). Refers also to *Ajuhannessa Bibi v. Hakim Biswas* (9).

#### JUDGMENT.

GREAVES, J.—This is an appeal by the defendants against a decision of the Subordinate Judge modifying a decision of the Munsif. The material facts are as follows:—

The plaintiffs sued to recover from the defendants rent at the rate of Rs. 146 odd in respect of the defendants' holding.

(2) 48 Ind. Cas. 35; 28 O. L. J. 142.

(3) 5 Ind. Cas. 309; 11 O. L. J. 106.

(4) 25 Ind. Cas. 829; 21 O. L. J. 325; 19 C. W. N. 321.

(5) 33 O. 607; 4 C. L. J. 320; 11 C. W. N. 62.

(6) 2 Ind. Cas. 828; 36 C. 604; 9 O. L. J. 343.

(7) 21 Ind. Cas. 395; 17 O. L. J. 435.

(8) 36 Ind. Cas. 884; 44 C. 555; 24 C. L. J. 363; 22 C. W. N. 89.

(9) 13 C. W. N. 1011 (208) notes.

The defendants' holding originally consisted of 68 *bighas* of land and the rent payable in respect of these 68 *bighas* was a sum of Rs. 78 odd. Subsequently, according to the findings of the lower Appellate Court, an area of some 21 *bighas* was added to the defendants' original holding and the plaintiffs' case is that a new settlement or arrangement was arrived at between them and the defendants whereby, in consideration of the additional area of 21 *bighas* being added to the original area of 68 *bighas*, the rent payable in respect of the whole holding of 90 *bighas* should be Rs. 146 odd, the amount now claimed by the plaintiffs in the suit.

The first Court held that the plaintiffs were not entitled to recover this amount of rent inasmuch as their claim was in violation of the provisions of section 29 of the Bengal Tenancy Act and the Court held that they were only entitled to rent at the rate payable for the original holding, that is to say, that in respect of the addition of 21 *bighas* rent was payable as the rate payable from the original holding of 68 *bighas*. The decision of the first Court was reversed on appeal by the Subordinate Judge who held that the provisions of section 29 of the Bengal Tenancy Act had no application, inasmuch as a new arrangement or settlement had been arrived at between the parties and that, consequently, the provisions of section 29 had no application. There were various other grounds stated in his judgment but I do not think that it is necessary to deal with those, as the main subject of contention before us has been as to whether the claim of the plaintiffs is in violation of section 29 of the Bengal Tenancy Act or not, and if it is not, it is conceded that the appeal must fail.

Now, what is said on behalf of the appellants is that, there is no finding that the additional rent over and above the enhancement allowed by section 29 is attributable to the added area of 21 *bighas* and we are asked to remand the case in order that a finding may be arrived at as to whether this is so or not. I do not think that this remand is necessary because, in my opinion, the provisions of section 29 of the Bengal Tenancy Act have no application to the facts of this case. I think,



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upon the findings of the lower Appellate Court, which are perhaps not so clear as they might have been, there is a finding that upon the defendants taking settlement of the additional 21 *bighas*, a new arrangement was arrived at and that a new rental of Rs. 146 was fixed. It is said on behalf of the defendants that this is a colourable infringement of the provisions of section 29 of the Bengal Tenancy Act: if it were, I think the appellants would be entitled to succeed, for, as has been pointed out in the decision of the case of *Raj Kumar Sarkar v. Faisuddi Tarafdar* (1), you have to consider in each case whether the enhancement of rent claimed is really a colourable infringement of section 29 or whether it is a new rental arrived at between the parties. If it is the former, then section 29 would apply and would be a bar to the enhancement of rent claimed. If, on the other hand, as appears to be the case here from the facts found, that this is not so, but that the inclusion of the additional 21 *bighas* resulted in a new arrangement being arrived at between the parties, then section 29 of the Bengal Tenancy Act has no application and authority for that proposition will be found in the case to which I have already referred and if further authority is desired it will be found in the case of *Satish Chandra Giri v. Kabiraddin Mallick* (10). At page 234 appears the argument of the learned Vakil who appeared for the appellant in that case. He argued that there had been an increase of rent on account of an increase in the area of the holding and consequently section 29 of the Bengal Tenancy Act did not apply. In the judgment of the Court, at page 235, the learned Judges remark: "It is argued that section 29 applies only to an increase in the rate of rent, and not to an increase in the amount of rent by reason of increase of the area," and then, later on, the learned Judges say, "we are of opinion that this contention is correct. Section 29 of the Bengal Tenancy Act applies only to cases of increase in the rate of rent, which is ordinarily designated 'Enhancement of rent'." In the result in that case, a remand was necessary to ascertain whether an increase in the rent

was due to an increase in the area. But that does not affect the statement of law laid down in the judgment to which I have already referred.

There is only one other case to which I need refer that is the case of *Sonaulla Sardar v. Bhagabati Debya Choudhury* (2). The learned Vakil for the appellants contended that this was an authority in support of the proposition for which he contended. But I do not think that on an examination of the facts of that case that this contention is correct. The original holding in that case was  $7\frac{1}{4}$  *bighas* and it was subsequently found on a fresh survey that the area was  $9\frac{1}{2}$  *bighas*. An increased rent was paid in respect of this increased area. Now, in that case the claim of the landlord for rent at the rate at which he claimed was disputed as being an infringement of the provisions of section 29 of the Act and this contention was upheld. But it appears to me that there is nothing in that case to show that the original holding did not consist of the area of which it was found to consist, upon a fresh survey being made, and accordingly in that case it seems to me that the rate of rent was fixed for the holding whatever its area was at the time of the demise and that accordingly section 29 applied. But the present case is entirely different from that case. Here, as I have already stated, you have an additional holding of 21 *bighas* and a fresh arrangement arrived at between the parties for increase of rent.

The appeal fails and it must be dismissed with costs.

WALMSLEY, J.—I agree.

*Appeal dismissed.*

### CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 275  
AND 330 TO 334 OF 1918.

June 2, 1920.

Present:—Mr. Justice Teunon and  
Mr. Justice Newbould.

HARI PROSAD ROY CHOWDHURY—  
DEFENDANT—APPELLANT

*versus*

RAMA PROSAD RAI CHOWDHURY

AND OTHERS—PLAINTIFFS—RESPONDENTS.  
*Contract Act (IX of 1872), s. 70—Joint estate in*

(10) 26 C. 233; 13 Ind. Dec. (N. S.) 753.

## HARI PROSAD ROY v. RAMA PROSAD RAI.

*tenancy—Decree for rent—Decree satisfied by one co-tenant—Contribution—Liability of other co-tenants.*

H. and R. were tenants of an estate in the proportion of  $\frac{1}{3}$  and  $\frac{2}{3}$ ; to save the estate R. satisfied a rent decree by paying the amount due for the entire estate, and brought the present suit against H. to recover from him his share of the amount awarded by the decree:

*Held*, that as the payment by R. was not a voluntary payment and as H. had benefited by the payment, he was bound to reimburse R. on the principle laid down in section 70 of the Contract Act. [p. 416, col. 2.]

Appeals against the decrees of the First Additional District Judge, 24 Parganas, dated the 18th of September 1917, affirming that of the Munsif, Third Court, at Diamond Harbour, dated the 22nd of March 1917.

FACTS appear from the judgment.

Dr. Sarat Chandra Basak (with him Babus Bepin Chandra Bose, Jatis Chandra Guha for Babus Surya Kumar Guha, Radhika Ranjan Guha for Babu Tajendranath Bose), for the Appellant.—The defendant is the appellant. The appeal arises out of a suit for contribution against defendants Nos. 1 and 2. There was a rent-decree by the landlord against plaintiff, defendant No. 1 and his niece Chandra Kumari. In execution of that decree the landlord put up to sale some of the properties belonging to the plaintiff. To save his properties which were not the subject-matter of that suit the plaintiff put in the decretal amount and compensation. The defendant No. 1 has paid off his share of the decretal amount. The present contest is with regard to Chandra Kumari's share. There being no claim against defendant No. 1 he should not have been made liable. The next question that arises is, whether the debt is to be a personal debt of Chandra Kumari or would be a charge on her father's death. The defaulting tenure has not been sold. The personal property of Chandra Kumari has been taken by defendant No. 2 as heir to her *stridhan* properties. Refers to *Upendra Lal Mukerjee v. Girindra Nath Mukerjee* (1). It was a claim made against Chandra Kumari for contribution. That, I submit, would surely make it a personal debt. Under the rent, decree these three persons were made liable. The decree also was executed as a personal decree against them under the provisions of the

Code of Civil Procedure, Section 70 of the Indian Contract Act would apply to the case. Refers to *Bireswar Das Dey v. Kamal Kumar Dutt* (2); *Kristo Gobind Majumdar v. Hem Chunder Chowdhury* (3) and *Roy Radha Kissen v. Nauratan Lall* (4). Here, in the present case, the question should not be looked at from the point of view that the estate has been benefited. Chandra Kumari was bound to pay the money. Supposing she had Rs. 10,000, from which she could have paid off her debt. On her death the creditors would be perfectly entitled to recover the amount from her reversioners who inherited the whole amount. Refers to *Braja Lal Sen v. Jiban Krishna Roy* (5) and *Jiban Krishna Roy v. Brojo Lal Sen* (6). Liability for rent ought to be regarded as a personal liability, the only exception being in the case of a landlord executing a decree under the provisions of the Bengal Tenancy Act. As the present case is not within that exception it ought to be taken as a personal liability, which her reversioner would be bound to contribute. We have paid our share, the balance should be paid by him.

Babu Surendra Chandra Sen (with him Babu Pratul Chandra Rai), for the Respondents.—The cases cited by them have no bearing on the present point. Defendant No. 1 and Chandra Kumari were the joint proprietors. She inherited her father's properties. She having died in 1316 her properties devolved on defendant No. 2. The suits were brought after Chandra Kumari's death. The decrees, consequently, were passed long after her death, although in some suits the rents claimed were for a period prior to Chandrakumari's death. The suit could be, therefore, decreed under section 65 of the Bengal Tenancy Act against the reversioner. In a rent suit under section 65 of the Bengal Tenancy Act rent is a first charge. At the time when the suit was brought and the decree was passed, Chandra Kumari was dead. Hari Prosad succeeded Kali Prosad, Chandra Kumari's father. Therefore, Chandra Kumari had nothing to do with the estate neither her heirs. It was, there-

(1) 25 O. 565 at p. 569; 2 C. W. N. 425; 13 Ind. Dec. (N. S.) 373.

(2) 16 Ind. Cas. 437; 17 C. W. N. 337.

(3) 16 C. 511; 8 Ind. Dec. (N. S.) 337.

(4) 6 C. L. J. 490.

(5) 26 C. 285; 13 Ind. Dec. (N. S.) 787.

(6) 30 C. 550 at p. 554; 7 C. W. N. 425; 30 I. A. 81; 5 Bom. L. R. 428; 8 Sar. P. O. J. 444 (P. C.).

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fore, plaintiff and Hari Prosad who were the only tenants. Further, there was no decree against Chandra Kumari. I did not make a voluntary payment which was solely for the benefit of the estate.

Dr. Sarat Chandra Basak replied in brief.

**JUDGMENT.**—These six appeals arise out of suits brought by the plaintiff to recover from the defendant No. 1 one Hari Prosad the sums paid by the plaintiff in satisfaction of six rent decrees which according to the plaintiff were justly payable by defendant No. 1.

It appears that the original owners of certain tenures were the plaintiff, Rama Prosad, the defendant No. 1 Hari Prosad and one Kali Prosad, the last two being brothers. On the death of Kali Prosad he was succeeded first by his widow and then by his daughter Chandra Kumari. Chandra Kumari, it appears, died towards the close of the year 1316. Thereafter the landlord brought six rent suits claiming rent for the years 1313 to 1316, that is for four years during which Chandra Kumari was alive. He made parties defendants to these six rent suits Rama Prosad, Hari Prosad and one Sital Prosad who was the daughter's son of Chandra Kumari and, therefore, heir to *stridhan* property. The rent-suits were decreed and payment by the defendant was directed, and it may here be observed that the payment to be made was not payment to be made out of the estate left by Chandra Kumari. The decrees are essentially rent-decrees against the tenant defendants. These decrees were put in execution and eventually some portions of the plaintiff's personal properties were put to sale and in order to recover these properties the plaintiff was compelled to satisfy the decrees in full. That he was justly liable to pay  $\frac{1}{3}$ rd of the decretal amount it is not disputed, and similarly it is not disputed that Hari Prosad was similarly liable to pay  $\frac{1}{3}$ rd, and in fact he has paid  $\frac{1}{3}$ rd of the respective decretal amounts.

The question is as to the remaining  $\frac{1}{3}$ rd, whether Hari Prosad who has succeeded to Kali Prosad's share as his reversionary heir should be required to pay the remaining  $\frac{1}{3}$ rd on account of his having inherited the share of Kali Prosad. Both Courts have answered this question in the affirmative.

The learned Vakil for the appellant contends on the strength of a number of cases which he has cited, for instance, the cases reported as *Birenwar Das Dey v. Kamal Kumar Dutt* (2), *Kristo Gobind Majumdar v. Hem Chunder Chowdhury* (3) and *Jiban Krishna Roy v. Brojo Lal Sen* (6) that Sital Prosad and not he is liable for that  $\frac{1}{3}$ rd. We are of opinion that this contention must fail. The decrees were not made against Chandra Kumari in her life time. They were made against Hari Prosad after her death when he was in possession as tenant having interest extending to a  $\frac{1}{3}$ rd share. It is true that Sital Prosad was also a judgment-debtor in that decree, but on the facts found it appears to us that he was not a necessary party. The only tenant-defendants in possession of the tenures were Rama Prosad and Hari Prosad and Hari Prosad was interested in them to the extent of  $\frac{2}{3}$ rd share. The rent-decree was the first charge on the holding in his hands and in the plaintiff's hands. The decree was against him. The payment made by the plaintiff was certainly not a voluntary payment and it cannot be said that Hari Prosad was not benefited by that payment and, on the principle laid down in section 70 of the Contract Act, Hari Prosad is bound to reimburse the plaintiff.

It has been pointed out to us that in the plaint as framed the plaintiff asked for relief not against Hari Prosad but against Sital Prosad. That claim was never formally amended, but it is quite clear that when the case came on for trial it was clearly understood that the claim was made against defendant No. 1, Hari Prosad, and that Hari Prosad fully realized that position and had every opportunity given him to meet that case. The defect in the plaint and the failure to amend it, therefore, did not affect the merits of the case and does not affect the appeal on its merits.

For these reasons, we dismiss these six appeals with costs.

*Appeals dismissed.*



EMPEROR V. ANANT KUMAR BANERJI.

## CALCUTTA HIGH COURT.

CRIMINAL REFERENCE NO. 1 OF 1920.

May 12, 1920.

*Present:—*Mr. Justice Walmsley and  
Justice Sir Syed Shamsul Huda, Kt.

EMPEROR—PROSECUTOR

*versus*

ANANT KUMAR BANERJI AND

ANOTHER—ACCUSED

*Confession, made through fear or under inducement,  
admissibility of.*

A statement made to a Magistrate by an accused person through fear (consisting of a threat by the Police to put his womenfolk to trouble), is inadmissible. Similarly, a statement made as the result of an inducement by the Police, which caused the person making the statement to believe that he would be offered a free pardon, should be rejected. [p. 418, col. 2; p. 419, col. 1]

Criminal reference by the Additional Sessions Judge, Howrah.

Mr. Gibbons, Z. O., (Advocate General),  
Babus Bankim Chunder Sen and Beni M. dhab  
Chatterjee, for the Crown.

Babus Dasarathi Sanyal, Manmatha Nath  
Mukherjee, Debendra Nath Bhattacharjee and  
Bibhuti Bhushan Lahiri, for the Accused.

## JUDGMENT.

WALMSLEY, J.—The accused persons were placed on their trial with four others before the Sessions Judge of Howrah upon charges of forging, and conspiring to forge, currency notes. The Jury was unanimous in acquitting all the accused persons, and the learned Judge accepted their verdict in regard to the other four, but referred the case as against these two men to this Court under the provisions of section 307, Criminal Procedure Code.

A short account of the incidents leading up to the trial will help to make the case more intelligible. On March 18th, 1918, a forged currency note for Rs. 5 was tendered and accepted at Bagnan Railway Station, a station on the Bengal Nagpur Railway. When it was found that the note was spurious, it was sent to the Railway Police, and, later, Sub-Inspector Panna Lal Roy of Bagnan Thana took up the enquiry. On April 1st, 1918, Panna Lal searched the house of the accused Anant at village Chandbag and found two five-rupee notes, one of which was forged. A man named Shibkali Chatterjee had given to Panna Lal the information which lead him to

search Anant's house on April 1st, and the same man handed over to him on April 16th, a post card, marked Exhibit II, which is said to establish a connection between Anant and Dhiraj. On April 19th, 1918, Inspector Darpa Narain Singh was placed in charge of the investigation. It is not necessary to follow all the details of his proceedings, but it may be remarked that by the time this trial was begun, the Police were in possession of no less than 84 forged notes of five rupees each, all taken, according to an expert, from the same block. On January 27th, 1919, Anant's house was searched a second time by Sub-Inspector Panna Lal Roy and this time the charred fragments of some five-rupee notes are said to have been found. Anant was arrested and taken to the head-quarters of the sub-division at Uluberia where he made a statement on the following day. He was remanded to custody, but released on bail on February 3rd and on February 13th he made a second statement. In the interval, he is said to have given information to the Police on various points. For the present, these are the principal points in the story against Anant.

Dhiraj Chandra Pal's family house is at a village called Bhowanipur, but he is said to live generally at the house of his father-in-law at Bhadreswar. A search was made of that house on January 27th, 1919, without result: then a second search was made on February 5th and this time it is said that inside a box were found some pearls wrapped in a piece of paper similar to the paper on which forged notes were printed. Dhiraj, it may be noted, was not present at this search. Then, as the result of the information supplied by Anant, the Inspector traced a man, named Lakhan, who had served in the house at Bhadreswar, to his home in Orissa. This Lakhan was brought to Calcutta, where he made some disclosures and on March 17th, he showed to the Police a tank into which the press had been thrown, and on the morning of the 18th the component parts of a press were recovered from the tank in the presence of witnesses. These are the salient points in the story against Dhiraj.

Both the accused say that they are innocent of the charges preferred against them. Anant does not admit that the charred fragments were found in his house

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on January 27th : he urges that the statements said to have been made by him are not admissible ; and that the evidence given by Lakhan is the evidence of an accomplice and unworthy of credit. Dhiraj says that he knows nothing about the packet of pearls, and he does not claim the pearls ; he denies having any correspondence with Anant ; he also attacks the evidence of Lakhan, and he says he is in no way responsible for what was found in the tank. He also pleads that at the time when the notes were being forged—the last quarter of 1917—he was laid up with a broken leg at Bhowanipur.

Before dealing with the evidence, I may note that the expert's evidence is not challenged. The Police are in possession of a large number of forged notes, all having a common origin, and the charred fragments are fragments of forged notes similar to the uninjured forged notes. These facts, of course, do not in any way affect the accused. One other fact to be mentioned is that the forged note found in Anant's house in March 1918 is of the same origin. That by itself proves nothing more now than it did in 1918 ; but it will become significant if it be proved that, ten months later, he had five or more similar notes in his possession. Consequently, I think that the proper starting point in considering the evidence against Anant must be the house-search that took place on January 27th, 1919.

The witnesses to this search are the Sub-Inspector and Rajani Kanta Chakravarty and Harihar Chatterjee ; prosecution witness No. 15 also signed the search list, though he was not present during the search. One Shib Kali Chatterjee also signed the search list and was present part of the time, but he has not been examined as a witness and is not to be confused with the other man of the same name (prosecution witness No. 50). This evidence has been criticised at great length. The point which impressed me most was this that if the story is true, Anant must have tried to burn the forged notes directly after the arrival of the Police, and it seems surprising that at such an early hour in the morning no one caught sight of the blaze, but as the walls are solid if the door were shut in time the light might have escaped notice. There are no doubt discrepancies in the evidence ; but the charred fragments were

undoubtedly brought out of the kitchen and placed on a mat outside. The witnesses are perfectly clear on that point. They also say that the persons of the Sub-Inspector and of the witnesses were searched. The long delay that took place before Anant was marched off to the *Thana* is easily explained by the meticulous care with which the fragments were detailed in the search list. The result of the evidence, to my mind, is that we must either believe that the fragments were found as they are said to have been found, or we must hold that they were cunningly introduced into the kitchen by the Sub-Inspector. The first of these alternatives is, I think, proved by the evidence. The second involves overwhelming difficulties, namely, that the intended fraud must have been discovered when the Sub-Inspector's person was searched, and that Anant would instantly have denounced the Sub-Inspector. The second of these difficulties is the greater ; Rajani, Harihar and Manmatha are not hostile to Anant, and the question was not put to them. The Sub-Inspector also was not asked whether he had gone to the house with the notes in his pocket, nor whether the accused had at once charged him with fraud. Lastly, there is the statement of the accused ; he was asked by the Committing Magistrate on June 26th whether the fragments had been found by the Sub-Inspector in his oven, and his answer was "*Daroga babu katakguli kagas paiyachhilen: e tukraguli taha naho.*" He said nothing further to the Judge. These words can only mean that the *Daroga* found some pieces of paper and then substituted the charred notes, but that is not the defense suggestion.

My conclusion is that the charred fragments of forged five rupee notes were found in Anant's kitchen in the manner alleged. It is his kitchen, and he is the only male inmate apparently.

Then we come to the statement made by Anant before Mr. Rahman on the following day. The objection taken on this statement is that it was made under pressure, and the pressure is said to consist of a threat by the Sub-Inspector to put Anant's womenfolk to trouble. I think it must be held on the prosecution evidence that the Sub-Inspector spoke unwisely, but I cannot believe that a man of his experience

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was such a fool as to use the words "*bijjat karibo*" in public. The position, however, was that, unless Anant shouldered the responsibility, all who were in the house at the time of the discovery might be accused and the only other inmates were his wife and mother. I think that fear may have worked on the mind of Anant, and may have been encouraged by the Sub Inspector in a subtle way in the hours that elapsed before Anant reached the Magistrate. In that view, I think that the statement is not admissible. The second statement, again, is said to be inadmissible because it resulted from inducement by the Inspector and Sub-Inspector. Shortly stated, the case is that Anant was led to believe that he would be offered a free pardon and examined as a witness. The evidence has been discussed elaborately; but I think the matter may be disposed of in a few words. After the statement on January 28th, Anant was sent to jail: an application for bail was refused abruptly, and at the instance of the Police. Then came a sudden change; Anant was released on February 3rd, on nominal bail: he went to Calcutta with Darpa Narayan, he showed the Inspector—it is said—Halder's shop and other places, in fact made him self thoroughly useful, and on February 13th he made a second statement much more detailed than the first, just the sort of statement that the Police like to have from a man who is to be used as an approver. It is difficult to believe that in those ten days he was not given to understand that a pardon was going to be offered to him on the condition that he betrayed his friends. In my opinion, therefore, the second statement made by Anant must also be rejected as inadmissible. I may say, in passing, that the omission to examine the Pleader Prabodh Chandra Chatterjee seems matter for regret.

With the confessions or statements ruled out of consideration, there remains the evidence of Thandaram and Kedar, the two coolies, and of Lakhan Jana. The evidence of the coolies loses its value by the rejection of the second confession, and I think it may be ignored. Lakhan says he was employed as a servant in the house of Dhiraj's father-in-law at Bhadreswar, and he describes the actual making of the forged notes. His evidence is assailed as being that of

an accomplice or at any rate, no better than that of an accomplice. If his story is true, there can be no doubt that he was placed in an extremely awkward position, a position which would be embarrassing even to a man of scrupulous integrity. But that fact does not release him from the suspicion that must attach to a man who sees a wrong act done, and holds his peace for many months, and then tells his tale without any signs of reluctance. I think it would be dangerous to say that his evidence is free from taint and, therefore, I hold that it needs corroboration. Another point against him is that, since he was brought back from his home in Orissa he has been living under the same roof as the Inspector, and it is the Inspector who secured him his present employment. Those are facts which render it likely that Lakhan is anxious to help the Police.

The result of this consideration of the evidence is that, while I hold it proved that charred fragments of forged notes were found, as alleged, in the house of Anant, I am unable to hold that his share in the manufacture of the notes has been established.

Turning to the case of Dhiraj, the evidence is that of Lakhan Jana, supplemented by the finding of a press or parts of press near his house and of a piece of paper in his house, and the correspondence with Anant. The statements made by Anant may be left out of account entirely. Of Lakhan I have already spoken: he needs corroboration as against Dhiraj just as much as against Anant. Now, there is no reason for doubting that parts of a press were found in a tank close to the house where Dhiraj was living in Bhadreswar, but the tank is accessible to others, and it seems that better hiding places might have been found. The paper in which the pearls were wrapped gives rise to suspicion, but I doubt whether more can be said than that. As for the correspondence with Anant, the most that can be said of it is, that it proves a certain measure of intimacy between the two men.

The result is that, as against Dhiraj I think that the evidence is inadequate: it raises grave suspicion but nothing more.



## RAJBANSI V. EMPEROR.

In my judgment, the verdict of the Jury should be endorsed except in regard to the charge under section 489.C against Anant. I think the attention of the Jury was so much absorbed in the charge of general conspiracy, that they overlooked the fact that this charge rested on the evidence of a few witnesses, whose evidence is wholly unaffected by the criticisms to which the other evidence is open. I hold that the charred fragments of forged notes were found, as alleged, in the possession of Anant, and from the circumstances already set out it follows that he knew them to be forged and intended to use them as genuine.

The result is, while Dhiraj is acquitted on all charges in accordance with the verdict of the Jury, Anant Kumar Banerji is convicted of the charge under section 489 C, of the Indian Penal Code, and acquitted of the other charges under section 489 A. Anant is sentenced to undergo three years' rigorous imprisonment.

SHAMSUL HUDA, J.—I agree.

*Reference answered accordingly.*

ALLAHABAD HIGH COURT.  
CRIMINAL REVISION No. 241 OF 1920.  
May 21, 1920.

Present :—Mr. Justice Walsh.  
RAJBANSI AND ANOTHER—ACCUSED  
APPLICANTS

*versus*

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 112—Security proceedings—Notice to show cause, whether necessary—Failure to issue notice, effect of—Revision—Application admitted on certain grounds—Procedure.

Two persons were arrested under section 55 of the Criminal Procedure Code on the ground that they were reputed habitual thieves and house-breakers and were placed before a Magistrate who fixed a date for evidence, with the object of issuing a notice under section 112 of the Code and detained the accused in custody without issuing any notice. On the date fixed the Magistrate recorded the evidence given by the Police and treated it as given in the hearing under section 110, and, without giving the accused the slightest

warning or opportunity of obtaining legal assistance called upon them to conduct their case:

*Held*, that the procedure of the Magistrate was wholly irregular and vitiated the proceedings. [p. 42, col. 1.]

Before a hearing under section 110 of the Criminal Procedure Code can by law take place, it is incumbent on the Magistrate, under section 112, to make an order setting forth the substance of the information which he has received, the amount of the bond to be executed, the period for which it is to be executed and the number, character and class of sureties, if any, required. Merely informing an accused person that he is a suspected thief is not sufficient, as, however substantial that expression may be as an offensive description of an individual, it gives the person alleged to be that character not the slightest intimation as to the grounds on which it is based. [p. 42, col. 2; p. 43, cols. 1 & 2]

Where a party applies for revision and obtains an order issuing notice to show cause, he should at the hearing confine himself to the grounds upon which that order was made. [p. 42, col. 2; p. 43, col. 1.]

Criminal revision from an order of the District Magistrate, Gorakhpur, dated the 19th of December 1919.

Mr. J. M. Banerji, for the Applicants.

Mr. R. Malcolmson, Assistant Government Advocate, for the Crown.

JUDGMENT.—These proceedings must be set aside on the ground of irregularity. The charge was the usual one against several people, including the two applicants, Rajbansi and Siar, under section 110 of the Code of Criminal Procedure, the alleged ground being that they were habitual thieves and house-breakers. There has been an appeal to the District Magistrate, who points out that these two men in particular are of comparatively recent appearance in this capacity and are entitled to more lenient treatment, but the point taken before me is a good one. The two applicants were arrested on the 9th of September under section 55. That arrest was lawful as the ground on which they were arrested was that they were "reputed habitual thieves and house breakers." They were then taken before the Sub Divisional Officer who, on the 9th of September, the same date as the report made of their arrest and of the grounds on which they had been arrested, fixed the 19th of September, for the production of evidence presumably with the object of issuing a notice under section 112. As the Magistrate seems doubtful about the procedure it is desirable to point out that section 112 requires him to make an order which is really a notice in writing setting forth the substance of the informa-

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tion which he has received, the amount of the bond to be executed, the term and the number, character and class of sureties, if any, required, so that he has to receive substantial information in order to found his authority to issue a notice to show cause. It is only after he has done that that the actual hearing under section 110 can by law take place at all. In fixing the date, the 19th September, it looks as though the evidence of which he required production was the evidence the substance of which it was necessary to set forth in the notice because he had not got it on the 9th and he did not then purport to issue notice. He thereupon detained the applicants in custody from the 9th to the 19th without having issued any notice at all. That was wrong. The procedure in such cases is clearly indicated by the Act, but it is further emphasized by the case of *Emperor v. Paiml Nai* (1), where my brother Knox pointed out that a Magistrate should not detain a person under section 110 unless he has information upon which he can make the order required by section 112. When the 19th of September arrived the Magistrate made matters worse by not merely issuing the notice on that date—the notice had in fact been dated the 19th September—but he seems to have forgotten the object with which he had fixed the 19th and proceeded to treat the evidence which had been given by the Sub Inspector as the evidence in the hearing under section 110 and fixed a further date for the accused to produce their evidence. One result of that proceeding, which was clearly irregular, is that the accused, who had been kept in detention for ten days without any opportunity having been given to them, were suddenly called upon to conduct their case without the slightest warning or opportunity of obtaining legal assistance. The defence is just as much entitled to be heard and developed during the evidence for the prosecution as after the prosecution evidence is closed, so that there was double irregularity. I rather doubt whether the notice was a good one. It is impossible to lay down any standard to which such notices are to conform, but when the Legislature provided that a Magistrate should make

an order in writing setting forth the substance of the information received, it certainly meant a great deal more than telling a man that he was a suspected thief, because, however substantial that expression may be as an offensive description of an individual, it gives the person alleged to be that character not the slightest intimation as to what are the grounds upon which it is based. If that notice is sufficient, all that would be necessary would be to call upon anybody in India to show cause on the mere statement that he was suspected by the Police to be an habitual thief; but the procedure clearly requires something in the nature of an indictment or charge containing substantial particulars indicating the grounds upon which the Police have given information to the Magistrate. On the other hand, I make this general observation that it may be of assistance to the Bar, at any rate in any case in which I am concerned, that where the real ground for complaint against the proceedings of the Court below does not appear in the grounds of an application for revision and the gentleman appearing for the person showing cause (in this case the Assistant Government Advocate) has been taken by surprise, I should certainly make no order until the person showing cause had an opportunity of investigating the ground which is urged in Court and of which he has had no previous notice. That is an ordinary business arrangement and it is clear that the Court ought not to make any order upon either party until they have had full opportunity of meeting the points in the case. In this application there was no reference whatever to the omission of the Magistrate under section 112 and the irregularity committed on the 19th of September, and, although it would be possible for anybody examining the record to discover it for himself, it is very often like looking for a needle in a bundle of hay, and if we had not found by the incontrovertible papers on the record that the matter was too clear for argument, I should have adjourned the case for Mr. Malcolmson to get an explanation from the Sub-Divisional Officer. In this case it is not necessary, but as a rule I think it a desirable practice, that parties applying in revision should be confined,

(1) 17 Ind. Cas. 574, 10 A. L. J. 351; 13 O. L. J. 827.

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where cause is shown, to the grounds upon which the original order issuing notice was made.

This application is allowed and the proceedings are set aside.

*Proceedings set aside.*

## PATNA HIGH COURT.

CRIMINAL REVISION No. 484 OF 1920.

November 15, 1920.

Present:—Justice Sir B. K. Mallik, Kt.  
and Mr. Justice Bucknill.

GAJADHAR LAL alias GAJO LAL—  
PETITIONER

*versus*

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), ss. 234, 235 Penal Code (Act XLV of 1860), ss. 408, 77 A—Charge under s. 408—Court, competency of, to try with this charge three charges under s. 477 A—Revision—Finding of fact—High Court, power of, to interfere.*

Where a person is charged, under section 190, Penal Code, with criminal breach of trust committed in one year in respect of a lump sum of money, the Court is competent, by virtue of the provisions of sections 234 and 35, Criminal Procedure Code, to try with this charge three charges for an offence under section 477 A, Penal Code, if committed within the period of one year and forming part of the same transaction as the offence under section 408. [p. 43, col. 2]

The High Court will not in revision interfere with a finding of fact which is within the competence of the lower Court. [p. 424, col. 1.]

Criminal revision against the order of the Sessions Judge, Monghyr, dated the 2<sup>nd</sup> September 1920, dismissing the appeal of the petitioner from the conviction and sentence by the Assistant Sessions Judge, Monghyr, dated the 4<sup>th</sup> August 1920.

FACTS.—The charge framed under section 408, Indian Penal Code, was, that between Magh and Bhadon 1326 at Ghughuldih Gajadhar Lal, being a *Patwari*, *Tehsildar* of *Musammatt Babadai*, and in such capacity entrusted with the collection of rents from tenants on her behalf, collected Rs. 2,522-14-7½ but in the counter-foils of the rent receipts he dishonestly showed as realised only Rs. 1,301-11-0 and thereby committed criminal breach of trust with respect to Rs. 1,222-3-7½.

The charge under section 477A, Indian Penal Code, gave details of three such omissions (included in the gross sum mentioned in the charge under section 408, Indian Penal Code) from counter-foils of rent receipts.

An objection as to the legality of the trial was raised before the Sessions Judge on appeal and was disposed off as under,—

“A preliminary objection is taken that the trial has been vitiated by a multiplicity of charges, and I am referred to the rulings of the Calcutta High Court quoted in *Raman Behary Das v. Emperor* (1). In that case three charges under section 409, Indian Penal Code, were joined with three charges under section 477A of the Indian Penal Code. But in the present case there is no such combination. The charge under section 408, Indian Penal Code, relating to the gross sum embezzled is to be deemed as a charge of one offence only, under section 222 (2) of the Code of Criminal Procedure. And the triple charge under section 477A seems to be good under section 234 (1), Criminal Procedure Code. The three offences alleged under section 477A are a selection from the series of offences alleged under section 408, Indian Penal Code; and it is perfectly legal to frame two charges about the same three offences. I consider this preliminary objection to be worthless.”

Mr. G. O. Pal, for the Petitioner.

The Assistant Government Advocate, for the Crown.

## JUDGMENT.

MULLICK, J.—The petitioner has been sentenced to rigorous imprisonment for 4 years under section 408, Indian Penal Code, for having committed criminal breach of trust in respect of a sum of Rs. 1,221, which was due to his employer, *Musammatt Babadai*, on account of rent collected from her tenants for the year 1326 *Fashi*. There was a second indictment under section 477A for having falsified the account-books which it was the duty of the petitioner to keep. The indictment under section 477A relates to three specific entries in the counter foil rent receipts prescribed by law for the realisation of rent from tenants.

(1) 22 Ind. Cas. 729, 41 O. 722; 18 O. W. N. 1152; 15 Or. L. J. 153.



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It is alleged that, for the year 1326, the net sum which was realised by the petitioner was Rs. 2,522-14-7. The petitioner gave rent-receipts to the tenants showing a payment of the full demand in various instalments which were set out in the rent-receipts, but in the counter-foils which were kept in the petitioner's office only some of the instalments were entered, and by adding the amounts therein shown one would be led to imagine that the petitioner actually realised and gave receipts for a sum of Rs. 1,301-11 0 only.

The case for the prosecution is that the petitioner has dishonestly misappropriated the balance of Rs. 1,221-3-7½.

In 1327 a theft occurred in the Toshakhana of the petitioner's employer. The petitioner was suspected and in the course of a search at his house and at his office a number of account-books were discovered in his possession among which were the counter-foil receipt books showing the false entries which are the subject of the charge under section 477A. The present prosecution was then begun upon the complaint of a servant of *Musammat Babadai* with the result that the petitioner was sent up for trial and was convicted in respect of both sets of charges by the Assistant Sessions Judge of Monghyr. There was an appeal to the Sessions Judge who confirmed the findings of the Trial Court and declined to reduce the sentence. The petitioner now moves this Court in revision and urges that the trial is bad and that the conviction should be set aside.

It is necessary to observe that there was another accused sent up along with the petitioner who, though found guilty by one of the Assessors was acquitted by the Trial Court. With regard to the petitioner both the Assessors, were of opinion that he was guilty of the offence under section 408, Indian Penal Code. As to the charge under section 477A, one of the Assessors was of opinion that he was guilty, while the other was of opinion that the case had not been proved.

The learned Vakil for the petitioner attacks the conviction mainly on the ground that there was an error of procedure. He contends that there was a fatal misjoinder of charges and that the petitioner having been prejudiced he must either be acquitted or a re-trial ordered. He relies upon the

case of *Raman Behary Das v. Emperor* (1) and on *Kasi Viswanathan v. Emperor* (2). It is urged that three charges of falsification of accounts in regard to different sums upon different dates cannot, though covering a period of one year, be joined with a charge of a criminal breach of trust, because the offences are distinct and separate offences for which there must be separate trials and that neither the provisions of section 234 or 235 of the Criminal Procedure Code bring the case within the exception contemplated by section 233. Now the facts of the cases above cited were totally different and it is quite clear that in the case before us there has been no error of the procedure in Courts below. Here there was a charge of criminal breach of trust committed in the year 1326 in respect of a lump sum. By reason of the provisions of sections 234, 235 it was competent to the Court to try with this charge three charges for an offence under section 477A, Indian Penal Code, if committed within the period of one year and forming part of the same transaction as the offence under section 408. The learned Vakil contends that the acts constituting the offence under section 477A were not committed in the same transaction, but I am of a contrary opinion. There was a community of object and design between the two sets of acts and it is clear that the petitioner made the three false entries in order to assist and conceal his fraud in the matter of the embezzlement. Each of the three false entries was intimately connected with the act of criminal breach of trust and there was, in my opinion, no misjoinder.

The first ground, therefore, for attacking the conviction fails.

The next point is, that there has been a miscarriage of justice by reason of the inferences which the learned Courts below have drawn from the evidence. It is said that the petitioner had in his possession certain *Sikha* or account-papers in which the various sums realised from each tenant were entered and which, if produced, would have shown that the rent-receipts granted to the tenants were correct, and it is urged that the omission to enter all the instalments in the counter-foils was nothing more than an act of negligence on the petitioner's part.

(2), 30 M. 328; 7 M. L. J. 141; 2 M. L. T. 177; 5 Cr. L. J. 31.

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Now in regard to these *Siaha* papers the learned Sessions Judge finds that there were some *Siaha* papers in the petitioner's possession, but he also finds that they were never handed over to the petitioner's employer. That is a finding of fact at which the learned Judge was competent to arrive upon the evidence and it cannot be said that he has committed any error of law in believing the petitioner's employer and in disbelieving that part of the evidence which is inconsistent with her story.

The other finding in regard to which the learned Judge has been attacked relates to the petitioner's employer's account books, the petitioner's case is that he has made payment to his employer fully covering the amounts which forms the subject of the charge of criminal breach of trust and that his employer has books of account which, if produced, would clearly establish his innocence. The learned Judge finds that no such account-books existed and he draws the inference that the petitioner has in fact embezzled the money. Here, again, the inference drawn by the learned Sessions Judge is one of fact which it was competent for him to draw, and I am not able to say that there has been any error of law on his part. There is a clear finding by both Courts that there is a discrepancy of Rs. 1,221-3-7½ between the rent-receipts and their counter foils, that this sum was collected by the petitioner and that it never reached the hands of *Musummat Bibidai*.

The Courts below have chosen to disbelieve the story told by the petitioner and the witness who deposed in his favour and to believe the evidence of the prosecution, and in revision we see no reason for interfering with that finding.

The only question that remains is, whether in law the offence of criminal breach of trust has been made out. If that offence is established it is not disputed that a conviction under section 477A must also follow. Now the learned Vakil for the petitioner maintains that, although there might be reason for proceeding in a Civil Court for a claim upon a civil liability, there is no ground for holding that there was that criminal or dishonest intention on the part of the petitioner which is necessary for an offence under the Indian Penal Code. Here, again, the question is one of fact and if we agree, as we do agree, with the findings of

the Courts below there is an end to the petitioner's case.

Finally, there is an appeal by the learned Vakil for reduction of sentence. We think, on a consideration of the whole circumstances, that the sentence of four years' rigorous imprisonment for each offence is perhaps too severe. We reduce the sentence to one of two years rigorous imprisonment on each charge and direct the sentence to run concurrently.

BICKNILL, J.—His Lordship Mr. Justice Mullick has dealt with this matter very fully and it is hardly necessary for me to add anything, but I should like to say one or two words. Counsel for the petitioner raised really four points. The first was as to the propriety of the frame of the charges. I think, however, that the cases which were quoted are easily distinguishable from the present one. Here we have a general charge under section 408 of the Indian Penal Code relating to lump sum of money embezzled and then we have three counts under one charge, under section 477A of the Code, each count referring to a particular falsification of accounts, that is to say, in this case omissions to enter accounts in books these three instances refer to part of the general embezzlement covered by the previous charge under section 408. I have never heard it argued that under the Indian Penal Code such a framing of charges is improper. On the contrary, I have often seen charges framed like this one and I do not remember that I have ever heard an objection of this sort taken against them. The cases, on the other hand, which have been quoted, show, I think, that it is embarrassing to an accused person if several disconnected, that is to say, more than three disconnected, instances of such more or less cognate charges as embezzlement and falsification of accounts relating to the same set of transactions are joined in one indictment. Here, however, it is impossible to imagine how the accused could be in any way embarrassed by the form in which the charges were framed.

As to the second point, the questions raised were as to whether the lady has kept private books of account and as to the existence and importance of certain rough accounts kept by the applicant. As has been pointed out by Mr. Justice Mullick, those questions are merely questions of facts

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or of inferences drawn from facts, it may be that the Court below took a wrong view. it may be that they did not, but, at any rate, it is impossible, I think, for this Court to say that the views to which they came regarding these two points were decisions to which they could not have reasonably come upon the evidence.

Then, thirdly, it is contended that there was no proof that the accused has any *mens rea* i. e., any intention, when, if he did, he retained this money, of permanently misappropriating it or converting it to his own use. Now, there again it seems to me quite clear that on the evidence which was before the Courts it was quite open to them to come to the conclusion that there was proof that the accused intended to deal with the money dishonestly.

As to the question of sentence I agree that the sentence was too severe and should be reduced as stated by his Lordship Mr. Justice Mullick.

*Sentence reduced.*

### PATNA HIGH COURT.

CIVIL CRIMINAL REVISIONS NOS. 14 AND 15  
OF 1920.

October 15, 1920.

*Present* :—Mr. Justice Jwala Prasad.  
**RAKHAL MOHAN ROY CHURAMANI**  
AND OTHERS—ACCUSED—PETITIONERS

*versus*

**EMPEROR—OPPOSITE PARTY.**

*Criminal Procedure Code (Act V of 1898), s. 476—  
Order directing prosecution—Notice, necessity of.*

In a suit upon a hand-note executed by R. for himself and his brother L, R appeared and resisted the claim and the plaintiff gave up his claim against him. L did not appear and the Court, finding the claim true, passed an *ex parte* decree against him. After this, upon an application by R it was found that the paper on which the note was written was issued on a date subsequent to the date of the note, whereupon R applied for sanction to prosecute the plaintiff: the Court granted the application without notice to the plaintiff and at the same time called upon him to show cause why the *ex parte* decree should not be vacated. Plaintiff moved the High Court to quash the order directing his prosecution:

*Held*, that, in the face of the finding that the claim on the hand-note was true, the order directing the prosecution of the plaintiff without deciding the genuineness or otherwise of the document in the presence of the plaintiff and R., the order was wholly illegal and without jurisdiction, and that, although no notice is essential in a proceeding under section 476 of the Criminal Procedure Code, yet, in the circumstances of the present case, notice was necessary, and the order having been passed without notice, it was wholly invalid. [p. 426, col. 2; p. 427 col. 1.]

Civil criminal revisions against the order of the Munsif, Puri, directing the prosecution of the petitioners by his order, dated the 6th July 1920 and 7th August 1920.

Messrs. *Hasan Imam* and *S. N. Sahay* in No. 14, and Messrs. *S. N. Sahay* and *G. O. Pal* in No. 15, for the Petitioners.

The Assistant Government Advocate, for the Crown.

**JUDGMENT.**—In Civil Criminal Revision No. 14 Rakhal Mohan Ray Churamani is the petitioner. In Civil Criminal Revision No. 15, Akshay Kumar Ray Churamani and Dina Bandhu Mahanti are the petitioners.

The aforesaid petitioners have been directed by the Munsif of Puri to be prosecuted under sections 193 and 467/471, Indian Penal Code, for offenses said to have been committed in connection with a hand-note produced in the Court of the Munsif in Suit No. 4 of 1920. The petitioner, Akshay Kumar Ray, was the plaintiff in that suit and the petitioner, Rakhal Mohan Ray, and his younger brother, Lalit Mohan Ray, were defendants Nos. 1 and 2 respectively. The plaintiff is the cousin of the defendants. The petitioner, Dina Bandhu Mahanti, is the *gumashita* of Akshay Kumar Ray.

The hand-note in question purports to have been executed by Rakhal Mohan Ray for himself and his brother Lalit Mohan Ray on the 27th December 1916, for Rs. 510. The defendant No. 2 was in Jail on that date having been convicted in 1913 and sentenced to seven years' rigorous imprisonment. The defendant No. 1, Rakhal Mohan Ray, received the summons for himself and his brother Lalit Mohan Ray. Rakhal Mohan Ray, defendant No. 1, did not appear in the case. Lalit Mohan Ray appeared in Court and resisted the claim of the plaintiff challenging the genuineness of the hand-note in question and disputing his



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liability on the ground that the money borrowed was not necessary for the payment of Government revenue or to support his wife during his imprisonment as she was living in her father's house.

At the trial, on the 15th May 1920, the plaintiff gave up his claim against Lalit Mohan Ray, and obtained an *ex parte* decree against Rakhal Mohan Ray only. He examined his *gomashta*, Dina Bandhu Mahanti, the petitioner, to prove that the hand-note was given for consideration.

On the 17th May 1920 Lalit Mohan made an application before the Munsif to send the paper on which the hand-note was written to the Controller of Government papers for his opinion if the paper was in circulation on the date the hand note is purported to have been executed. The reply received from the Controller showed that the cartridge paper was issued later than the date when the hand-note was written.

On the 2nd June 1920 Lalit applied under section 195 of the Code of Criminal Procedure for sanction to prosecute the plaintiff.

On 6th July 1920, the Munsif passed an order under section 476 of the Code directing prosecution of the plaintiff and his *gomashta* under sections 193 and 467/471, Indian Penal Code, and issued a Civil Rule upon the plaintiff to show cause why the *ex parte* decree obtained by him should not be vacated as being illegal and fraudulent.

In the meantime, the plaintiff moved the High Court to quash the order for prosecution. The criminal proceeding was stayed by the order of this Court pending the disposal of the Civil Rule. In the Civil Rule, the plaintiff showed cause on the 2nd August 1920. On that very day, Rakhal Mohan Ray filed a petition admitting that he borrowed Rs. 510 in cash from the plaintiff on 27th December 1916 and that he wrote the hand note with his own hand some months after and put the 27th December 1916 as the date of the hand-note. Notice was issued upon Lalit Mohan for his attendance, but he did not appear. The Munsif did not accept the explanation and held that the claim was not a true one and that the hand-note was forged and fraudu-

lent. He, however, did not disturb the decree as the defendant No. 1 did not dispute it, but in that proceeding he directed the prosecution of defendant No. 1 also under the aforesaid sections. The plaintiff and his *gomashta*, therefore, renew their application to this Court for quashing the order of the Munsif directing their prosecution. The defendant No. 1 has also moved against the order of the Munsif, dated the 7th August of 1920, by a separate application. Hence the aforesaid two Rules.

As regards the application of the plaintiff and his *gomashta* in Civil Criminal Rule No. 15 of 1920, the learned Assistant Government Advocate raised a preliminary objection. He says that the present application is barred by the order of this Court in Civil Criminal Revision No. 12 of 1920, dated the 27th July 1920 dismissing the first application for revoking the sanction. I do not think there is much force in this objection, inasmuch as the High Court did not go into the matter at that stage because the Civil Rule issued by the Munsif against the plaintiff was then pending and the plaintiff might have obtained the relief and it was possible that the Munsif would have come to the conclusion that the claim was a true one and the hand-note genuine and would have himself discharged his former order.

Coming now to the merits of the application, it appears that the order for prosecution of the plaintiff and his *gomashta* was passed on the 6th July without any notice to them. The decree was passed in favour of the plaintiff on the 15th May. Lalit Mohan's application for sanction was made two days later on the 17th May and on receipt of the report from the Controller of papers the Munsif straightway directed the prosecution of the plaintiff and his *gomashta* on the 6th July. The decree passed by the Court in favour of the plaintiff concluded the civil suit before the Munsif. There was no finding of the Munsif upon which he could base his order for the prosecution of the plaintiff and his *gomashta*. On the other hand, his decree was to the effect that the claim of the plaintiff based upon the hand-note was true. It was wholly illegal, verging upon want of jurisdiction, on the part of the Munsif to direct the prosecution of the petitioner merely upon the report of the Controller

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without deciding the genuineness or otherwise of the document in the presence of the plaintiff and defendant No. 1 who were the parties to the decree. The Munsif issued the Civil Rule calling upon the plaintiff to show cause why the decree should not be set aside. This should have been decided first before the order of the 6th July could be passed. Apparently, this was the view of the learned Judges of this Court in Civil Criminal Rule No. 12 of 1920, who directed the plaintiff to go to the Civil Court to seek redress in the proceeding which related to the validity or otherwise of the decree. The order of the 6th July 1920 to my mind is without jurisdiction. Although no notice is essential in a proceeding for an order under section 476 of the Code of Criminal Procedure, yet, in the circumstances of each case, it is to be seen whether the party affected by the order was entitled to any notice, and whether, in the circumstances of the case, notice was necessary as in the present case the order passed under section 476 will be irregular, if not wholly invalid and illegal.

Again, the order of the 7th August does not direct the prosecution of the plaintiff and his *gomashita*. It has already been held that the order of the 6th July was invalid and *ultra vires*. There is, therefore, no valid order for the prosecution of the plaintiff and his *gomashita* Akshay Kumar Ray and Dina Bandhu, two of the petitioners. Again, the decree has not been disturbed. In other words, the claim of the plaintiff based upon the hand-note has been affirmed. It seems to me anomalous that the plaintiff's decree should stand and side by side he should be prosecuted for having brought an unjust and fraudulent claim. If the claim was fraudulent, the Munsif ought to have set aside the decree in spite of the defendant's admission of the claim, for fraud vitiates the most solemn proceedings of a Court of Justice and the Court coming to know of it must vacate its decree. No Court can be permitted to be party to a fraudulent decree. The order of the 7th August is, therefore, unintelligible and inconsistent.

Coming to the case of defendant No. 1, Rakhal Mohan Ray, he has been directed to be prosecuted by an order of the 7th August

passed in the Civil Rule issued against the plaintiff to show cause why the *ex parte* decree against the defendant No. 1 should not be set aside. No Rule was issued upon him and he was not called upon to show cause why he should not be prosecuted. He appeared in pursuance of the Rule against the plaintiff and filed a verified petition admitting the plaintiff's claim and explaining the circumstances under which the hand-note was executed in 1917 with respect to the loan taken in 1916, the hand-note bearing the date of the actual loan. It is impossible to conceive that the defendant would suffer a decree to be passed against him for a large sum of Rs. 510 when in fact the loan was not taken by him. It is possible that he wanted to bind his younger brother Lalit Mohan Ray also on the ground that the loan was for family necessities, he being the head member of the family. It would have been otherwise if Rakhal Mohan Ray, defendant No. 1, had forged the signature of Lalit Mohan Ray upon the hand-note. He signed it for himself and as guardian of his younger brother Lalit Mohan Ray. Lalit Mohan Ray objected, and the plaintiff finding it difficult to prove the family necessity referred the matter to the *panches* and upon their advice he contented himself with obtaining a decree against defendant No. 1 alone. The learned Munsif has disbelieved his explanation. As a matter of fact, he says that it does not concern him so long as the allegation in the plaint is untrue. I cannot look upon the case from that point of view. If the explanation of the defendant No. 1 is true, there can be no prosecution with respect to the hand-note in question, for in that case it will not be a forgery at all.

Now the Munsif bases his order upon the ground that there was a conspiracy between the plaintiff, his *gomashita* and the defendant No. 1 to obtain a decree against Lalit, the defendant No. 2. There is no material upon the record to justify this supposition. Even if it were true, it is impossible to obtain any evidence in the case for the prosecution. These three persons connected with the execution of the hand-note and the advance of Rs. 510 to defendant No. 1 are accused in the case. There is no witness to prove that the transaction was

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a false one and that no money was advanced by the plaintiff to defendant No. 1. Lalit admittedly was not present at the transaction. It is the case of no body that Lalit took the money. Defendant No. 1 takes the entire responsibility of having taken the money. He simply wanted to bind his brother on the ground of family necessity. Lalit Nohan's evidence is that of a negative character. Besides, he did not appear when called upon by the Munsif in the Civil Rule. There is, therefore, absolute want of evidence in the case and there is thus no chance of successful prosecution in the present case. It will not be sufficient to show that the cartridge paper upon which the hand-note was written came into existence a few months later than the date when the document was written. There is nothing to controvert the case of the defense.

For all these reasons, I would set aside the order of the Munsif of the 6th July as well as of the 7th August and make both the Rules absolute.

*Rules made absolute.*

### ALLAHABAD HIGH COURT.

APPLICATION IN FIRST APPEAL NO. 198  
OF 1920.

July 22, 1920.

Present:—Mr. Justice Piggott.

RAJ KUNWAR SINGH—APPLICANT  
versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 476—  
Criminal proceedings initiated by Civil Court—Appeal  
on same facts pending in High Court—Criminal pro-  
ceedings, whether should be adjourned.*

Where criminal proceedings are initiated by a Civil Court under section 476 of the Criminal Procedure Code, the fact that an appeal upon the same facts is pending in the High Court cannot be regarded as a valid reason in law for the adjournment of the criminal proceedings till the decision of the civil appeal. [p. 429, cols 1 & 2.]

Mr. S. O. Mukerji, for the Applicant.

Mr. L. M. Banerji, for the Opposite Party.

JUDGMENT.—I have before me two applications which have been preferred as Miscellaneous Applications in First Appeal No. 198 of 1920. The unusual nature of the applications is apparent as much from the headings as from the actual contents of these papers. The names of the parties to the first appeal are, of course, given, but the miscellaneous application as it describes itself is made in terms as against the King-Emperor opposite party, and notice has under the orders of this Court gone to the Government Advocate and to no one else. An appearance has been entered on behalf of the plaintiff-respondent to the first appeal, but I do not think I should be justified in taking any action upon this fact, seeing that notice was not ordered to go to him. The two applications are connected in this way. Raj Kunwar Singh is the defendant-appellant in First Appeal No. 198 of 1920 which has been admitted and is pending in this Court, the other applicant Sunder Lal is described in the affidavits before me as a *Faisakar* on behalf of the defendant in the Court below, and it is stated that he was allowed to be examined by the plaintiff during the proceedings in that Court in connection with a certain matter. The suit in the Court below was decided in the plaintiff's favour and one of the points in controversy was as to the genuineness of two documents, the production of which in the Trial Court took place on the application of the defendant. The learned Subordinate Judge in deciding the suit has held those documents to be forgeries. He has now taken action under section 476 of the Criminal Procedure Code and has issued notice to the defendant Raj Kunwar Singh, and also to Sunder Lal, to show cause why their prosecution should not be ordered for offences punishable under sections 471 and 471 109 of the Indian Penal Code. The prayer in each of the two applications before me is that these proceedings be stayed pending the decision of the appeal by the defendant to this Court. It is not suggested that a stay order of this nature could be obtained under any provision of the Civil Procedure Code. The established practice of this Court, resting upon a course of judicial decisions, which treat any application in revision



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against an order of a Subordinate Civil Court passed under section 476 of the Criminal Procedure Code as an application in civil revision, governed by the provision of section 115 of the Civil Procedure Code, makes it impossible to regard these applications as governed by anything in the Code of Criminal Procedure. I can only regard the applications, therefore, as invoking the general powers of superintendence of this Court over the proceedings of all Courts subordinate to it. I am not prepared to say that it would not be within the jurisdiction of this Court, under those powers, to direct a Presiding Officer of any Civil Court subordinate to it to adjourn for a time any proceeding, of whatsoever nature, which he might have initiated by virtue of any powers exercisable by him as the Presiding Officer of such Court. In any case, as has rightly been argued on behalf of the applicants, a mere expression of opinion by this Court that the proceedings in question might well be suspended would probably be sufficient to give the applicants what they desire. While, therefore, I do not think that applications of this kind ought to be encouraged, I am not prepared to go back on the order of the Judge of this Court who admitted the applications and to say that it is outside the jurisdiction of this Court to entertain them.

The question then arises whether, on the facts stated in the affidavits before me, supplemented as these have been by extracts which have been read to me from a certified copy of the judgment delivered by the Trial Court in the civil suit out of which the first appeal arises, it is advisable or expedient that any order or direction should be issued to the learned Subordinate Judge in this matter. On the general question of the stay of criminal proceedings when these, on the face of them, raise a question of fact which is still under adjudication by a Civil Court of competent jurisdiction as, for instance, by this Court in first appeal, a valuable note is to be found in Appendix S. to the Edition of the Criminal Procedure Code by Mr. G. P. Boys, Advocate of this Court. The tendency has been, whenever possible, to secure a final adjudication by the Civil Court before the actual trial of the accused persons in a Criminal Court, I do not think, however, that any direct authority can be quoted for interfering with proceedings by a Subordinate Civil Court

under section 476 of the Criminal Procedure Code merely on the ground that an appeal upon the same facts is pending before this Court. The general intention of the Legislature undoubtedly is that action under section 476 of the Criminal Procedure Code should ordinarily be taken by the Presiding Officer of the Civil Court before which the alleged offence has been committed, and should be taken as promptly as possible upon the termination of the suit in the said Court. Having regard to the present state of the pending file of this Court, it seems probable enough that an order granting these applications would result in the stay of the proceedings initiated by the learned Subordinate Judge for a period of at least two years and probably in those proceedings being continued by some successor-in-office of that gentleman. This seems to me altogether inexpedient. In the present case a further question has been suggested whether there are not documents which may be required in the course of the criminal trial, not at present on the record of the civil suit, which may nevertheless require to be brought as speedily as possible into the safe custody of the Court of the Subordinate Judge. This could be done as part of the preliminary enquiry under section 476 of the Code of Criminal Procedure, and an order staying the proceedings under the section would interfere with its being done.

A curious difficulty has, however, been brought to my notice in the course of the argument, based upon a reported decision of this Court in *Mathura Kunwar v. Durga Kunwar* (1). On the face of it, that decision seems to lay down that, if criminal proceedings are once instituted upon an order by the learned Subordinate Judge as the result of the proceedings now initiated, the fact that a first appeal is pending in this Court would not be regarded as a valid reason in law for the adjournment of those criminal proceedings, reference being made to section 344 of the Criminal Procedure Code. If so, it would almost appear as if a postponement of the criminal prosecution, should this appear desirable in the interests of justice, could only be ordered before the proceedings under section 476 of the Criminal Procedure Code came to a termination in an order

(1) A. W. N. (1905) 254; 2 A. L. J. 747; 2 Cr. L. J. 798.

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directing the prosecution of the accused person or persons. I am obliged, however, to the Appendix to Mr. G. P. Boys' book, to which I have already referred, for a note which I have no doubt is based upon an examination of the actual record of the case in the course of which the decision above referred to was pronounced, this shows that a way was found out of the difficulty. As I have heard the parties at length on the general question of the proper procedure which should be followed, or directed to be followed, in connection with this matter, I think it just as well to express my opinion that a course of action similar to that suggested in Mr. Boys' note might well be followed in the present case.

I decline to interfere with the pending proceedings to which these applications refer and both these applications accordingly stand dismissed.

When the accused persons come before a Magistrate it will be open to them to move this Court, which undoubtedly has, under the Criminal Procedure Code, itself very large powers over Criminal Courts of subordinate jurisdiction, to direct a temporary postponement of the prosecution pending further action in this Court. The further action which I suggest should take the form of moving this Court to expedite the hearing of the first civil appeal in connection with which these applications have been made. Assuming that the defendant-appellant shows all possible diligence in the matter, and that this Court is prepared to accept the pendency of a criminal prosecution as a valid reason for expediting the hearing of the appeal, there is no adequate reason why the appeal should not be disposed of in such reasonable time as to admit of the stay of the criminal proceedings until its disposal. If it should appear otherwise to this Court, when the question of expediting the hearing of the first appeal is raised, then, on the principles laid down by the learned Judge who decided the case of *Mathura Kunwar v. Durga Kunwar* (1), the matter will have to proceed to trial in the Criminal Courts, even though the question in issue may be one requiring legal reconsideration on the part of this Court in the first civil appeal. I have had to consider the question of the costs of this application and I feel myself in a some-

what unfortunate position, in view of the facts already noticed, I am really not able to allow the plaintiff-respondent to the appeal, the costs which have been certified on his behalf, upon his entering appearance in this matter without having been called upon to do so; the learned Government Advocate, who would undoubtedly have been entitled to his costs, has not been able to certify them, I simply dismiss these applications, making no order as to costs.

*Application dismissed.*

# PATNA HIGH COURT.

CRIMINAL REVISION No. 547 OF 1920.

December 9, 1920.

Present:—Mr. Justice Jwala Prasad.

MANINDRA KISHORE JHA—

PETITIONER

*versus*

E. B. CLAIRSMITH AND OTHERS—

OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1908), s. 145—Possession, decree for, by Civil Court—Adverse party in possession—Criminal Court, order by, in favour of such party to continue in possession—High Court, whether will interfere.*

Although a Criminal Court is bound to respect the decree of a Civil Court and delivery of possession and cannot go behind the decree, yet when, in a proceeding under section 145 of the Criminal Procedure Code, it is shown by evidence that, notwithstanding such a decree, the party affected adversely thereby has continued in possession, and the Criminal Court has declared that that party should continue in possession until evicted in due course of law, the High Court will not interfere. [p. 431, col. 1.]

Criminal revision against the order of the Deputy Magistrate, Bhagalpore, dated the 4th October 1920.

Mr. G. O. Pal, for the Petitioner.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—This is an application against an order passed under section 145 of the Code of Criminal Procedure declaring the possession of the first party over the land in dispute, 1 bigha, 16 kathas. This land originally belonged to one Biswa.

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nath Chondhari who sold it under a registered *kabala* for Rs. 100 (Exhibit 5) to Babu Sri Mohan Thakur whose estate is now under the management of the Court of Wards. Sri Mohan Thakur turned the land into orchard and included it into his adjoining garden making all into one large block. This was recognised as a separate holding for which rent was paid by the first party to the landlord. It was separately recorded in the survey and the number in *Khasra* is 47. In 1911, the landlord brought rent suit against the original tenant Biswanath for *Khasra* No. 748 and included the disputed land in *Khasra* No. 47 also for rents due for 1315 to 1318 *Fasli* (1908 to 1911). This period is long after the purchase by the first party in 1905 and his recognition as a tenant of *Khasra* No. 47. Rent-decree was obtained and in execution thereof both *Khasras* Nos. 748 and 47 were purchased on 23th of October 1918, delivery of possession being effected on the 6th of March 1918. The present dispute arose in May 1920 when the second party wanted to construct a *Machan* on the disputed land. The Court below has held that, in spite of the rent decree and the possession delivered in execution thereof, the first party continued to be in possession and hence declared that party to remain in possession until evicted therefrom in course of law. The order is challenged on the ground that the Court below was wrong in not giving effect to the Civil Court decree and delivery of possession. There is no doubt that the Criminal Court is bound to respect the Civil Court decree and delivery of possession and cannot go behind it and in certain cases the Criminal Court has been held to recognise the delivery of possession even as against persons not parties to the Civil Court decree, but in all those cases the parties disputing the delivery of possession by the Civil Court derived their title from the judgment-debtor or the decree was obtained in a representative character [*Doulat Koer v. Rameswari Koeri* (1), *Kunja Behari Das v. Khetra Pal Sing* (2)]. In other words, the Civil Court sale must have passed the interest of the persons not parties thereto. This would have been so in the present case if the party's pur-

chase of 1905 was not recognised by the landlord. In the present case the sale was recognised and a separate *khata* (holding) was created in favour of the first party. The landlord ought to have made the first party vendee a party to the civil suit. His interest in the land in dispute, therefore, did not pass under the sale. *Atul Ohandra Mandal v. Srinath Laik* (3).

Again, the Court below has upon evidence held that, in spite of the *dakhal dahani* in March 1919, the 1st party continued to be in possession of the property up to the present time. This concludes the contention of the petitioner (second party). The petition is accordingly rejected.

*Petition rejected.*

(3) 53 Ind. Cas. 936; 30 C. L. J. 123; 23 C. W. N. 982; 20 Cr. L. J. 840.

### CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 556 OF 1920.

July 28, 1920.

Present:—Justice Sir N. R. Chatterjea, Kt.,  
and Mr. Justice Cuming.

SHEW KHELAON RAM KALWAR—  
1ST PARTY—PETITIONER

*versus*

NAYAN BEPARI—2ND PARTY—  
OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), ss. 133, 137—Magistrate, whether can drop proceedings without taking evidence.*

The provisions of section 137 of the Code of Criminal Procedure are imperative. Before a Magistrate can make an order under clause (2) of that section dropping a proceeding started under section 133 of the Code, he must take evidence in the matter as directed by clause (1) of section 137. [p. 432, col. 2.]

Rule against the order of the Deputy Commissioner, Lakhimpore.

FACTS appear from the judgment.

Babu Hemendra Kumar Das, for the Petitioner.—The Rule was issued on behalf of the

(1) 26 C. 625; 3 C. W. N. 461; 18 Ind. Dec. (N. S.) 1002.

(2) 22 C. 208; 6 C. W. N. 88.



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first party in a proceeding under section 133, Criminal Procedure Code, to show cause why the proceeding should not be revived. I applied for the removal of a hide godown belonging to the opposite party which was causing a great nuisance. The preliminary order was made and the opposite party appeared and showed cause. The Magistrate, without taking any evidence, on the report of the Assistant Commissioner dropped the proceedings. I submit it is obligatory to take evidence in cases under section 133, Criminal Procedure Code. Refers to *Sarajbasini Devi v. Sripati Oharan Chowdhury* (1). That case is exactly on all fours with the present case. In *Upendra Nath Mandal v. Rampal* (2) it has been laid down that the provisions of section 137, Criminal Procedure Code, are mandatory and even the consent of parties does not dispense with the obligation with the duty of Court in the taking of evidence. Refers to *Srinath Roy v. Ainadi Halder* (3).

Mr. Syed Muhammad Saadullah, for the Opposite Party.—My submission is that, under section 137, Criminal Procedure Code, it is the duty of the first party to apply for and summon witnesses. He could himself have got examined as in a summons case under section 244, Criminal Procedure Code. I submit a Court cannot of its motion summon witnesses and take evidence on the complaint of a person who does not at all care to prove his complaint. The Court in such a case cannot but drop the proceedings.

Babu Hemenra Kumar Das replied in brief.

JUDGMENT.—This is a Rule calling upon the Deputy Commissioner of Lakhimpore and the opposite party to show cause why the order dropping proceedings under section 133, Criminal Procedure Code, should not be set aside and the case proceeded with according to law.

The opposite party has appeared to show cause.

The petitioner before us complained against the opposite party that a hide godown belonging to him was causing a great

nuisance in the locality and prayed that it might be directed to be removed. The learned Magistrate thereupon made a conditional order under section 133. The opposite party was served with notice to show cause and he showed cause. Thereupon the Deputy Commissioner directed the Assistant Commissioner to make an inquiry at his own convenience and report. On receiving the report of the latter, the Deputy Commissioner made the following order:—"Read the Assistant Commissioner's report. This shows that there is no ground for an order under section 133, Criminal procedure Code. Rule discharged."

We think that this order ought not to have been made without taking evidence as directed by section 137 of the Code. The provisions of that section are imperative. The section runs as follows:—"If he appears and shows cause against the order, the Magistrate shall take evidence in the matter" as in a summons case. Now, clause (2) of the section lays down that, if the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case. But before the Magistrate can make an order under clause (2) it is clear that he must take evidence in the matter as directed by clause (1). We may refer to the case of *Sarajbasini Devi v. Sripati Oharan Chowdhury* (1) and also to the case of *Upendra Nath Mandal v. Rampal* (2).

It is contended on behalf of the opposite party that the petitioner does not appear to have applied to the Magistrate for examining witnesses. But, evidently, he had no opportunity of adducing evidence before him. The Deputy Commissioner, on receipt of the report of the Assistant Commissioner, at once dropped the proceedings.

The order complained of must, therefore, be set aside and the case sent back to the Deputy Commissioner in order that he may proceed according to law.

Order set aside;  
Case sent back.

(1) 28 Ind. Cas. 799; 16 Cr. L. J. 415; 19 O. W. N. 232; 42 C. 702.

(2) 4 Ind. Cas. 436; 10 O. L. J. 432; 11 Cr. L. J. 1.

(3) 24 O. 395; 1 O. W. N. 217; 12 Ind. Dec. (N. S.) 280.

TAJAMMUL HUSAIN U. BANDE RAZA.

OUDE JUDICIAL COMMISSIONER'S  
COURT.

SECOND CIVIL APPEAL No. 337 OF 1919.

April 3), 1920.

Present :—Mr. Lindsay, J. C.

Hakim Saiyad TAJAMMUL HUSAIN  
AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Saiyad BANDE RAZA AND OTHERS—  
PLAINTIFFS, Saiyad YUSUF ALI—DEFENDANT  
—RESPONDENTS.

Partition suit—Preliminary decree, nature of—  
Application for final decree, whether application for  
execution—Limitation—Partition of dwelling-house—  
Jurisdiction of Civil Court—Appeal, second—Plea on  
ground of inconvenience urged for first time, whether  
entertainable.

Inasmuch as a preliminary decree in a partition  
suit is not a decree which can be executed, an  
application for the purpose of actually effecting a  
partition and that a final decree be prepared, is not  
an application for execution the limitation for  
making which is governed by Article 141 of Schedule  
I to the Limitation Act; such an application is an  
application in the suit to which the law of limitation  
does not apply. [p. 434, col. 1.]

In a partition suit a plea on the ground of incon-  
venience, not urged in the Courts below cannot be  
urged in second appeal. [p. 434, col. 2.]

A Civil Court has jurisdiction to partition a  
dwelling-house situate in a village along with its  
*chabutra*, as the latter is only an appurtenance to the  
dwelling-house, and as no question of the division of  
a ground-site at all arises in the case. [p. 434, col.  
2.]

Appeal from the decree of the Officiating  
Subordinate Judge, Hardoi, dated the 23rd  
August 1919, upholding order of the Munsif,  
Bilgram, dated the 28th February 1918.

Babu Ajit Prasad with him Babu Bishesh-  
war Nath Srivastava, for the Appel-  
lants.

Mr. Niamut Ullah, for Respondents Nos.  
1—3.

JUDGMENT.—I have heard Counsel in  
this case and have decided that the appeal  
must be dismissed. There is no ground upon  
which the defendants appellants are entitled  
to succeed here.

The facts may be briefly stated as follows:  
—In the year 1906 a suit was brought  
by Musammât Waris Fatima against members  
of her family for partition of certain family  
property consisting of a dwelling-house. On  
the 15th of February 1907 a preliminary  
decree was passed by which the shares of the  
parties were defined. The lady was given

a share of 7/12ths. It is admitted that after-  
wards by reason of an appeal to this Court—  
which was decided on the 20th of August  
1909, the lady's share was increased to  
one of 1-12th (*sic*). Nothing appears to have  
been done with reference to the case until  
the 10th of March 1916 when an appli-  
cation was put in before the Trial Court  
in order that proceedings might be continued  
and that a final decree in partition might  
be prepared. The case was delayed for a  
good while, but eventually an *amin* was  
appointed to make a division of the pro-  
perty. The final decree has now been pre-  
pared and the property has been allotted  
by the Trial Court. An appeal against the  
final decree was taken to the lower Court  
and has been decided against the present  
defendants-appellants. They come here in  
second appeal and various pleas have been  
raised, the first of which to be noticed is a plea  
of limitation.

The argument here is this. The pre-  
liminary decree, which was finally passed  
by this Court, was passed on the 20th of  
August 1909. No application was made to  
the Trial Court until the 10th March 1916  
and it is claimed that that application  
was beyond time by reason of the provi-  
sions of Article 181 of the Schedule to  
the Limitation Act. The lower Court  
repelled this contention and its decision, in  
my opinion, was a perfectly correct one.  
The application was not in any sense an  
application in execution for there was in  
existence no decree which was capable of  
execution. A preliminary decree in a parti-  
tion suit is not a decree which can be  
executed. The application, therefore, was an  
application in the suit and, so far as I am  
aware, there is no law of limitation which  
can be applied to an application of this  
nature. Various cases have been cited before  
me but the matter seems to me to be con-  
cluded by a judgment of the Calcutta  
High Court reported as *Dwarka Nath Misser*  
*v. Barinda Nath Misser* (1). In the concluding  
portion of the judgment reported at page 434  
the Bench observed as follows:—

"Having in view the principles which  
underlie the case to which we have  
just referred, there can be no doubt  
that no formal application need have been

(1) 22 C. 425; 11 Ind. Dec. (N. S.) 284.

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made by the plaintiff to the suit in which the order of the 10th of March 1885 was passed for the purpose of effecting a partition of the property, which was the subject-matter of the suit. The Court was bound upon any application, oral or otherwise, to proceed with the suit, and to make a final decree in it, after appointing a Commissioner for the purpose of effecting a partition of the property. The same view was adopted in another case decided by this Court on the 4th of December 1894, and, following this decision, we think there can be no limitation to the application which was made by the plaintiff on the 1st of August 1891."

On the same principle there can be no limitation to the application which was made in this case on the 10th of March 1916. The plea of limitation, therefore, fails.

The next point of law which is argued relates to a certain portion of the premises in dispute which is styled a *chabutra*. The Court in the final decree has made a certain division or allotment of this *chabutra* and the point raised here is that this allotment was made without jurisdiction. A reference is made to the judgment of the learned District Judge who dealt with this case at its preliminary stage in appeal and it is argued that, from the language of the judgment there, it is plain that it was not intended that there should, in these partition proceedings, be any division of land as distinct from houses. What I understand the judgment to mean is this, that the Court had before it a case in which the parties were seeking a division of the family dwelling-house. The learned Judge has laid down that there was not in these proceedings to be any division of the ground site occupied by the premises. It is not, however, proper to argue that, in view of the language which was employed in the judgment just referred to, the Court below has had no jurisdiction to make any division or allotment of the *chabutra*. The *chabutra* is, in my opinion, an appurtenance to the dwelling house which was the subject matter of the partition and I am satisfied that the Court below was perfectly correct in holding that the expression "house" included the *chabutra*. There is no question of the division of a ground-site at all. The *chabutra* is one of the appurtenances for the convenience of the

house and was, therefore, liable to division like any other part of the premises.

The only other matter which has been touched on second appeal is with regard to the allotment of a certain latrine. In second appeal I cannot listen to any pleas which are urged upon the ground of inconvenience. It may be very inconvenient to the appellants here that the latrine should have been allowed to one of the other parties in the case, but that is a matter with which I have got nothing to do here. I am concerned only with questions of law and no question of law arises in connection with the allotment of this particular portion of the premises.

The result, therefore, is that the appeal fails and is dismissed with costs.

*Appeal dismissed.*

### CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2695  
OF 1917.

May 19, 1920.

Present:—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice Sir  
Ernest Fletcher, Kt.

KAMINI KESHORE SEN CHOUDHURI  
—PLAINTIFF—APPELLANT

*versus*

Sri PARBARTYA TIPPERAH RAJ (MO-  
HARAJA BIRENDRA KISHORE MANI-  
KYA BAHADUR in *Vakalatnamah*) AND  
OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 100 c—  
Defective procedure, what amounts to—Defendant not  
appearing before Commissioner, whether can object to  
Commissioner's report.

The procedure of a Court is substantially defective within the meaning of clause c) of section 100 of the Civil Procedure Code, if a) it rejects the report of a Commissioner without affording him an opportunity to meet objections raised by a defendant who neither appeared nor placed the objections before him for consideration; b) if it permits documentary evidence to be considered piecemeal by two different Commissioners, and c) if it places reliance upon a sketch map when it is possible to prepare a scientific map. [p. 416, cols. 1 & 2.]

A defendant who fails to appear before a Commissioner cannot ordinarily object to his report. [p. 435, col. 2.]



KAMINI KESHORE SEN V. PARBARTYA TIPPERAH RAJ.

Appeal against the decree of the Subordinate Judge, First Court, Sylhet, dated the 13th of October 1917, reversing that of the Munsif, First Court, at Nabinagar, dated the 12th of May 1917.

FACTS appear from the judgment.

Babu Rishendra Kumar Sarkar, for the Appellant. The plaintiff is the appellant. The appeal arises out of a suit for recovery of land on a declaration of plaintiff's title thereto. The plaintiff claimed the land to belong to his *taluk* while the defence was that it appertained to their *taluk*. The first Court appointed a Commissioner to identify the lands with reference to the *thak* map. The defendants not appearing before the Commissioner the investigation was held *ex parte*. The defendants did not further contest the suit which was decreed *ex parte*. Subsequently, on the defendants' application the suit was restored. The defendants filed two documents thereafter and to identify the lands covered by them a Commissioner was appointed who prepared a sketch map. The suit was decreed on the basis of the first Commissioner's report. On appeal, however, that decision has been reversed and the suit has been dismissed on the basis of the second Commissioner's report. My submission is that the procedure adopted by the Appellate Court is illegal and defective under section 100 (c), Civil Procedure Code. The report of the first Commissioner ought not to have been rejected summarily without affording him any opportunity to meet the defendants' objections. Refers to *Rames Surut Soondree Debea v. Babu Prosonno Oommar Tagore* (1). The investigation of the second Commissioner was imperfect and insufficient. The Court ought not to have relied on a sketch map. It ought to have relied on the map prepared by the first Commissioner which was done with reference to the *thak* map. I would, therefore, ask for a remand for the investigation of these points afresh.

Babu Govind Chandra Dey Roy (with him Babu Birendra Chandra Das), for the Respondents.—I submit there has been no error or defect of procedure as contemplated by section 100 (c), Civil Procedure Code. The Court considered the report and maps

(1) 13 M. I. A. 407; 15 W. R. P. C. 20; 6 B. L. R. 677; 2 Suth. P. O. J. 393; 2 Sar. P. O. J. 632; 20 E. R. 677.

of both the Commissioners and came to its own conclusions. It is discretionary for a Court to examine the Commissioner. Refers to *Sitaram v. Ram Prosad Ram* (2). The other side has not made out a case sufficient to be remanded back for further consideration.

Babu Rishendra Kumar Sarkar replied in brief.

### JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal by the plaintiff in a suit for recovery of possession of land on declaration of title.

The case for the plaintiff is that, the disputed land appertains to *Taluk Ratana-ballav*, the case for the defendants is that it is included in *Taluk Golam Ali*. The Court of first instance appointed a Commissioner to identify the lands with reference to the *thak* map. The contesting defendant did not appear before the Commissioner, with the result that his proceedings were held *ex parte*. The report he submitted supported the claim of the plaintiff. There can be no doubt the Commissioner adopted the only course which was open to him, namely, to proceed *ex parte* in the absence of the defendants. In such circumstances, the defendants would not ordinarily be entitled to take objection to the report of the Commissioner, as was pointed out by Sir Barnes Peacock, C. J., in the case of *Eshan Chunder Chuckerbutty v. Soorjo Loll Gosain* (3) which was followed in *Bamun Doss Mookerjee v. Brojo Kishore Mitter* (4). See also the decision of the Judicial Committee in *Meer Mahomed Tuque v. Jadurath Jha* (5). The defendants, however, appeared in Court, and were allowed to take exceptions to the report of the Commissioner. They prayed that the Commissioner might be examined, so that they might establish that the proceedings had been defective. The Court refused the application, apparently on the ground that there had been laches on their part. The defendants then did not contest the claim and the suit was decreed *ex parte*. Subsequently, the defendants applied to have the *ex parte* decree set aside. This application was granted, and the suit was restored. The defendants then prayed for a fresh local

(2) 22 Ind. Cas. 858; 19 C. L. J. 87; 18 C. W. N. 637.

(3) Marsh. 139; 1 Ind. Jur. (o. s.) 3; W. R. F. B. 1.

(4) 6 W. R. 140.

(5) 16 W. R. P. C. 28.

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investigation. This application was refused. Some months later, the defendant produced two documents which had not been previously filed: one of these was a conveyance, the other was a lease. To identify the lands covered by these two documents, the Court appointed a second Commissioner who prepared a sketch map. The case then came before the Trial Court again, and that Court accepted the conclusions of the first Commissioner in preference to the view taken by the second Commissioner. The result was that a decree was again made in favour of the plaintiff. On appeal, the Subordinate Judge has rejected the report of the first Commissioner, on grounds which the Commissioner had no opportunity to controvert, and has accepted the report of the second Commissioner; on this basis, he has finally dismissed the suit.

On the present appeal, it has been argued on behalf of the appellant that the procedure adopted by the Subordinate Judge was substantially defective within the meaning of clause (c) of section 100 of the Code of Civil Procedure and that the matter should be re-investigated. We are of opinion that this contention is well-founded and must prevail.

No doubt, as was pointed out by this Court in the case of *Sitaram v. Ram Prosad Ram* (2), the Court has a discretion to examine the Commissioner as a witness upon an application by either party, but if the report of the Commissioner is attacked on grounds which require explanation, it is necessary that the Commissioner who has acted as an expert should be examined as a witness and furnish the explanation required in justification of the report submitted by him. This is clear from the judgment of the Judicial Committee in the case of *Rajkumar Roy v. Gobind Ohundur Roy* (6). The first defect in the procedure adopted by the Court below is that the report of the first Commissioner was rejected without any opportunity afforded to the Commissioner to meet objections raised by the defendants who neither appeared nor took care to place the objections before him for consideration. It has been pointed out by the Judicial

Committee in the case of *Ranee Surul Somdree Deaea v. Baboo Prosonna Ocomar Tagore* (1) that, in circumstances like these, it is not safe for a Court of Appeal to act as an expert and to sit in judgment over the Court below in considering the report of a Commissioner: [*Monkee Dumber Sahes v. Monkee Bhullundur Sahes* (7).]

The second defect in procedure is that the investigation of the second Commissioner was imperfect and insufficient. In order that the rights of the parties may be satisfactorily determined, the matter must be investigated in its entirety; in other words, the question whether the *thak* map has or has not been rebutted by the documents produced by the defendants at a late stage of the case should be considered by one Commissioner and not piecemeal by two different individuals. It is further plain that reliance should not be placed upon the sketch map when it is possible to prepare a scientific map. In view of these defects, it is impossible for us to support the judgment of the Subordinate Judge.

The result is that this appeal is allowed, the decree of the Subordinate Judge reversed and the case sent back to the Court of first instance to be reheard, in accordance with law. A Commissioner will be appointed, to deal with the *thak* map and the other documents upon which the parties rely, and the Court will pronounce judgment on the materials placed before it by the Commissioner and such other evidence as may be brought forward by either party.

Costs will abide the result.

FLETCHER, J.—I agree.

*Appeal allowed.*

(7) 15 W. R. 423.

(6) 19 C. 60 (P. C.); 19 I. A. 140, 6 Sar. P. C. J. 140, 9 Ind. Dec. (N. S.) 883.

SARABJIT S. MATA DIN.

ODDH JUDICIAL COMMISSIONER'S  
COURT.

FIRST CIVIL APPEAL No. 34 OF 1919.

May 18, 1920.

Present:—Mr. Daniels, A. J. C.

SARABJIT AND ANOTHER—DEFENDANTS

Nos. 1 AND 2—APPELLANTS

versus

MATA DIN AND ANOTHER—PLAINTIFFS, Musam-

[mat GULZARA AND ANOTHER—DEFENDANTS

Nos. 3 AND 4—RESPONDENTS.

*Evidence Act (I of 1872), s. 80, applicability of—  
Depositions more than 60 years old—Oral evidence to  
identify deponent, absence of, effect of—Copies, signature  
of Presiding Officer wanting on, effect of.*

The mere fact that there is no oral evidence to identify the deponent of a deposition made more than 60 years ago, is not sufficient to render the provisions of section 80 of the Evidence Act inapplicable thereto, nor would the absence of the signature of the Presiding Officer to a copy of such deposition preclude the presumption that the copy is a true copy. [p. 438, cols. 1 & 2.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 31st May 1919.

Babu Bisheshwar Nath Srivastava, for the Appellants.

The Hon'ble Pandit Gokaran Nath Misra and Pandit Sarju Prasad, for Respondents Nos. 1 and 2.

Pandit Harkaran Nath Misra, for Respondent No. 4.

**JUDGMENT.**—This first appeal arises out of a suit for possession of the property of one Ujagar, deceased, on the death of his widow, Ramdei, in the village of Patman in the Bara Banki District. The only point now at issue between the parties is one of the pedigree. The plaintiffs-respondents, Mata Din and Ganeshi, are the sons of Basti and the grand-sons of one Sheodin whom they allege to have been the son of Debi, the common ancestor. The defendants appellants, Sarabjit and Radha Kishan, are the great grand-sons of Udit, the son of Debi, and, therefore, if the plaintiffs' pedigree is correct, are one degree more remote from the deceased Ujagar than the plaintiffs are. The defendants-appellants, on the other hand, insert two generations Banna and Badla between Sheodin and Debi, thus making the plaintiffs one degree more remote than themselves. The case turns on the weight to be attached to the documentary evidence produced by the parties. The oral evidence has been ignored both in the Court

below and in this Court. The plaintiffs' documentary evidence is earlier in time and, if it is genuine, there can, I think, be no doubt that the learned Subordinate Judge was right in giving it greater weight than that produced by the defendants. The plaintiffs' evidence consists of the following Exhibits:—

Exhibit 3 is a copy of an application made by the plaintiffs' father, Basti, in the Settlement Court in 1866 in which Basti describes himself as the son of Sheodin the son of Debi. (Exhibit 4 is the order passed on this).

Exhibits 6 to 10 are copies of papers forming part of the record of certain suits which were brought in connection with the first Summary Settlement. The originals are no longer available.

Exhibits 5 and 7, which are orders of the Court are admitted.

Exhibit 6, which is a compromise between the plaintiffs' father and one Gohray; and Exhibit 5 to 10, which are copies of statements of Bala and Makka, whose names appear in the family pedigree are disputed.

These papers, if genuine, amply establish the plaintiffs' case and they relate to a time long before the present suit arose. The appellants attack their genuineness or suggest that, at least, they should be regarded with some suspicion. The attack was particularly directed at Exhibit 3 the original of which was perused by the learned Subordinate Judge and has been called for again in this Court. This is certainly an old paper and the general appearance of the ink and the writing does not suggest that it is a forgery. The chief points of attack against it are,—

(a) that it has a horizontal fold across the centre of the paper which no other paper on the same record has and had at the time of its production in the lower Court no vertical fold;

(b) that the ink has run slightly near this fold though admittedly it has not done so in any other part of the document;

(c) that the signature "Muhammad Hussain" on the document differs somewhat from other signatures of the same person on the Settlement file;

(d) that there is no other application



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document on the Settlement file on precisely similar paper, and

(e) that the description of Basti as son of Sheodin, son of Debi, is unusual and does not occur in other documents on the file.

These criticisms have some force but may, perhaps, be explained by the compromise having been originally prepared out of Court. Considering the variety of papers which do appear on the file, I cannot attach any weight to the alleged difference in the paper. If the document had been a forgery prepared on old paper of as spongy a nature as this paper is, I should have expected the ink to spread to some extent in other parts of the document. From the fact that there was a fold in the paper when the compromise was written it does not necessarily follow that it is a forgery. As regards point (e), it is not denied that such descriptions did sometimes occur in old documents of this period.

If the plaintiffs' case rested on Exhibit 3 alone I might feel some doubt about it but the attack on the remaining exhibits is of a much more unsubstantial character and, after examining them carefully, I can find no reason for not agreeing with the learned Subordinate Judge in treating them as genuine. They are on old Court-fee stamps and bear various endorsements which show not the slightest trace of being forged. They bear the seal of the Deputy Commissioner's Court of Daryabad which was at that time the Tahsil and what purports to be is the signature of the European Officer responsible for the issue of copies. It is urged that Exhibits 5 and 7 bear the words "True Copy" in English whereas the other copies do, not but these two copies were issued under the signature of a different officer from the others and the latter bear a corresponding endorsement in Urdu. It is objected that section 80 of the Evidence Act cannot be applied to these depositions because oral evidence was not given to prove the identity of the persons who made them. It would be very difficult to give such evidence in the case of a deposition made more than sixty years ago. It is sufficient to say that they bear internal evidence that the persons by whom they were made were the Bhole and Makha

mentioned in the pedigree of the family. It is also objected that section 80 cannot apply, inasmuch as the copies of depositions do not purport to bear the signature of the Presiding Officer, which is the fact. It is possible that the signature may have been omitted in copying but even if the Presiding Officer omitted to sign the depositions I do not consider that this fact absolutely precludes the Court from presuming that the copies are what they purport to be, namely, true copies certified by competent authority of depositions made in a suit in the Court of the Extra Assistant Commissioner. The question is not, however, of supreme importance as, even without the depositions, the compromise is sufficient for the respondents' purpose.

Accepting as I do the plaintiffs' evidence as genuine, it is unnecessary to discuss in detail that of the defendants or to add more than a word or two to what the learned Subordinate Judge has said regarding it. The defendants' evidence consists partly of proceedings in a suit by Surajbali and Ujagar against *Musammal Tikan* in 187-88 in which they set up a pedigree similar to that now set up by the defendants, and partly of the fact that the plaintiffs subsequently pre-empted a portion of this property, on a sale by Surajbali and Ujagar, without setting up their title by inheritance. A deed of gift executed by *Musammal Ramdei* in favour of the defendants has also been referred to in which she calls them her next reversioners but this is, for obvious reasons, entitled to very little weight. The other evidence does carry some weight but, as the learned Subordinate Judge says, it was to the interest of the parties in the litigation of 1887 to say nothing as to the plaintiffs' rights. It is not so easy to see why they said nothing about their rights in the pre-emption suit, but the plaintiffs would only have been entitled to a half share of the property in dispute in that suit. If they had set up a claim based on inheritance instead of suing for pre-emption it would have been a good defense to say that the portion of the property which Surajbali and Ujagar had sold was less than the half share to which they were admittedly entitled.

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Other points which were raised in the lower Court are not now pressed.

On the whole I can find no sufficient ground for disturbing the order of the lower Court and I accordingly dismiss the appeal with costs.

*Appeal dismissed.*

### CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1533  
OF 1918.

June 14, 1920.

Present:—Mr. Justice Walmsley and  
Mr. Justice Buckland.

MOHENDRA NATH MAITI—DEFENDANT  
—APPELLANT

versus

PARAMESWAR SAMANTA AND ANOTHER—  
RESPONDENTS

*Transfer of Property Act (IV of '88), s. 52—Lis pendens. Plaint in suit returned to make up stamp-duty—Plaint re-presented—Suit, whether pending in interval.*

A transfer of property effected between the date when an insufficiently stamped plaint is returned for the stamp-duty to be made good, and the date of its re-presentation, is not affected by the doctrine of *lis pendens*, as on the date of the transfer no suit was pending. [p. 10, col. 1.]

Appeal against the decree of the Additional District Judge, Midnapur, dated the 4th of May 1918, affirming that of the Munsif, Second Court, at Tamluk, dated the 19th of August 1916.

FACTS appear from the judgment.

Babu Dwarkanath Chakravarty (with him Babu Kalikinkar Chakravarty), for the Appellant.—Defendant No. 1 is the appellant. The appeal arises out of a suit for recovery of certain lands on the basis of a purchase. The defendant No. 2 was the owner of a jots. The plaintiff's case is that there was a contract for sale of the land with the plaintiff on 6th February 1912. The plaintiff then sued for specific performance. The plaint having been insufficiently stamped was returned on 3rd April 1912. The suit was then properly filed on 9th

April 1912. On 6th April 1912 defendant No. 2 sold the land to defendant No. 1. I bought without notice of the previous contract with plaintiff, neither was I impleaded in that suit which was decreed on 18th December 1913 on appeal. Plaintiff obtained the conveyance by Court on 23rd July 1914. The plaintiff has now brought this suit. My defense was that I was a *bona fide* purchaser without notice, that the property in suit was a mere right of occupancy and not saleable without the landlord's consent, that I had been recognised by the landlord by his acceptance of rent from me. The plaintiff's answer was that I had bought with notice and that the tenancy was permanent and, therefore, saleable and that I was bound by the doctrine of *lis pendens*. The first Court, accepting the plea of *lis pendens*, decreed the suit although it found that my purchase was without notice and that the holding was non-transferable without the landlord's consent. On appeal, the suit was decreed on the ground of *lis pendens* alone. I submit the doctrine of *lis pendens* does not bar my title as I was a *bona fide* purchaser for value without notice and my purchase was long before the plaintiff's conveyance. Further, I am recognised by the landlord while the plaintiff's story of recognition was negatived. As regards my first point about the applicability of the doctrine of *lis pendens*, there was no suit pending in Court in course of active prosecution when I purchased. The plaint was then withdrawn.

[BUCKLAND, J.—Was the plaint returned when it was filed with insufficient stamps and five days were allowed for filing it with proper stamps?]

The plaint was withdrawn. No suit was pending in any Court then. Mere pendency alone of a suit would not be sufficient. Reads section 52 of the Transfer of Property Act. Irregular presentation of a plaint does not amount to proper and actual initiation of a suit. If my first point succeeds, the case will succeed and will have to go back on remand.

Babu Mohendranath Roy (with him Babu Santosh Kumar alior B. on Jyotish Chandra Hura, for the Respondents.—The suit must be taken to have been instituted on 3rd April 1912. Refers to Order VII

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rule 11 (c), Civil Procedure Code; sections 148, 149, Civil Procedure Code. The former requires a Court to dismiss the plaint on failure of plaintiff to put insufficient stamps within the time granted. The order was—Plaintiff to file deficit Court-fee stamps within five days. It was evidently made under Order VII, rule 11 (c), Civil Procedure Code.

[BUCKLAND, J.—Ought the Court not to have kept the plaint in its file?]

According to the practice it does not matter after such an order where the plaint is kept. The order made was not then final. Some other order would be necessary either to register the plaint or to reject it; when the deficit stamps are paid the plaint will be treated as having been filed on the date it was originally presented in view of section 149, Civil Procedure Code. Assuming, therefore, that the defendant was *bona fide* purchaser for value without notice he did not acquire a valid title by his purchase. The provisions of section 52, Transfer of Property Act, are clear on the point.

Babu Dwarkanath Chakravarty replied in brief.

#### JUDGMENT.

BUCKLAND, J.—The only question that arises in this appeal is whether or not on the 6th of April when the land in question was sold by the second defendant to the first defendant there was a suit pending so as to introduce the operation of section 52 of the Transfer of Property Act. According to the register it appears that the plaint was actually registered under Order IV, rule 2, as if it had been admitted on the 9th April. It is not clear what occurred in connection with the insufficiency of the Court-fee, but if the Munsif returned the plaint actually to the plaintiff and then allowed him five days within which to present it again with the additional Court fee, such order does not appear to be strictly in accordance with Order VII, rule 11, of the Civil Procedure Code. In the circumstances, we accept what we find in the register of suits. In consequence, there was no *lis pendens* on the date, that is the 6th of April. In the circumstances, we reverse the judgment of the learned Judge. The learned Judge has not come to any findings on the other

points in the case with reference to the nature of the right claimed or whether the transfer was without notice and we remand the case to the learned District Judge for him to come to findings on those points.

Costs of this appeal to abide the result.

WALMSLEY, J.—I agree.

*Case remanded.*

#### ODISH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 4 OF 1918.

July 2, 1920.

Present:—Mr. Daniels, A. J. C.,  
and Syed Wazir Hasnani, A. J. C.

RAMPAT AND ANOTHER—DEFENDANTS—  
APPELLANTS

*versus*

Mahant DURGA BHARTHI—PLAINTIFF  
— RESPONDENT.

*Asthan, Sannyasi, nature of—Separate and personal property of Mahant—Burden of proof—Alienation by Mahant—Breach of trust—Compromise, conditions of, parties whether can resile from.*

An *Asthan* is essentially an institution of *Sannyasi* celibates and ascetics, having no worldly connections either of wealth or of family, and there is a presumption that the Mahant of an *Asthan* has no property other than *Asthan* property and that his income consists in the profits of that property and the offerings made to him in the character of trustee of the institution, but this does not disable him from owning property of his own, only those who allege the separate and personal character of any property found in the possession of a Mahant must prove their allegation; and in the absence of such proof, or of proof of unavoidable necessity, an alienation made by a Mahant is *ultra vires*. The fact that there have been a large number of alienations by successive Mahants proves nothing more than breaches of trust by the alienors [p. 442, col. 2; p. 443, col. 1; p. 446, col. 2; p. 447, col. 1.]

Where a dispute is settled and the terms and conditions of the settlement are recorded in a compromise, it is not open to any of the parties to resile from those conditions. [p. 448, col. 1.]

Appeal from the decree of the Subordinate Judge, Gonda, dated the 7th December 1917.

Babu Aditya Prasad, for the Appellants.

Messrs. A. P. Sen and H. K. Ghosh, for the Respondent.



RAMPAT V. DURGA BHARTHI.

## JUDGMENT.

WAZIR HASAN, A. J. C.—This appeal arises out of the suit brought by Mahant Durga Bharthi against Rampat and Ramenkh in the Court of the Subordinate Judge of Gonda for recovery of possession of the following villages situate in Pargana Utraula in the district of Gonda :—

1. Bankasia, hamlet of Magaipur, under-proprietary right to the extent of 6 annas.

2. Bankasia, superior proprietary right, the whole.

3. Matebna, hamlet of Magaipur, under-proprietary right to the extent of 4 annas.

4. Pura Bharpurwa, superior proprietary right, the whole.

5. Magaipur, superior and inferior proprietary rights, the whole.

6. Sahayapur, superior proprietary right, the whole.

7. Dubaiha, under-proprietary right, to the extent of 2 annas; and

8. A house in Magaipur.

The plaintiff's case, briefly stated, is that the properties in suit appertain to the Asthan of Parela in the district of Basti, that one Dasrath Bharthi, brother of the defendants, was in possession of those properties in virtue of the settlement of the 6th April 1906 between him and the plaintiff; that Dasrath Bharthi made a transfer of them by way of *shankalap* under a deed, dated the 20th of September 1913 in favour of the defendants; that Dasrath Bharthi died on the 10th of March 1915; that the said transfer was *ultra vires*, and that the plaintiff, in the capacity of the Mahant of the Asthan as well as under the settlement, is entitled to recover possession of the properties in suit from the defendants.

The defence, so far as it is necessary to notice for the purposes of this appeal, raised three main pleas in answer to the plaintiff's suit. The questions which thus arose for determination were embodied in the following issues framed by the learned Subordinate Judge :—

(1) Was the property in suit Asthan property in the hands of Dasrath Bharthi?

(2) Did he exceed his powers of alienation in making the *shankalap* in question?

(3) Did the plaintiff become entitled to the whole of the property in suit on the death of Dasrath Bharthi?

The Trial Judge decided the foregoing issues in favour of the plaintiff and, in consequence, gave him a decree for possession of the properties in suit. Aggrieved by this decree the defendants have appealed to this Court. The same three points to which I have already made reference were argued before us though in somewhat modified forms. The questions, therefore, which we are called upon to decide in this appeal are :—

(1) Whether the properties in suit appertain to the Asthan in question.

(2) Whether Dasrath Bharthi was competent to alienate them.

(3) Whether Durga Bharthi, the plaintiff-respondent, is entitled to eject the defendants-appellants.

About 300 years ago Jagdeo Gurn, says the tradition, was the head of a monastic institution of Sannyasis, known as Bharthi Mahants, at Gaura in the district of Basti. One Ori, Chattari by caste, became his disciple and drank deep of the fountain of religious mysteries at the feet of his Gurn. After having attained the zenith of perfection, Ori Bharthi, under the authority of his preceptor, made Parela, a village in the same district, the seat of his devotional exercises. His fame spread far and wide and consequently Parela began to attract large congregations of the people of the neighbourhood and Ori Bharthi, within a comparatively short interval of time, amassed a large fortune out of the presents he used to receive. True to his creed, he spent his wealth on the construction of a monastery (Asthan) at Parela and after furnishing it with necessary things consecrated it to the service of his ascetic brotherhood, and purchased the following villages from the Raja of Basti for the maintenance of the institution :—

Bezpur, Pirpur, Amrangor, Tamaku Gois, Kakkar Gania, Thour, and Jonkadih.

Ori Bharthi then framed a set of rules, continues the tradition, based upon the usages obtaining in the monastery of his preceptor for the guidance of his successors. "Whereby he provided that out of his disciples, the most competent of them should succeed him and should lead the life of a celibate and acting as a custodian of the properties left behind, should out of its profits continue the work of charity. After him his disciple Gangu Bharthi, Chattari

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by caste, who was the most trusted of all, succeeded him and observed the practice laid down by the rules." (*Vide* Exhibit 2, the *waib-ul-az* of village Bzpur). In the absence of any defects of anachronism and more reliable evidence to the contrary, the general accuracy of the tradition must be accepted. Indeed, no attempt was made at the Bar to impeach it. In my opinion, the Asthan at Parela, as founded, was completely in accordance with the type of monasteries of the old days. The several legal concepts which emerge out of the foregoing narrative may be stated to be as follows:—

(1) It is a congregation of Sannyasis, celibates and ascetics, who have entirely cut themselves off from worldly ties.

(2) The properties appertaining to the Asthan are held in trust for the purposes of the Asthan.

(3) The purposes of the Asthan are maintenance of the devotees and propagation of charities.

(4) The head of the Asthan is the trustee of the institution and of the properties attached to it.

(5) The rule of descent of the headship or of the *gudde* is founded upon the special usages and customs obtaining in the Asthan.

The origin of such institutions is generally traced to the conception of the life of a Hindu of the twice-born classes as composed of the four Holy orders so truly illustrated in the life of Ori Bharti who founded the Asthan in question:—

(1) A Brahmachari, or student, living with the Guru as a member of his family

(2) A Grihastha, or house-holder, married after the first stage was over.

(3) Vanaprastha, or one retired from the world, residing with persons of the same order engaged in religious practices and contemplation of the deity, being free from all worldly cares—the retirement saving the effect of extinguishing his right to the property he had at the time of retiring.

(4) Yati, or itinerant contemplative ascetic (*Treatise on Hindu Law by Golapchandra Sarkar, Sastri, 4th Edition*).

The third stage clearly necessitated foundations of the character of Mathas, Matte, Satras, Asthans or Asthals. The spread of Buddhism gave great stimulus to the growth of such institutions. Rai Bahadur Jogendra

Chundar Ghose expresses the idea in felicitous language as follows:—

"Buddhism cannot exist without the three gems.

"Buddha, the Dharma and the Sangha, i. e., the congregation of monks, who observed the law in its purity." (*J. C. Ghose's Principles of Hindu law, Volume I, page 209, Third Edition*).

On the revival of Brahmanism about the eighth century A. D. Sankara Acharya, the greatest Hindu scholar and philosopher of modern India, (or his disciples) founded the ten orders of Sannyasis, called after the names of the ten disciples of the foremost favourite pupils of his, namely, (1) Giri, (2) Sagar, (3) Parvat, (4) Pari, (5) Saraswati, (6) Bharavi, (7) Pirtha, (8) Aaram, (9) Ban and (10) Aranga. (*Vide Sastri's Hindu Law, 4th Edition, page 455*).

An Asthan, therefore, is essentially an institution of Sannyasis celibates and ascetics—having no worldly connection either of wealth or of family; and the Asthan at Parela is an Asthan of Bharti Sannyasis being of the sixth order above-mentioned.

A Math should, by a person having faith in the Shastras, be made three-storied or two-storied or one-storied, consisting of different apartments, possessed of an elephant; accommodated with places for meditation, for study, for burnt offering to consecrated fire and the like, and for teaching..... And he should endow a village or sufficient land for meeting the expenses, so that the ascetics and the travellers getting shelter (there) may receive sandals, shoes, umbrellas, small pieces of cloth and also other necessary things. Thus, having established an asylum beneficial to the persons practising austerities and also to other poor people seeking shelter, he should declare—"I am endowing this asylum, May He who is the support of the universe be pleased with me"—Baraba Purana (*Vide Sastri's Hindu Law, pages 475 and 476*).

I have, therefore, come to the conclusion that the villages which Mahant Ori Bharti had purchased from the Raja of Basti were dedicated to the Asthan of Parela and he and his successors held them as trustees. Having shown the true characteristics of Sannyasis and the real character of an institution like an Asthan, I am led

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to the conclusion that in the very nature of things there must arise a presumption to effect that the head of an Asthan has no property other than Asthan property and that his income consists in the profits of that property and the offerings made to him in the character of the trustee of the institution. The law of the land, of course, does not disable him from owning property of his own, but all I say is that those who allege the separate and personal character of any property found in the possession of a head of an Asthan of Sannyasis and which has descended to him in an unbroken course of succession of Mahants for a long time must have the onus laid upon them of proving their allegation.

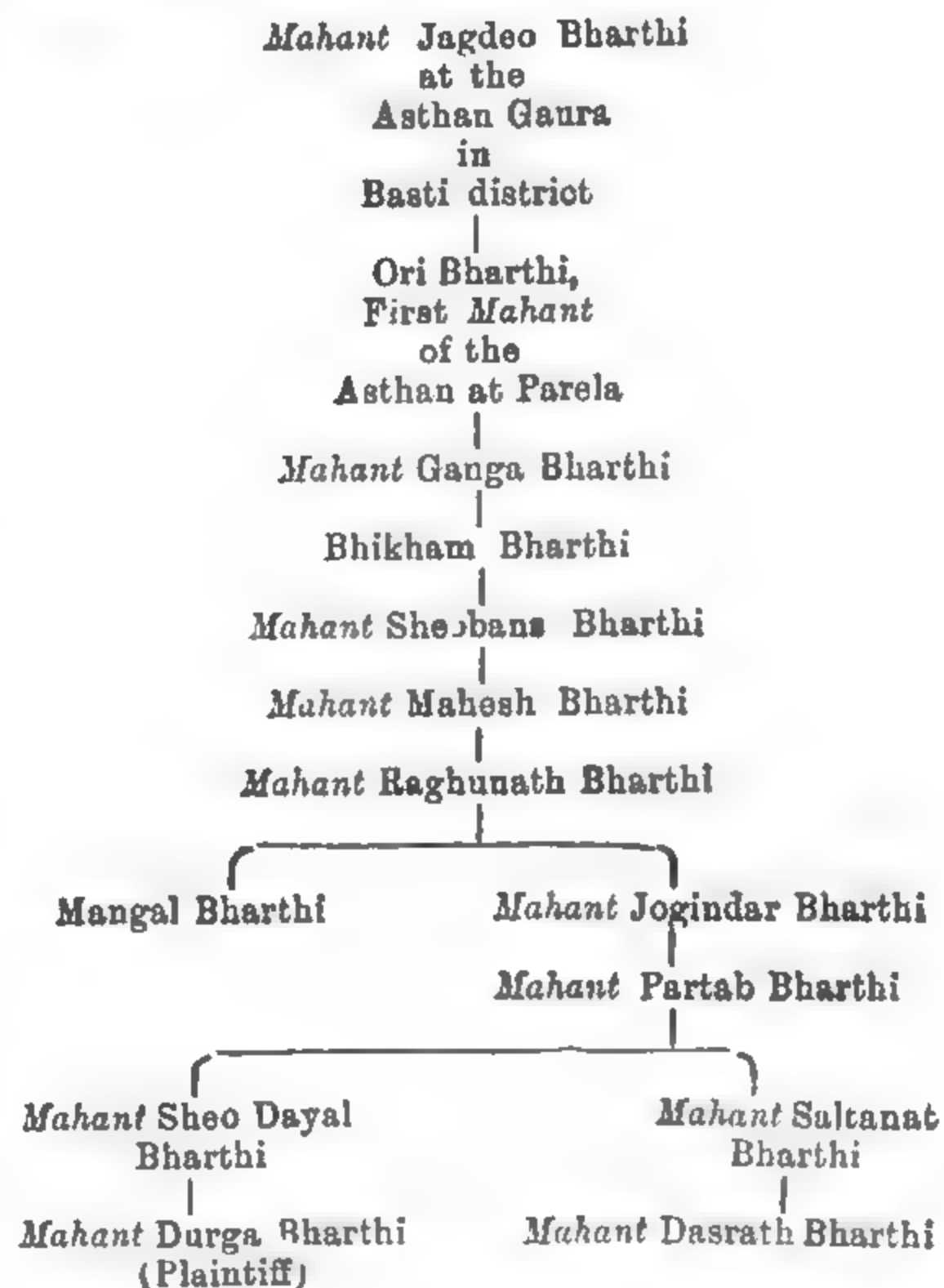
Vijnaneswara, himself an ascetic, the author of the Mitakshara, in commenting upon Yajnavalkya's text—"The heirs of a hermit, of an ascetic and of a professed student, are in their order, the preceptor, the virtuous pupil, and the spiritual brother and the associate in holiness"—observes as follows:—

"Are not those, who have entered into a religious profession, unconnected with property; since Vasishtha declares, 'They, who have entered into another order, are debarred from shares.' (Vasishtha, XVII, 52). How, then, can there be a partition of their property? Nor has a professed student a right to his own-acquired wealth: for the acceptance of presents, and other means of acquisition, are forbidden to him. And since Gantama ordains, that 'a mendicant shall have no savings.' (Gantama, II, 11) the mendicant also can have no effects by himself acquired.

"The answer is, a hermit may have property: for the text (of Yajnavalkya) says, 'The hermit may make a hoard of things sufficient for a day, a month, six months, or a year; and, in the month of Asvina he should abandon what has been collected' (Yajnavalkya, III, 47). The ascetic, too, has clothes, books, and other requisite articles, for a passage directs that 'he should wear clothes to cover his private parts;' and a text prescribes that 'he should take the requisites for his austerities and his sandals.' The professed student likewise has clothes to cover his body: and he possesses also other effects,

"It was, therefore, proper to explain the partition of or inheritance to, such property." (Mitakshara, Chapter II, section VIII, Paragraphs 1, 7, 8 and 9, Setlar's Collection of Hindu Law Books, 1911 Edition).

I will here give the line of succession from Mahant Jagdeo Bharthi down to the present Mahant,—



I need hardly say that the above pedigree represents the succession of 'monday disciples' (shaved disciples) as they are called in these proceedings. I now proceed to trace the acquisition of each item of the properties involved in this appeal.

(1) Bankasia—"It is about 200 years ago that Bhikham Bharthi, the ancestor of the proprietor of the village, having purchased a jungle from the *talukdar* of Utraula, cut it and populated it." Half of the village under certain vicissitudes was lost to the Asthan prior to the old settlement and the only other half now remains (*Vide Exhibits A 28, A 29 and A 32*).

(2) Matebna—This village was purchased by Mahant Jogendra Bharthi in the year 1855 (*Vide Exhibit 1*).

(3) Para Bhardpurwa was purchased by



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*Mahant Bhikham Bharthi* in the year 1207 *Fasli*, i. e., in 1800 A. D. Only the superior rights in this village are now possessed and owned (*Vide Exhibits 2, A 38 and A 39*).

(4) *Magaipur* was purchased by *Bhikham Bharthi* in 1207 *Fasli*, i. e., in 1800 A. D. In this village also only the superior rights are now possessed and owned (*Vide Exhibits 2 and A 38*).

(5) *Sahayapur* was purchased by *Bhikham Bharthi* in 1209 *Fasli*, i. e., 1802 A. D. As in the other two foregoing villages only superior rights are now owned in this village.

(6) *Dubaiha* was purchased by *Partab Bharthi* in 1886 A. D.

If the sources of the income of a reigning *Mahant* for the time being must be presumed, as I have held before, to be limited to the profits of the endowed properties and the fresh offerings received by him in his character as such it follows that subsequent acquisitions must equally be presumed to have been made with the aid of such income and consequently will follow the same character as of nucleus. I will first deal with the legal character of offerings. The essential fact to be borne in mind in this connection is that the offerings made at an *Asthan* of the kind in question are made to the priests of the *Sannyasi* order who, as I have shown above, possess no wealth of their own. Such offerings would, I conceive, bear a more marked stamp of trust property than offerings to an idol at an ordinary shrine. In the case of *Babajirao Gambhirsing v. Lazmandas Guru Raghunathdas* (1) Sir Lawrence Jenkin, C. J., made the following observations:—"A Math, like an idol, is in Hindu Law a judicial persona capable of acquiring, holding and vindicating legal rights, though of necessity it can only act in relation to those rights through the medium of some human agency." An *Asthan*, therefore, as much as an idol is a juristic person capable of holding property and consequently offerings made to the priest of the *Asthan* presumably at least belong to the *Asthan*. The judgment of Mr. Justice West in the case of *Manohar Ganesh v. Lakhmiram Govindram* (2) is

extremely illuminating and instructive if I may say so. At page 265 the learned Judge observes as follows:—"But if there is a juridical person, the ideal embodiment of a pious or benevolent idea as the centre of the foundation, this artificial subject of rights is as capable of taking offerings of cash and jewels as of land. Those who take physical possession of the one as of the other kind of property incur thereby a responsibility for its due application to the purposes of the foundation—Compare *Griffin v. Griffin* (3), *Mulhallen v. Marum* (4), *Aberdeen Town Council v. Aberdeen University* (5). They are answerable as trustees even though they have not consciously accepted a trust, and a remedy may be sought against them for maladministration by a suit open to any one interested, as under the Roman system in a like case by means of a *popularis actio*." This decision was affirmed in appeal by their Lordships of the Privy Council in *Chotalal Lakhmiram v. Manohar Ganesh* (6).

The observations of a learned Hindu Judge, Sir Gura Das Bannerji, in the case of *Girijanund Ditta Jha v. Sailajanund Ditta Jha* (7) must command our respect and are, in my opinion, conclusive on that point that such offerings cannot be treated as the personal property of the priest or the *Mahant* whoever the trustee may be. At page 655 the learned Judge observes as follows:—"But where, as in this case, the idol is an ancient one permanently established for public worship and the offerings are generally of a more or less permanent character, being coins and other metallic articles, in the absence of any custom or express declaration by the donor to the contrary, they are, as they ought to be, taken to be intended to contribute to the maintenance of the shrine with all its rites, ceremonies and charities and not to become the personal property of the priest. However much a Hindu votary may wish that his offerings to public shrines should ultimately go to the use of meritorious

(3) (1804) 1 Sch. & Lef. 352; 9 R. R. 51.

(4) 3 Dr & War 317.

(5) (1877) 2 App. Cas 544; 4 Rettie 49; 14 So. L. R. 490.

(6) 24 B. 50 (P. C.); 2 Bom. L. R. 516; 4 O. W. N. 28; 23 I. A. 189; 7 Sar. P. O. J. 559; 12 Ind. Deco (N. S.) 570.

(7) 23 C. 645; 12 Ind. Deco. (N. S.) 429.

(1) 28 B. 215 at p. 223; 5 Bom. L. R. 982.

(2) 12 B. 247; 12 Ind. Jur. 887; 6 Ind. Deco. (N. S.) 650.

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Brahmins, he can never be supposed to intend, nor does the Hindu Law anywhere allow, that they should become the property of the priest, to be squandered by him or devoted to purposes foreign to the endowment." I am, therefore, of opinion that the offerings, if any, made at the Asthan of Parela, must be deemed, unless proved to the contrary, to be properties belonging to the Asthan and not the personal properties of the Mahant for the time being.

Now I come to the question of the profits of the endowed properties. The view taken in the case of *Vidyapurna Tirtha Swami v. Vidyantidhi Tirtha Swami* (8) as to the legal position of a Mahant and his power of disposal of the surplus income of a Muth cannot now be accepted as correct. Mr. Justice Sadasiva Aiyar in his judgment in the case of *Muthusamier v. Sree Sree Methanithi Swamiyar Avergal* (9) observes as follows:—"A Matathipathi has been compared to a corporation sole in *Vidyapurna Tirtha Swami v. Vidyantidhi Tirtha Swami* (8) but (speaking for myself) I do not like to dwell on that analogy, as (unless we are very careful) that analogy might not only mislead us into the complications and difficulties of considering and construing the varied opinions given in English cases about corporations sole, but there is this fundamental distinction, namely, that whereas 'the properties belonging to an English Bishop' (a corporation sole under the English Law) 'including his savings from the revenues of the benefice, devolve upon his legal representatives or heirs,' the savings of a Matathipathi devolve upon the succeeding Matathipathi. I am also not at all sure that as regards even the income of the Muth properties, a Matathipathi has an absolute and unqualified power of disposition as a Bishop over the income of his benefice, that is, to squander it away in even immoral or extravagant ways." In the case of *Prayaga Doss Jee Varu v. Tirumala Anandam Pillai Purisa Sriranga Charylu Varu* (10) their Lordships of the Privy Council threw the entire income of the Muth in question in that case into the scheme of management which they

framed. Paragraph 2 of that scheme is as follows:—

"All funds to be in the custody of the treasurer. Rules to be framed by the District Court to ensure the proper receipt and custody of all offerings, income and funds, and investment of any surplus, and to prevent misappropriation, and to ensure the proper management of any estate or other properties or investments."

With due respect to the learned Judges, I am unable to accept the proposition of law laid down in the case of *Sree Mahant Kishora Dossjee v. Coimbatore Spinning and Weaving Company* (11). The report does not show what texts from the Hindu Sacred Law Books were referred to: as regards which the learned Judges remarked that they 'cannot be looked on as anything more than counsels of perfection.' In my opinion, such of the texts as I have quoted in this judgment show beyond any reasonable doubt that the several characteristics of a Sannyasi mentioned therein constitute the very essence of his existence as such and are not merely 'counsels of perfection.' But as I read the judgment in that case, I am of opinion that it mainly depends for its conclusions not upon any rule of law but upon the facts of that particular case. The matter seems to me to be concluded by the recent pronouncement of their Lordships of the Privy Council in the case of *Ram Parkash Das v. Anand Das* (12). Lord Shaw, in delivering the judgment of His Majesty's Privy Council in the above-mentioned case, observed as follows:—

"An Asthal, commonly known in Northern India as a Muth, is an institution of a monastic nature. It is established for the service of a particular cult, the instruction in its tenets and the observance of its rites. The followers of the cult and disciples in the institution are known as *chelas*; the *chelas* are of two classes, celibate and non celibate..... The Mahant is the head of the institution. He sits upon the *gaddi*; he initiates candidates into the mysteries of the cult; he superintends the worship of the idol and the

(8) 27 M. 435; 14 M. L. J. 105.

(9) 19 Ind. Cas. 694; 38 M. 356; 13 M. L. T. 498; (1913) M. W. N. 581; 25 M. L. J. 393.

(10) 84 I. A. 78; 80 M. 138; 11 C. W. N. 442; 2 M. L. T. 119; 17 M. L. J. 236; 9 Bom. L. R. 535 (P. O.).

(11) 26 M. 79; 12 M. L. J. 439.

(12) 33 Ind. Cas. 583; 43 C. 707; 20 C. W. N. 802; 14 A. L. J. 621; (1916) 1 M. W. N. 436; 31 M. L. J. 1; 18 Bom. L. R. 490; 3 L. W. 556; 24 C. L. J. 116; 20 M. L. T. 267; 43 I. A. 78 (P. O.).

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accustomed spiritual rites, he manages the property of the institution; he administers its affairs, and the whole assets are vested in him as the owner thereof in trust for the institution itself. Upon his death or abdication he is succeeded by one of the *bairagi chelas*. These *bairagi chelas* are, as stated, celibates; or if they have ever been married they must, prior to their initiation as *bairagi chelas*, have renounced their wives and families and have conformed to the practice of the Math. This practice is ascetic: it involves a separation from all worldly wealth and ties, and a self-dedication to the services and rites of the Asthal ..... It is, however, the rule that this property is held by the *Mahant* as its owner, and the succession to him in such property follows with the succession to the office. The nature of the ownership is, as has been said, an ownership in trust for the Math or institution itself, and it must not be forgotten that, although large administrative powers are undoubtedly vested in the reigning *Mahant*, this trust does exist, and that it must be respected." The full effect of this pronouncement has been recognised in a recent decision of a Bench of the Madras High Court in the case of *Baluswami Aiyar v. Venkataswamy Naicken* (13). In a still later decision of His Majesty's Privy Council the following observation occurs:—"Their Lordships concur with the learned Judges of the High Court and the Trial Judge that the village of Lowthwa attached to the Asthal, is endowed property subject to the trust set out in the grant, and that all acquisitions with the income thereof are subject to the same trust." (The italics are mine—*Vide Basudeo Roy v. Jugalkishwar Das* (14)).

The learned Subordinate Judge supports his finding on Issue No. 1 by reference to the admissions made by Dasrath Bharthi on several occasions (*Vide* Exhibit 14, written statement of Dasrath Bharthi in the previous litigation: Exhibit 20, judgment by the Court of first instance in that litigation: Exhibit 1, compromise in the same litigation: and Exhibit 17, deposition of

Dasrath Bharthi). I agree with the learned Subordinate Judge as regards the evidential value of these documents. Agreeing, therefore, with him I answer the first question in the affirmative. It follows that the alienation made by Dasrath Bharthi of the properties in suit in favour of the defendants appellants was *ultra vires* of him, no case of unavoidable necessity being either proved or argued before us. See *Abhiram Gowami Mohant v. Shyama Charan Nandi* (15) and *Basudeo Roy v. Jugalkishwar Das* (14). But it is contended that Dasrath Bharthi acquired the power of alienation under the terms of the settlement of the 6th of April 1906. This brings me to the consideration of the second question stated at the outset of this judgment.

In connection with this point, it is necessary to give a short history of a previous litigation between *Mahant Darga Bharthi*, the plaintiff-respondent, and *Dasrath Bharthi* in whose shoes the defendants-appellants claim to stand. We have seen that several *Mahants* of the Parela Asthan successively acquired large properties in the district of Gonda. Bezpur was also one of the villages acquired by Ganga Bharthi so far back as 1772 *Fasli*, (i. e., 1765 A. D). Bezpur in course of time became the centre of the landed interest in the Gonda district of the original Asthan at Parela and in very recent times acquired the status of a branch Asthal to the chief institution. Instances of such branch Asthans are not rare. See *Giyana Sambandha Panlala Sannadhi v. Kendusami T mbiran* (16). Some of the more ambitious *chelas* took up their abode at Bezpur and in many instances, which I will notice later, abused the trust which they voluntarily took in their charge. Dasrath Bharthi appears to have been a prominent figure in this respect. After the death of *Mahant Suro Dayal Boarthi* in October 1900, a dispute arose between the plaintiff and Dasrath Boarthi as to the succession to the Asthan *gaddi*; the latter claiming to be the successor of *Saltanat Boarthi*, who had taken possession of the Bezpur properties during the minority of the plaintiff. *Saltanat Boarthi* died early

(13) 40 Ind. Cas 581; 40 M. 745; 32 M. L. J. 24.

(14) 45 Ind. Cas. 818; 16 A. L. J. 631 at p. 606; 5 P. L. W. 57; 35 M. L. J. 5; 22 C. W. N. 841; 19 8 M. W. N. 431; 8 L. W. 130; 24 M. L. T. 305; 25 C. L. J. 476; 20 Bom. L. R. 1088 (P. O.).

(15) 4 Ind. Cas 449; 36 C. 1023; 10 C. L. J. 294; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 520; 14 C. W. N. 1; 36 L. A. 143 (P. O.).

(16) 10 M. 375; 3 Ind. Deq. (N. s.) 1015.



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in 1902. Durga Bharthi went to Court in 1904 against Daserath Bharthi (*Vide* Exhibit A 48, *Plaint*) but lost his suit in the Court of the Subordinate Judge of Gonda on the ground that he had failed to prove his succession to the *gaddi* of the Asthan at Parela (*Vide* Exhibit 20, *Judgment*). Durga Bharthi appealed to this Court. The parties entered into a compromise which was embodied in a petition presented to this Court on the 6th of April 1906 (Exhibit 1). The appeal was decided accordingly and a decree was prepared in terms of the said compromise (Exhibit 13). The construction of this compromise is one of the questions in the case.

In my judgment, there can be no two opinions on this point. The preamble and the several clauses of this settlement unmistakably recognise the real character of the properties dealt with as belonging to the main Asthan of Parela and Durga Bharthi as the successor of the last Mahant of that Asthan, namely, Sheo Dayal. The pleadings of that suit and the absence of any issue as to whether the properties appertained to the Asthan or not also support this interpretation of the compromise. I am clearly of opinion that the two elements mentioned above constitute the entire foundation of the compromise and it is not open to any of the parties to resile from those conditions [See *Kanhai Lal v. Lala Brij Lal* (17)]. The dispute is settled by a temporary partition of the trust properties between the two claimants, but care is taken to restore their integrity on the death of either of the two. Clause 6 of the compromise is as follows:—

"No party to this suit shall have the right of making disciples as long as one of the parties does not die; and when one of them dies his share will devolve upon the other and the surviving party shall then be entitled to make disciples:"

and clause 7 is "Each party shall be the owner and possessor of his respective share and shall be entitled to have his share mutated in his name."

It is contended, on the strength of the word 'owner' used in clause 7, that

(17) 47 Ind. Cas. 207; 40 A. 487; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 236; 85 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N. 709; 28 C. L. J. 394; 5 P. L. W. 294; 20 Bom. L. R. 1048; 45 L. A. 118 (P. C.).

Daserath Bharthi acquired complete proprietary rights unburdened with any trust in favour of the Asthan, in the properties allotted to him under the 7th clause of the compromise and reliance is placed upon several decisions of their Lordships of the Privy Council in support of the contention.

I think the rule of construction laid down by their Lordships of the Privy Council in the case of *Swarnani v. Rabi Nath Ojha* (18) at once negatives the contention urged by the appellants' learned Pleader. The rule is that "the use of the word '*malik*' implies 'absolute ownership' unless there is anything in the context or surrounding circumstances to qualify such meaning." In the 'context' we find clause No. 6, the first portion of which restricting the right of making disciples loses all sense if, in construing the word '*malik*' in clause 7, I hold that it implies 'absolute ownership.' Similarly, the second portion of clause 6 relating to the devolution of the share of one party on the survivor of the two is deprived of all sense and significance if I were to accept the construction put forward by the Pleader for the appellants. The 'surrounding circumstances' equally exclude the construction sought to be placed by the appellants. The litigation which ended by the compromise related to the succession to the *gaddi* of the Asthan—an inalienable right; the compromise deals with properties which were not alienable at the sweet pleasure of the Mahant; it recognises the trust character of the properties; it further recognises the status of the parties as Mahants and, finally, any attempt to alter the character of the properties from trust into personal would clearly have been defeated by law.

A large number of alienations on the part of the plaintiff were brought to our notice as evidence of conduct in aid of the construction pressed upon us by the learned Pleader for the appellants—Exhibits A 61, A 55, A 57 (b), A 58 and A 59. The rule under which this aid is sought is stated in Beal's Cardinal Rules of Legal Interpretation, page 106, Second Edition, as follows:—"The acts of the parties done

(18) 30 A. 84; 5 A. L. J. 67; 12 C. W. N. 221; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 35 I. A. 17 (P. C.).

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under the contract can be looked at to ascertain the intention, if the words of the contract are ambiguous, or to show that the contract does not express that which the parties intended to express in it." I am of opinion that the words of the compromise which we have to construe in this case are perfectly clear and there is no ambiguity whatsoever about them. Under the circumstances, the rule quoted above does not apply.

"The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous."—*North Eastern Railway v. Lord Hastings* (19), *Earl of Halsbury, L. C.* Further, having found that the properties held by the successive *Mahants* are trust properties as belonging to the *Asthan*, I must hold that these alienations amount to nothing more than so many instances of breach of trust on the part of the alienor [See *Madhab Chandra Bora v. Sarot Kumari Debi* (20) and *Gordhan Das v. Chuni Lal* (21)]. On these grounds, I reject the contention of the appellants and, in agreement with the Trial Judge, answer also the second question in favour of the respondent. Now remains the last question as to the status of the plaintiff. *Mahant Sheo Dayal Bharthi* was the last undisputed *Mahant* of the *Parela Asthan*. The position of the plaintiff as his successor is fully recognised by the settlement of the 6th of April 1906 and I have already expressed my opinion that the parties or their representatives-in-interest cannot be permitted to resile from the terms of that settlement. But, apart from the title of the plaintiff in the character of a *Mahant*, it is clear beyond any doubt that the plaintiff is entitled to the possession of the properties in suit under the sixth clause of the compromise as being the survivor of the two parties to it. I decide the last question against the appellants and in favour of the respondent.

I would dismiss the appeal with costs.

DANIELS, A. J. C.—I concur.

*Appeal dismissed.*

(19) (1900) A. C. 260 at p. 263; 69 L. J. Ch. 516; 82 L. T. 429; 16 T. L. R. 325.

(20) 6 Ind. Cas. 26; 15 C. W. N. 126.

(21) 30 A. 111; 5 A. L. J. 28; A. W. N. (1908) 34.

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1104 OF 1920.

JANUARY 5, 1921.

Present:—Mr. Justice Chevis.

TOTA—PLAINTIFF—APPELLANT

versus

MUKHA AND OTHERS—DEFENDANTS—RESPONDENTS.

*Custom—Adoption, what constitutes—Suit to set aside gift—Appeal by donor, whether competent.*

Where one person makes a gift in favour of another alleging that the latter is his adopted son, a declaration to that effect made at the time of mutation and repeated subsequently in the course of a suit brought by the collaterals of the donor to contest the validity of the gift is sufficient proof of adoption. [p. 449, col. 1.]

Where in such a suit a decree is passed declaring the invalidity of the gift, the donor alone is competent to prefer an appeal against the decree. [p. 449, col. 1.]

Second appeal from the decree of the District Judge, Hissar, dated the 20th February 1920, reversing that of the Munsif, First Class, Hissar, dated the 24th June 1917.

Mr. Nanak Chand Pandit, for the Appellant  
Mr. O. L. Gulati, for the Respondents.

JUDGMENT.—This is a suit by Tota for a declaration that a gift of land made by his brother Mukha in favour of Bal Ram, nephew of both Mukha and Tota, shall not affect his reversionary rights. Mukha made the gift in 1919 by causing mutation of names to be effected in favour of Bal Ram, alleging at the time of mutation, that he had adopted Bal Ram in 1912. The plaintiff denies that any such adoption was made. The defendants, *vis.*, Mukha and Bal Ram, produced oral evidence in support of the adoption alleged to have been made in 1912 but this evidence has been disbelieved by both the lower Courts. The first Court decreed the suit, holding that no adoption had taken place. The learned District Judge on appeal, while agreeing that no adoption had taken place in 1912, remarked that Mukha's allegations made at the time of mutation and repeated in the course of this suit to the effect that Bal Ram was his adopted son were sufficient proof of an adoption. The learned District Judge relies on *Budh Singh v. Mula Singh* (1) where it is held that the execution of a deed coupled with the adoptor's

(1) 40 P. R. 1905; 18 P. L. R. 1905; 46 P. W. R. 1905.

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clear statement in Court and continuous subsequent treatment is sufficient to constitute the appointment of an heir. So the District Judge reversed the decision of the first Court and dismissed the suit.

The plaintiff appeals to this Court. One point which has never been expressly stated in the pleadings nor put in issue is whether the parties are governed by Hindu Law or by custom. If they are governed by Hindu Law, then the ruling relied on by the learned District Judge has no application, but looking to the wording of the plaint I can only say that if they are governed by Hindu Law, the plaintiff has not shown on what ground he claims to challenge his brother's gift of land. The land is not joint and there is no question of a joint Hindu family. So that, even in the absence of any adoption, I do not see what there is to prevent Mukha from gifting his land to his nephew if he wished to do so. On the other hand, if the parties are governed by Customary Law, then, no doubt the plaintiff can challenge a transfer of ancestral land made without necessity. But in this case the ruling relied on by the learned District Judge becomes applicable and has, I consider, rightly been applied.

On behalf of the plaintiff appellant it is urged that the learned District Judge has set up a new case for the defendant and decided questions which were not put in issue: but the real question between the parties was simply whether there had been anything amounting to an adoption or a customary appointment of an heir and even though the alleged adoption in 1912 was held to be not proved, still I think the District Judge had a perfect right to hold that Mukha's actions at and subsequent to the mutation proceedings amounted to an adoption.

The other point urged on behalf of the plaintiff-appellant is that the appeal to the District Judge should have been dismissed because it was lodged only by the donor and not by the donee, but the donor had a distinct interest in appealing from the decision of the first Court because he obviously wanted to gift the land to his nephew and the plaintiff wanted to thwart his wishes by wresting the land from the donee after the donor's death. I hold, there-

fore, that Mukha had a perfect right to appeal to the District Judge. I note in conclusion that it is very doubtful if plaintiff would have gained much by getting a decision in his favour in the present suit, as Mukha is still alive and I do not see what there is to prevent him from formally adopting his nephew to-morrow if he wishes to do so.

The appeal is dismissed with costs.

*Appeal dismissed.*

### CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 316  
OF 1919.

July 20, 1920.

*Present:*—Mr. Justice Teunon and  
Mr. Justice Newbould.

NAYANJAN BIBI—DEFENDANT No. 2—  
APPELLANT

*versus*

DURGADAS BANDAPADHAYA—

PLAINTIFF—RESPONDENT.

*Bengal Tenancy Act (VIII of 1885), s. 22 (3), 49 (b)  
—Occupancy holding, acquisition of, by ijaradar from  
landlord—Sub-letting, effect of—Tenant inducted by  
ijaradar on holding, whether trespasser.*

The plaintiffs were the owners of an *osat taluq* which was let out in *ijara* for a certain period. The *ijara* lease authorised the *ijaradar* to buy holdings at sales in execution of decrees for arrears of rent and also provided that during the term of the *ijara* he would be at liberty to sub-let the same. During the term of the *ijara* the *ijaradar* purchased a certain holding in execution of a decree for arrears of rent in respect thereof and sub-let the same to the defendants without any written agreement. On the expiry of the *ijara* lease the plaintiffs sought to eject the defendants as trespassers:

*Held*, that, having regard to the provisions of section 22 of the Bengal Tenancy Act and also to the terms of the *ijara* lease, the holding continued and the defendants who were inducted upon the same by the *ijaradar* were in the position of under-*raiyats*, that, therefore, when the plaintiffs succeeded to the *ijaradar* in the possession of the holding, they took it burdened with the under-*raiyats* inducted by the *ijaradar* and the sub-letting not having been by a written lease, the defendants could not be ejected otherwise than after notice under section 49 (b) of the Bengal Tenancy Act, [p 450, cols. 1 & 2.]

Appeal against the decree of the subordinate Judge, Kbulna, dated the 19th of November 1910, reversing that of the Munsif, 2nd Court, at Bagerhat, dated the 17th of December 1917.



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FACTS appear from the judgment.

Babu Atindranath Mukherjee for M. A. K. Farul Haq, for the Appellant.—The *ijaradars* were standing in the shoes of the *taluqlars*. When, therefore, the *ijaradars* purchased the holdings the tenants' interest merged in the superior interest of the landlord and, therefore, the *ijaradars* could not have re-let to the defendants as under *raiyats* or, in other words, the holding could not have continued after its purchase by the *ijaradars*. My next contention is that even if the defendants be held to be under-*raiyats*, the sub-letting not having been by a written lease, section 49 (b) of the Bengal Tenancy Act applied and the defendants could not be ejected otherwise than after notice.

Babu Broj Lal Chuckerbutty (with him Babu Susil Kumar Bose), for the Respondent.—The case of the defendants was that they were *raiyats* and not under *raiyats*. That position is clearly negatived by the terms of the *ijara* lease and also by the provisions of section 22 (3) of the Bengal Tenancy Act. Having regard to the nature of the title set up by the defendants the question of notice was not gone into and it is now too late for them to raise that question.

Babu Atindranath Mukherjee was not called upon to reply.

JUDGMENT.—This appeal arises out of a suit for ejectment. The plaintiffs in the suit are the owners of an *osat taluq*. For a certain period their property was let out in *ijara*. During the term of the *ijara* the tenant of a certain holding, one Salim, fell into arrears. A suit was brought against him and in execution of a decree obtained, the holding was purchased by the *ijaradar*. Having thus purchased the holding he next proceeded to sub-let the same to the old tenant, Salim. Thereafter, Salim died and on the death of Salim the *ijaradar* or purchaser of the holding next inducted upon it his heirs the present defendants. On the expiry of the *ijara* lease the landlord seeks to eject the heirs of Salim as trespassers. The first question in the case is, whether the *ijaradar* when he re-let to Salim re-let to him as an under *raiyat* or as a *raiyat* of the holding which he had purchased at the auction, that is to say, whether this holding continued. Having regard to the provisions of section 22 (3) of the Bengal Tenancy Act and also to the terms of the *ijara* lease we

must conclude that the holding continued and that Salim and after him his heirs who were inducted upon the same by the *ijaradar* were in the position of under-*raiyats*. The *ijara* lease authorized the *ijaradar* to buy holdings at sales in execution for arrears of rent and also provided that during the term of the *ijara* he was at liberty to sub-let the same. The sub-letting to Salim's heir must, therefore, be taken to be by consent of the landlord. The sub-letting to Salim's heirs was not by a written lease. When the proprietor succeeded to the *ijaradar* in the possession of the holding he took it burdened with the under-*raiyats* inducted by the *ijaradar*. The sub-letting not having been by a written lease section 49 (b) applies and it follows that Salim's heirs, the present under *raiyats*, cannot be ejected otherwise than after notice. It follows, therefore, that this appeal must succeed and that the plaintiff's suit must be dismissed with costs in all the Courts.

*Appeal dismissed.*

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3245 of 1916.

January 6, 1921.

*Present* :—Mr. Justice Broadway and  
Mr. Justice Abdul Raouf.

Musammât BARKAT BIBI—PLAINTIFF—  
APPELLANT

*versus*

Musammât KARAM BIBI AND OTHERS—  
DEFENDANTS—RESPONDENTS.

*Custom—Gift, completed, whether can be revoked.*

Defendant, who was the occupancy holder of a square of land, agreed to gift it to the plaintiff provided the latter paid the money required for the acquisition of proprietary rights. Plaintiff was put in possession of the square in pursuance of the gift, but when the proprietary rights had been acquired the defendant refused to be bound by the gift on the ground that the plaintiff had not paid the money agreed to be paid by him.

*Held*, that the gift in favour of the plaintiff having been acted upon, his mere failure to pay the money agreed to be paid by him could not entitle the defendant to revoke the gift. [p. 451, col. 2.]

BARKAT BIBI v. KARAM BIBI.

Second appeal from the decree of the District Judge, Lyallpur, dated the 15th August 1916, affirming that of the Subordinate Judge, Lyallpur, dated the 9th November 1914.

Mr. Ghulam Rasul and Sheikh Niaz Muhammad, for the Appellant.

Sheikh Abdul Qadir, K. B., for the Respondents.

**JUDGMENT.**—One Piran Ditta died leaving him surviving his widow, Musammat Karam Bibi, and four daughters. Musammat Karam Bibi succeeded to certain occupancy rights held by her deceased husband in a square of land in the Canal Colony. She also succeeded to similar occupancy rights on the death of her brother-in-law Allah Ditta, who died without issue. Subsequent to this, she is said to have told her four daughters that if they chose to pay the necessary sum for the acquisition of the proprietary rights in the said square of land, she (Musammat Karam Bibi) would make a gift of the said land to them. In accordance with this arrangement the said Musammat Karam Bibi on the 6th of March 1911 applied to the Revenue Authorities for mutation of the said land in the names of her four daughters, alleging that she had made a gift of it to them and was taking steps to acquire the proprietary rights. On the 13th of March 1911 the sum necessary for the acquisition of the proprietary rights was deposited. Her application for mutation in favour of her daughters was rejected by the Collector who was under the impression that the proprietary rights had not been acquired by her. That this is so is clear from the order of the Commissioner, dated the 17th January 1912, and the report of the Assistant Settlement Officer, dated the 17th February 1912. The Commissioner, however, on the 28th February 1912, passed an order to the effect that as mutation of proprietary rights had not yet been effected in the name of Musammat Karam Bibi, the present entry would stand till Musammat Karam Bibi had been recorded as "proprietor," and that after that she could make a fresh application. On the 21st of June 1912 Musammat Karam Bibi's name was duly entered in the proprietary column. She, however, made no further application in connection with the mutation in favour of her daughters. On the 4th of March 1914 she executed a deed of gift under which she donated the whole of the

land in favour of one of her daughters, Musammat Bhagan Bibi, and mutation in accordance with that deed was duly sanctioned by the Collector. On the 18th of April 1914 Musammat Barkat Bibi, one of the other daughters, instituted the suit out of which this appeal has arisen. In it she alleged that her mother had gifted the land to her and her three sisters on condition that they paid the necessary amount of money for the acquisition of the proprietary rights; that she had duly paid in her share of the necessary sum and had been put in possession of her share of the gifted property, and prayed for a declaration that she was owner of the land of which she was in possession, and that the gift in favour of her sister, Musammat Bhagan Bibi, did not affect her interest. The Trial Court dismissed the suit holding that there had been no gift. The lower Appellate Court recited the facts as stated above and came to the conclusion that Musammat Barkat Bibi had failed to prove that she had paid the sum of Rs. 200, to her mother as alleged and that, therefore, she was not entitled to the decree. It is also held that even if the plaintiff were allowed to maintain that the gift was an "unconditional" one, she could not succeed as she had not shown that the gift had really been acted upon, inasmuch as her other three sisters had not been put in possession of their respective shares. Musammat Barkat Bibi has thereupon come up to this Court in second appeal through Mr. Ghulam Rasul, and we have heard Mr. Abdul Kadir on behalf of the respondents.

The real question is, whether the gift was a completed one, for if it was, it is clear that Musammat Karam Bibi had no power to revoke it. The fact that Musammat Karam Bibi applied to the Revenue Authorities for mutation of names in favour of her four daughters is beyond dispute. It is also perfectly clear that in her application to the Revenue Authorities she definitely stated that she had made the gift. It has also been found as a fact that Musammat Barkat Bibi had, in pursuance of this gift, been put in possession of her share of the land in question. Mr. Abdul Kadir contended that the possession of the appellant was merely a cultivating possession, but we are unable to concur in this view having regard to the fact that

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the possession was definitely given as a result of the gift. The possession was given in *Kharif* of 1911; Musammât Karam Bibi had become proprietor on the 13th March 1911 when the necessary money was paid in. In these circumstances, *qua* the appellant the gift had been acted upon, and whether or not Musammât Barkat Bibi had paid her share of the money to her mother is a matter that did not affect her legal right to the land.

We accordingly accept this appeal with costs and, setting aside the judgments of the Courts below, grant the plaintiff-appellant a decree as prayed.

*Appeal accepted.*

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1603  
OF 1918.

JUNE 2, 1920.

*Present:*—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice Sir  
Ernest Fletcher, Kt.

SHARAJINI DAS—DEFENDANT NO. 3  
—APPELLANT  
*versus*

KAZI ABDUL AND OTHERS—RESPONDENTS.

*Bengal Patni Regulation (VIII of B. C. 1819), s. 8 (1)*  
—Patni, diminution of area of—Rent, whether can be  
summarily levied.

The fact that since its creation a *patni* has diminished in area, from whatever cause, would not exempt the *patni* from the provisions of the Patni Regulation as to the summary levying of the rental. [p. 453, col. 1.]

Appeal against the decree of the District Judge, Jessore, dated the 14th of June 1918, affirming that of the Subordinate Judge of that district, dated the 30th of August 1917.

FACTS appear from the judgment.

Babu Surendra Ohandra Sen (with him Babu Surendranath Bose), for the Appellant.—The *patni* sale held on the 15th May 1913 was not a valid sale under the Regulation. The *patni* was created on the 15th January 1879. Since that time it has shrunk into a certain fraction of its original size. It was, therefore, impossible

to bring to sale the entire *patni* as created on the 15th January 1879. A valid sale under the Regulation must be of the entire *patni* as it existed at its inception. See section 8, paragraph 1, clause (1) of Regulation VIII of 1819.

Dr. Dwarkanath Chuckerbutty (with him Babu Sarat Ohandra Roy Ohoudhury, Khetra Mohun Ghose and Sarat Chandra Dutt), for the Respondents.—The contention of my learned friend is not supported by section 8 of the Regulation. The only requisites under the section are whether the *patni* at the time of its creation was made subject to a reservation that it could be sold by the summary procedure prescribed by section 8 of Regulation VIII of 1819. The fact that the original *patni* had subsequently shrunk into a certain fraction of its original size, cannot free it from the liability to summary sale. Section 37 of the Transfer of Property Act is clearly applicable under such circumstances. Refers to *Ramnarayan Banerjee v. Jayakrishna Mookeries* (1).

Babu Surendra Ohandra Sen replied.

## JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal by the third defendant in a suit for declaration of title to a *Patni Taluk*. The *patni* was created on the 15th January 1879 and was in its inception, held by Obedulla Khan under Nilmoni Bhatterjee as the Zemindar. Subsequently one Gohar Ali Kazi purchased an one-eighth share both in the *patni* and in the Zemindari. The result of these purchases by Gohar Ali was that the *patni* interest in the one-eighth share merged in the Zemindari interest in the one-eighth share. All that remained of the original *patni* was a seven-eighths share under the owner of an equal share of the Zemindari. The lands were also partitioned, so that specific lands corresponding to seven-eighths of the lands comprised in the original *patni* were allotted to the *patnidar*. This *patni* was brought to sale under the Patni Regulation on the 15th May 1913. The point in controversy is, whether this was a valid sale under the Regulation and passed a good title to the purchaser.

The appellant contends that there was no valid sale and that as it was impossible

(1) B. L. R. Sup. Vol. 1 at p. 70; 1 W. R. 299.



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in the events which had happened to bring to sale the entire *patni* as created on the 15th January 1879, no sale could have taken place under Regulation VIII of 1819. We are of opinion that this contention is unfounded.

Reliance has been placed on the first paragraph of the first clause of section 8 of Regulation VIII of 1819 which provides as follows: "Zemindars, that is, proprietors under direct engagements with the Government, shall be entitled to apply in the manner following for periodical sales of any tenure upon which the right of selling or bringing to sale for an arrear of rent may have been specially reserved by stipulation in the engagements interchanged, on the creation of the tenure." In order to determine whether this provision is applicable to the *patni* as it existed after an one-eighth share thereof had merged in an equal share of the superior interest, let us examine the terms of this clause. The test to be applied is, whether this is a tenure, which at the time of its creation, was made subject to a condition that it could be brought to sale for an arrear of rent and whether there was in the engagements interchanged a stipulation reserved that the property could be sold by the summary procedure prescribed by section 8 of Regulation VIII of 1819. The answer can only be in the affirmative. The fact that the original *patni* had shrunk, by course of events subsequent, into seven-eighths of its original size, has not freed it from the condition imposed upon it at the time of its creation. In fact what has happened is precisely what is contemplated by section 37 of the Transfer of Property Act which lays down the rule for the apportionment of benefit obligation on severance. That provision is plainly applicable to *patni* tenures, and there can be no room for doubt that the rent payable in respect of the seven-eighths share of the *patni* was seven eighths of the original rent. This rent, in our opinion, could be summarily levied under the provisions of the Regulation. It is conceded that the contrary view has never been suggested, far less maintained, since the enactment of the *Patni* Regulation just a century ago:—This is significant as transformations of *patni* tenures, similar to what has happened here, are by no means

infrequent under a variety of conditions. To take one illustration, as pointed out by a Full Bench of this Court in *Ramnarayan Banerjee v. Jayakrishna Mookerjee* (1), a *patni-dar*, like any other lease-holder may bring a suit against the Zemindar for abatement of rent. It does not appear to have been ever suggested that if abatement of rent is granted on the ground that part of the land of the *patni* has been resumed by Government or has disappeared by diluvion, the provisions of the Regulation cease to be applicable to the *patni*.

We are of opinion that there is no ground for this appeal, which must be dismissed with costs.

FLETCHER, J.—I agree.

*Appeal dismissed.*

# LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 951 of 1920.

January 31, 1921.

*Present:*—Mr. Justice Scott-Smith.  
Musammat CHIRAGH BIBI, MINOR,  
UNDER THE GUARDIANSHIP OF HER  
FATHER GHULAM KADIR—  
PLAINTIFF—APPELLANT

*versus*

GHULAM SARWAR—DEFENDANT  
—RESPONDENT.

*Muhammadan Law—Marriage—Option of puberty—Marriage contracted by other than father with consent of father, effect of.*

If the father of a minor girl is present and consents to the contract of her marriage entered into by another person it is all the same as if he himself had contracted the minor in marriage. There is no option of puberty in such a case. [p. 454, col. 1.]

Second appeal from the decrees of the District Judge, at Lahore, dated the 26th March 1920, affirming that of the Munsif, first Class, Lahore, dated the 27th May 1919.

*Pandit Bindra Ban*, for the Appellant.

*Lala Amar Nath Chopra*, for the Respondent.

JUDGMENT.—This is a second appeal from the order of the lower Courts dismissing the plaintiff's suit for cancellation of her marriage. She sues on the ground

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that the marriage was contracted by her step-grand mother, *Musamm-t Mehr ul Nisa*, who could not act as guardian during the lifetime of her father, and that now she wishes to exercise her option of puberty which she has under the *Mubammadan Law*. The lower Appellate Court has found that the marriage contract was effected by *Musamm-t Mehr-ul Nisa*, but that the plaintiff's father was a consenting party to the marriage, which plaintiff, therefore, could not repudiate.

In second appeal it is urged that, because the guardian who contracted the marriage was other than the father or grand-father of the minor, she is entitled to repudiate it on attaining puberty. In *Ameer Ali's Muhammadan Law*, IV Edition, Volume, I, page 422, the rule is stated to be as follows: "Where minors are contracted in marriage by a father or grandfather they have no option on arriving at puberty, but when contracted by any other than a father or grandfather, they may, according to *Abu Hanifa* and *Muhammad*, on arriving at puberty, if they wish it, either abide by the marriage or cancel it."

Counsel for the appellant wished to contest the finding of the lower Appellate Court that the father consented to the marriage. He pointed out that the learned District Judge has misread the evidence because he said that the father affixed his thumb-mark to the deed of dower. This, however, was obviously a mistake on the part of the District Judge as the deed upon which his thumb-mark was affixed was the agreement, Exhibit D-1. This mistake on the part of the District Judge, however, does not vitiate his finding, because the execution of the agreement has been proved and it shows that the father did consent to the marriage of his daughter with the defendant. Moreover, the grounds of appeal in the lower Appellate Court do not contest the finding of the first Court that the plaintiff's father consented to the marriage.

The only point which I have to decide is whether the father's consent validates the marriage when the contract for marriage was made by *Musamm-t Mehr-ul-Nisa*. The appellant's Counsel has been unable to cite any ruling bearing on the point but Counsel for the respondent has referred to *Kullan*

*v. Piari* (1) wherein the law is stated as follows:—"A contract of marriage entered into by a father or grandfather on behalf of an infant is valid and binding, and the infant has not the option of annulling it on attaining maturity...if the contract is made by a more distant guardian while a nearer is present and competent to the guardianship, the contract is dependent on the sanction of the nearer." See second paragraph at page 448 of the record. I fully agree with this exposition of law for I think it is obvious that the *Mubammadan Law* upon this question as laid down in the passage from *Ameer Ali* quoted above must be interpreted in a reasonable manner. If the father is present and consents to the contract of marriage entered into by another person it is all the same as if he himself had contracted the minor in marriage. In this case, moreover, the deed of agreement, Exhibit D-1, shows that both father and *Musamm-t Mehr-ul Nisa* got the girl married to the defendant.

I, therefore, agree with the decision of the lower Courts and dismiss the appeal with costs.

*Appeal dismissed.*

(1) 157 P. R. 1879.

### CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO 2103 OF 1918.

July 6, 1920.

*Present*:—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice Sir  
Ernest Fletcher, Kt.

NIBARAN CHANDRA HALDAR—  
DEFENDANT—APPELLANT

*versus*

PARBATI CHARAN NASKAR—PLAINTIFF  
AND BHUSAN CHANDRA TANTI  
AND OTHERS—DEFENDANTS

—RESPONDENTS.

*Transfer of Property Act (IV of 1892), s. 88—  
Notice of deposit, service of—Duty to Court.*

Where a mortgagor makes a deposit of the money due upon a mortgage under section 88 of the *Transfer of Property Act*, it is the duty of the Court under the

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second paragraph of that section, to see that notice of the deposit is served upon the mortgagee, it is not the business of the mortgagor to see that this is done.

Appeal against the decree of the first Additional District Judge, 24-Pargannas, dated the 21st of August 1918, modifying that of the Munsif, Second Court, at Diamond Harbour, dated the 14th of September 1917.

FACTS appear from the judgment.

Babu Narendra Kumar Bose, for the Appellant.—The mortgagor made a deposit under section 83 of the Transfer of Property Act. Interest on the principal money should, therefore, cease from the date of the tender or as soon as the mortgagor has done all that has to be done by him to enable the mortgagee to take the amount out of Court. See section 84 of the Transfer of Property Act. On the deposit being made it was the duty of the Court to cause notice to be served upon the mortgagee. It is not necessary for the mortgagor to prove that the Court did its duty and served the notice on the mortgagee. The first Court ought to have dismissed the suit as no question was raised as to the sufficiency of the amount deposited.

Dr. Sarat Chandra Basak for Babu Jogesh Chandra Roy and Babu Sitaram Banerjee, for the Respondents.—The finding is that the service of notice of deposit on the mortgagee has not been proved. My friend is not entitled to ask your Lordships to make a decree of dismissal on the ground that there was a valid and sufficient deposit under section 83 of the Transfer of Property Act, because that point was not taken by the present appellant in the lower Appellate Court.

Babu Narendra Kumar Bose replied.

#### JUDGMENT.

MOOREJEE, ACTG. C. J.—This is an appeal on behalf of the defendant in a suit to enforce a mortgage security. In the Court of first instance it was pleaded that a deposit had been made under section 83 of the Transfer of Property Act. The Court overruled the contention that the deposit was valid, because it found that the service of notice on the mortgagee had not been proved. The Court thereupon made a decree for the principal sum with interest at a reduced rate. Upon appeal, the District Judge has allowed

interest at the contract rate up to the date of suit. It is not necessary, however, to investigate whether the Court was competent to restrict interest at the contract rate up to the date of suit only, because we are of opinion that the view taken by the Court of first instance as to the scope of sections 83 and 84 is erroneous.

Section 83 contemplates a deposit to satisfy the mortgage. Section 84 provides that "when the mortgagor or such other person as aforesaid has...deposited in the Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease...as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court." It is plain that the second paragraph of section 83 casts a duty upon the Court to cause the notice of deposit to be served upon the mortgagee and not on the mortgagor to see that the notice has been served. In the present case, the mortgagor made the deposit as required by law and carried out the prescribed requirements in connection therewith. It is not necessary for him to prove that the Court did its duty and served the notice on the mortgagee. As no question was raised as to the sufficiency of the amount deposited, the Court of first instance should have dismissed the suit. We are, however, not in a position to make that decree, because the point was not urged by the present appellant in the lower Appellate Court.

The result is, that the decree of the District Judge is set aside and that of the Court of first instance restored. There will be no order as to the costs of this Court or the lower Appellate Court.

The appellant will be at liberty to deposit the decretal amount within three months from the date of service on him of notice of arrival of the record in the lower Court.

FLITCHER, J. I agree.

*Decree set aside.*



BAHADUR V. RAM SINGH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1069 OF 1920.

January 4, 1921.

Present:—Mr. Justice Chevis.

BAHADUR AND OTHERS—DEFENDANTS

—APPELLANTS

versus

RAM SINGH—PLAINTIFF—RESPONDENT.

*Punjab Tenancy Act (XVI of 1887), s. 59—Occupancy rights—Succession—Burden of proof—Mutation, effect of—Presumption.*

In a contest between the landlord (and the collaterals of a deceased occupancy tenant with regard to the succession to the tenancy the burden of proving that the requirements of the proviso to section 59 of the Punjab Tenancy Act have been fulfilled lies on the collaterals. [p. 456, col. 2; p. 457, col. 1.]

The mere fact that the collaterals are in possession of the land and that mutation has been effected in their favour does not shift the burden of proof on to the collaterals. [p. 456, col. 2]

The Civil Courts have to come to an independent finding in such cases and cannot base their decision merely on an opinion formed by the Revenue Authorities. [p. 457, col. 1]

In the *parcha tasdiq* of 1881-1882 it was entered that the occupancy tenants who were real brothers had stated that they had occupied the land in 1860:

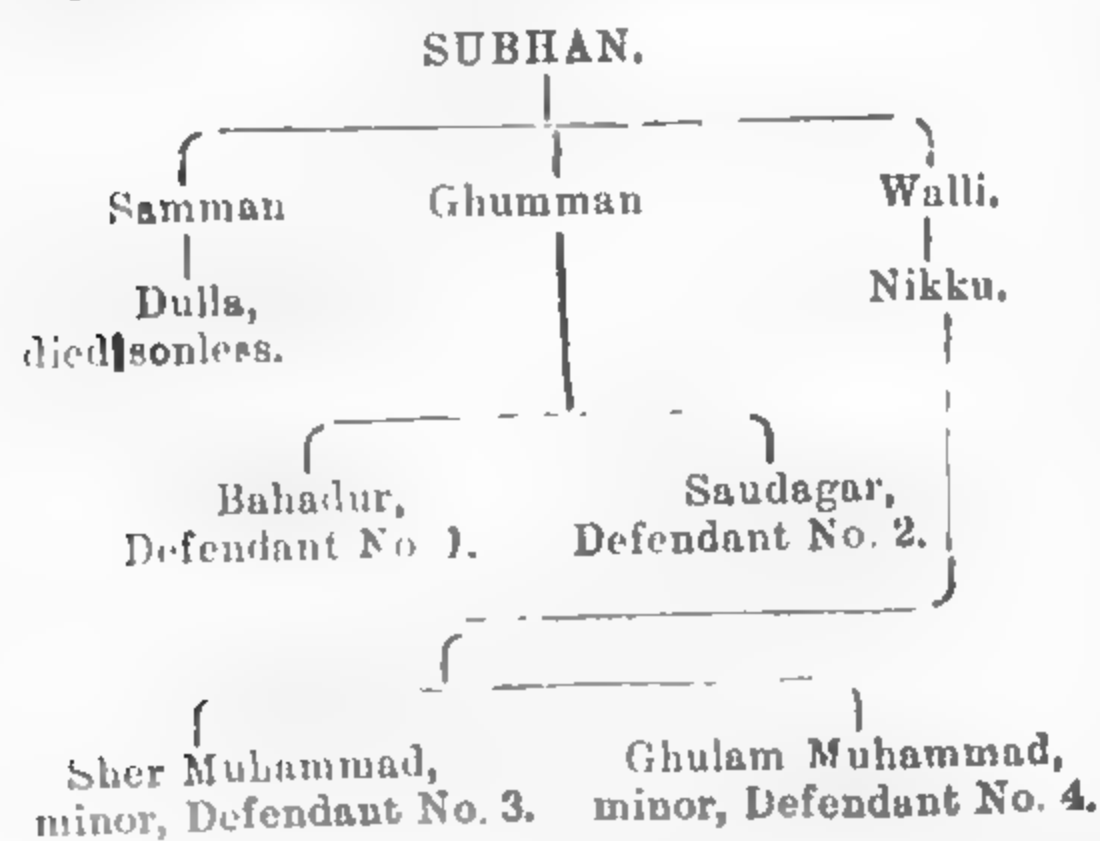
Held, that there was no presumption that the word "they" included their father. [p. 457, col. 1.]

Second appeal from the decree of the District Judge, Ferozepore, dated the 16th of March 1920, affirming that of the Munsif, Second Class, Fazilka, District Ferozepore, dated the 23rd of December 1919.

Bakhshi Tek Chand, for the Appellants.

Messrs. R. Obbard and T. D. Khanna, for the Respondent.

JUDGMENT.—The genealogical tree of the parties is as follows:—



The plaintiff who is the landlord sues for possession of the land left by Dulla who was

an occupancy tenant. The defendants are cousins of Dulla and contend that the occupancy tenure is not extinct as the common ancestor Subhan occupied the land. The earlier revenue entries show that Subhan's three sons, Samman, Ghumman and Walli, had a joint *khata*. Later on, Samman's share was separated from that of his two brothers, so the tenure certainly was not joint at the time when Dulla died, and Bakhshi Tek Chand who appears on behalf of the defendants-appellants has not argued ground No. 4 of the appeal which urges that the rule of survivorship applies. The only question, therefore, for my decision is whether the common ancestor occupied the land. This question has been decided by the lower Courts in favour of the plaintiff who has been given a decree. On behalf of the defendants it is urged that as the tenancy was shown as a joint one, the presumption is that Subhan's three sons got the land in succession to their father. But whatever the presumption may be in cases generally, in this particular case we find from the *parcha tasdiq* of 1881-82 that Subhan's three sons then stated that they had come from a village in Patiala in Sambat 1917 (1860 A. D.) and got the land from the contractors, i. e., the proprietors. The phrase *ham ne* might, of course, be used by the sons when describing a family transaction and might possibly refer to an act done by their father, so the meaning might be that their father had come from Patiala and taken the land, they accompanying him and succeeding him on his death. On the other hand, if the father had really come himself from Patiala, there seems no particular reason why the sons should not have stated that their father came and took possession of the land in 1860.

On behalf of the defendants-appellants it is urged that as they are in possession and mutation of names has been effected in their favour by the Revenue Authorities the burden of proof lies on the plaintiff. It is, however, a case of contest between the landlord on the one hand and the collaterals of the late tenant on the other, and section 59 of the Tenancy Act clearly lays down that collaterals are entitled to succeed only provided that the common ancestor occupied the land. I am, therefore, of opinion that the burden of proving that the requirements of the proviso are fulfilled

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lies on the collaterals. As regards possession it may be remarked that some of the defendants were cultivating the land in dispute as sub-tenants even during the lifetime of Dulla. As regards mutation, I consider that the Civil Courts have to come to an independent finding in such cases and cannot base their decision merely on an opinion formed by the Revenue Authorities. I note, too, that it is a common practice for the Revenue Authorities to effect mutation in disputed cases in favour of the party in possession without attempting to decide, except, perhaps, in a summary manner, the disputed question of title. Reverting to the entry in the *parcha tasdiq* of 1881-82. I am unable to hold that it means anything else than that the persons who made the statement themselves came over from Patiala and occupied the land in 1860 A. D. So I see no reason for holding contrary to the lower Courts that it is proved that the common ancestor occupied the land.

I uphold the decree of the lower Courts and dismiss the appeal with costs.

*Appeal dismissed.*

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1738  
OF 1917.

May 26, 1920.

*Present:*—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice Sir  
Ernest Fletcher, Kt.

AMINULLA CHOWDHURY AND OTHERS  
—PLAINTIFFS—APPELLANTS

*versus*

MAHABAT ALI AND OTHERS—  
DEFENDANTS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1886), s. 85—Under-  
raiyat agreeing to accept heritable tenancy—Landlord,  
whether can eject heirs of under-raiyat.*

It is not a violation of the provisions of section 85 of the Bengal Tenancy Act for an under-raiyat to agree to accept from his landlord a heritable tenancy; and when such agreement has been entered into, the landlord cannot ignore it and treat the tenancy

as if it were not heritable and eject the heirs of the under-raiyat. [p. 458, col. 2.]

Appeal against the decree of the District Judge, Noakhali, dated the 28th of July 1917, reversing that of the Munsif, Second Court, at Lakhipur, dated the 18th of July 1916.

FACTS appear from the judgment.

Babu Mohendra Nath Roy (with him Babu Amulya Charan Banerjee (Jr.)), for the Appellants.—The plaintiffs-appellants are *raiya*s, the defendants are the heirs of the under-*raiya*s. The appeal arises out of an action in ejectment. The Court of first instance decreed the suit, the Court of Appeal below dismissed the suit. The facts are shortly these. In February 1899 one Makaram Ali, the predecessor of the present defendants, took a permanent heritable lease by a registered document. The property was described therein as a *kosat raiyati* (under *raiya*ti) holding. The plaintiffs seek to eject the defendants on the ground that the holding is non-heritable and non-permanent. The tenant died in 1914. The suit was commenced in December 1915. The *kabuliyat* was executed in 1913. In 1911 the plaintiffs brought a suit for arrears of rent against the original tenant. That suit, however, was compromised and a decree was passed on the basis of a *solenamah* which provided, amongst other terms, that the holding would be treated as heritable in accordance with the terms of the lease of 1899 on payment of a premium of Rs. 25. The compromise was put in writing and filed with the record of the case which was decreed. My point is that the *solenamah* being an unregistered document not incorporated in the decree is of no avail now to the defendant. Neither the lease of 1899 nor the *solenamah* could create a heritable tenancy in contravention of the provisions of section 89 of the Bengal Tenancy Act. The whole point, therefore, resolves to this, *viz.*, whether the tenancy was determined on the death of the under *raiya*ti. Refers to section 147 (a) of the Bengal Tenancy Act. I submit the learned Judge ought not to have given effect to the compromise in contravention of the express provisions of the law.

Babu Romesh Chandra Sen, for the Respondents, was not called upon to reply.

AMINULLA CHOWDHURY v. MAHABAT ALI.

## JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal by the plaintiffs in a suit for ejectment. The subject matter of the litigation is an under *raiya* holding created on the 11th January 1899, in contravention of the terms of section 85 of the Bengal Tenancy Act, the *raiya* granted a permanent lease to the under-*raiya*. The under-*raiya* continued in occupation for many years on payment of the rent fixed in the lease. Default was thereafter made and in 1911 the *raiya* sued the under-*raiya* for recovery of arrears of rent. Various defences were taken to the claim. On the 9th August 1911 the parties came to a settlement. One of the terms of the agreement was that the under-*raiya* should abandon all opposition to the suit; another term was that on payment of Rs. 25 as premium to the *raiya*, the latter should agree to treat the holding as heritable. A decree was drawn up in the rent-suit on the basis of this settlement; and, although the terms of the compromise are not set out in the decree, it is stated explicitly that the decree was made by consent of parties. The premium of Rs. 25 was made, and the under-*raiya* continued in occupation till his death early in 1914. On the 9th December 1915 the *raiya* instituted the present suit for ejectment of the representatives in interest of the under-*raiya*. The claim is based on the allegation that the interest of an under-*raiya* is not heritable, and that consequently the defendants in occupation are trespassers and are liable to be ejected. We are of opinion that the claim cannot possibly be sustained.

We shall assume for the purposes of the present appeal, and for that purpose alone, that the lease of the 11th January 1899 was not operative as a permanent lease, even between the grantor and the grantee, because it was granted in contravention of the provisions of section 85 of the Bengal Tenancy Act. We shall further assume that the position of the lessee was that of an under-*raiya*, who held without any fixed term. The effect of the agreement of the 9th August 1911 was that the *raiya* consented to transform the tenancy of the under-*raiya* into a heritable tenancy. Such an agreement is not in contravention of the terms of section 85 of the Bengal

Tenancy Act. There may be tenancy for nine years or even for a shorter time, which may be a heritable tenancy. [*Maharaja Tek Chund Bahadur v. Sri Kanth Ghose* (1), *Gobind Lal v. Hemendra Narain* (2), *Hedict Khasia v. Karan Khasiani* (3), *Kishori Lal Roy v. Krishna Kamini* (4)]. The provisions of section 85 were in no way violated when the under-*raiya* agreed to accept from his landlord a heritable tenancy. The plaintiff *raiya* now seeks to obtain relief in contravention of his solemn engagement, although he has taken consideration for the agreement. The previous suit, which was defended by the under-*raiya*, was decreed in favour of the *raiya* without contest on the basis of that compromise. No Court of Equity will now permit him to turn round, to ignore the engagement, to treat the tenancy as if it were not heritable, and to eject the heirs of the under-*raiya* as if they were trespassers. The well-known rule in *Walsh v. Lonsdale* (5) has been repeatedly followed in this Court, as shown by the long line of cases from *Bibi Jawahir Kumari v. Chatterput Singh* (6) to *Syam Kishore Das v. Umesh Chandra* (7) and is applicable here. The *raiya* must be deemed to have honestly carried out his engagement, namely, executed valid document whereby a heritable right was conferred on his under-*raiya*. This is only an illustration of the principle that where B. agrees to let land to A. who takes possession and the agreement is one of which specific performance would be granted, A. and B. have the same legal rights and liabilities as between themselves, as if a lease had been executed, provided the rights of third parties are not affected. In this view, it is impossible for the plaintiff to maintain the suit, which has been rightly dismissed.

We need not examine the validity of the grounds which form the basis of the decision of the District Judge; nor need we express an opinion on the question whether

(1) 2 M. L. A. 281; 6 W. R. P. C. 42; 1 Suth. P. O. J. 152; 1 Sar. P. C. J. 278; 18 E. R. 427.

(2) 17 O. 686; 5 Sar. P. C. J. 427; 8 Ind. Dec. (N. S.) 296.

(3) 13 Ind. Cas. 277; 15 C. L. J. 241.

(4) 5 Ind. Cas. 500; 7 O. 277; 11 O. L. J. 401.

(5) (1882) 21 Ch. D. 9, 52 L. J. Ch. 2, 46 L. T. 858; 21 W. R. 104.

(6) 2 O. L. J. 343.

(7) 55 Ind. Cas. 154; 31 O. L. J. 75; 24 O. W. N. 462.



MALIK KHAN v. BHOLA RAM.

the tenancy of the present defendants is or is not terminable by notice under section 49 of the Bengal Tenancy Act.

The appeal is dismissed with costs.

FLETCHER, J.—I agree.

*Appeal dismissed.*

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 649 OF 1920.

January 3, 1921.

*Present:*—Mr. Justice Scott Smith.

MALIK KHAN AND ANOTHER - DEFENDANTS  
—APPELLANTS

*versus*

BHOLA RAM—PLAINTIFF, HUSSAIN—

DEFENDANT—RESPONDENT.

*Shamilat land—Sale of khewat land—Second sale by purchaser with rights of shamilat, if any, effect of—Second purchaser, rights of.*

K. sold certain *khewat* land to M. who sold it to B. The sale-deed in favour of B. contained the following clause: "whatever rights I had in the *shamilat* in respect of the above-mentioned land all those rights now belong to the purchaser." K subsequently obtained a declaration that no share in the *shamilat* had passed either to M or to B. The latter then brought a suit against M. claiming to be compensated out of M's *khewat* land for the loss of *shamilat* consequent on K's act:

*Held*, that M. did not purport to sell any *shamilat* to B. and the latter's suit must, therefore, fail. [p. 460, col. 1.]

Second appeal from the decree of the District Judge, Shahpur at Sargoda, dated the 6th January 1920, varying that of the Mansif, First Class, Shahpur dated the 2<sup>nd</sup> May 1919.

Lala Hargopal, for the Appellants.

Mr. Nanak Chand, for the Respondents.

**JUDGMENT.**—In 1872 Khaira effected two sales of land in favour of Misri. The sale-deeds contain no reference to a share in the *shamilat* land. On the 18th of February 1888 Misri sold the whole of the property purchased by him from Khaira to Bhola Ram, plaintiff-respondent, for Rs 483. In July 1889 Bhola Ram re transferred the *khewat* land which he had bought from Misri to a third person reserving to himself the share in the *shamilat* which appertained

to the land sold. Subsequently, Hussain, the grandson of Khaira, sued Bhola Ram for a declaration that Khaira had not sold any share in the *shamilat* to Misri and succeeded in that suit. The result was that Bhola Ram was deprived of the share in the *shamilat* land appertaining to the land bought by him from Misri and amounting nearly to 27 *kanals*. Misri having died, plaintiff brought the present suit against the defendants, his representatives, for a declaration that 123 *kanals* of *shamilat* land, which had come to them on account of Misri's other land belonged to them and for possession of 58 *kanals* of *khewat* land formerly owned by Misri by way of compensation for the 247 *kanals* of *shamilat* land of which he had been deprived. The Trial Court gave the plaintiff a decree in respect of the *shamilat* land only dismissing the suit for 58 *kanals* of *khewat* land. The lower Appellate Court held, following the principle laid down in the unpublished ruling of the Chief Court in Civil Appeal No. 2680 of 1917, that the plaintiff was entitled to be compensated not only out of Misri's *shamilat* land but also out of his *khewat* land. It, therefore, gave plaintiff a decree for possession of the 58 *kanals* of *khewat* land also. The defendants have filed a second appeal to this Court in respect of the *khewat* land only.

In the unpublished ruling, Civil Appeal No. 2680 of 1917, Rattigan, C. J., followed the principle enunciated in *Beli Ram v. Shahrada Begam* (1) and if the deed of sale shows that Misri purported to sell to plaintiff a share in the *shamilat* land I think the latter would, if I follow this ruling, be entitled to the 58 *kanals* of *khewat* land decreed by the lower Appellate Court. It is, however, argued by appellants' Counsel that Misri did not actually sell any share in the *shamilat* land, but only sold any share which he owned and which appertained to the *khewat* land sold by him. The deed of sale specifically mentions the *khewat* land and Misri purported to sell it together with all the rights which appertained thereto. The deed then goes on as follows:—*Aur jo haqq shamilat nish tarazi bala muh ko the, ush sub ch muktri ko hue.* Generally, in deeds of sale when a vendor intends to sell his

(1) 101 P. R. 1894.

RAM SUNDAR DAS v. SHAJIDUR RAHAMAN.

proprietary rights together with *shamilat* land after describing the proprietary land the words *bameh hissa shamilat deh* or words to that effect are used. In the present instance, however, Misri did not purport to sell *khewat* land together with a share in the *shamilat deh*. He sold the *khewat* land with all its rights and then added a clause which, literally translated, means "whatever rights I had in the *shamilat* in respect of the above-mentioned land all those rights now belong to the purchaser." The deed does not state that the seller does own any share in the *shamilat*, and it appears to me that the deed was so worded because Misri was not sure whether he owned any share in the *shamilat* in consequence of Khaira's sale to him. There is no covenant in the sale deed that if it turns out that he owns no *shamilat* land in respect of the *khewat* land sold he will compensate the vendee. I, therefore, hold that Bhole Ram is not entitled to be compensated out of Misri's *khewat* land for the loss of *shamilat* consequent on Hussain's suit.

I accordingly accept the appeal and, modifying the decree of the lower Appellate Court, dismiss the plaintiff's suit for possession of the 58 *kanals* of proprietary land and restore the decree of the first Court. Under the circumstances, I direct that the parties bear their own costs throughout.

*Appeal accepted.*

### CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 805  
OF 1918.

June 9, 1920.

Present : —Justice Sir Syed Shamsul Huda,  
Kt., and Mr. Justice Panton.

RAM SUNDAR DAS, AND ON HIS DEATH HIS  
HEIR AND LEGAL REPRESENTATIVE RAKESH  
CHANDRA DAS, MINOR, BY HIS MOTHER AND  
NEXT FRIEND BILASH MUNJARI DAS!—  
PLAINTIFFS—APPELLANT

*versus*

SHAJIDUR RAHAMAN AND ANOTHER—  
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 4—  
Decree against several defendants on common ground  
—Appeal by one—Appellate Court, jurisdiction of, to  
vary decree in favour of all,

Where a decree proceeds against several defendants on a common ground, an Appellate Court has jurisdiction under Order XLI, rule 4 of the Civil Procedure Code, upon the appeal of one defendant only to vary the decree in favour of all the defendants.

Appeal against the decree of the Subordinate Judge, First Court, Sylhet, dated the 9th of January 1918, reversing that of the Munsif, Second Court, at Moulvi Bazar, dated the 28th of July 1917.

FACTS appear from the judgment.

Dr. Sarat Chandra Basak (with him Babu Paresh Lal Shome), for the Appellant.—The decree should have been allowed to stand as regards the defendants who did not choose to prefer an appeal. It was only defendant No. 3 who preferred an appeal. I beg to submit that the Court of Appeal had no jurisdiction to vary the decree in favour of all the defendants, as all of them did not appeal. The Appellate Court had gone beyond its legitimate jurisdiction, and so I assail the judgment of the Appellate Court. The other side will argue that the judgment of the learned Judge is right and proper, regard being had to the provisions of Order XL, rule 4, Civil Procedure Code. But I submit that that section does not authorise the learned Judge to pass the judgment as he has done.

Babu Jatindra Mohan Choudhury, for the Respondents, was not called upon.

JUDGMENT.—This appeal is concluded by the findings of fact arrived at by the lower Appellate Court. It has been urged that the first Court had passed a decree against all the three defendants, and the appeal having been filed only by one of them, namely, defendant No. 3, the decree could not have been reversed as regards the defendants who did not appeal, and that, so far as those defendants were concerned, the decree should have been allowed to stand. We do not think that this contention is well-founded. The language of Order XLI, rule 4 is sufficiently wide to give jurisdiction to the Appellate Court to vary the decree in favour of all the defendants, the decree against them proceeding on a common ground.

The appeal is accordingly dismissed with costs.

*Appeal dismissed,*

MOHAMMAD DIN v. THAKAR SINGH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3108 OF 1916.

January 2, 1921.

Present:—Mr. Justice Chevis and

Mr. Justice Martineau.

MOHAMMAD DIN AND OTHERS—

DEPENDANTS—APPELLANTS

versus

THAKAR SINGH—PLAINTIFF AND JHANDA

SINGH—DEPENDANT—RESPONDENTS.

*Custom—Alienation—Necessity—Re-marriage, whether necessity—Sale partly for necessity—Decree, form of.*

Where a sale is held to be partly for necessity it should not be converted into a mortgage for the sum proved to have been paid for necessity, the sale should be allowed to stand subject to the proviso that when succession opens out the heirs of the last male owner would be entitled to recover the land on payment of the sum found to have been paid for necessity.

*Semle:*—The re-marriage of a proprietor who has a son alive is not such a necessity as would justify the sale of ancestral land.

Second appeal from the decree of the District Judge, Sialkot, dated the 16th August 1916, reversing that of the Subordinate Judge, First Class, Sialkot, dated the 21st December 1915.

Mr. J. O. Vaughan, for the Appellant.

**JUDGMENT.**—The plaintiff in this case sued for a declaration that the sale of 111 kanals of land effected by his father on the 5th of April 1904 should not affect his reversionary rights. The land has been found to be ancestral and the only other question in the case is whether the alienation was for consideration and necessity.

The land was sold for Rs. 1,200. Of this sum Rs. 675 were due to one Chanda Shah, a previous mortgagee, and so far the sale was clearly for necessity. The rest of the Rs. 1,200 is made up as follows:—

	Rs.
Cash taken for the marriage of the vendor	370-0-0
Earnest-money	13-0 0
Pro-note	142-0-0

The proceeds of the pro-note are also said to have been taken for the vendor's marriage. The vendor was a widower at the time of the sale but he had a son alive, namely, the present plaintiff. The first Court held that to get married again was such a necessity as justified the sale of ancestral land. So the first Court held that the

sale was both for necessity and consideration and dismissed the suit.

The learned District Judge on appeal held that as the plaintiff already had a son alive re-marriage was rather a luxury than a necessity and the sale of ancestral land was not justified. So the learned District Judge held that, though the sale was for consideration, necessity was not proved beyond Rs. 675 and, reversing the decree of the first Court, the District Judge gave the plaintiff a decree that the sale should not affect his rights after his father's death except to the extent of Rs. 675. The District Judge adds at the end of his judgment "or in other words, I convert the sale into a mortgage for Rs. 675." The decree of the District Judge also winds up by saying "the sale is converted into a mortgage."

The alienees appeal urging that the re-marriage of the vendor was a necessity. We know of no authority in support of the proposition that the re-marriage of a proprietor who already has a son alive is such a necessity as justifies the sale of ancestral land, but we note that the only question raised in the appeal is simply one of custom and we cannot go into the question in the absence of a certificate.

The appeal, therefore, fails and is dismissed with costs, but on our own motion we must correct the wording of the District Judge's decree. The sale in such a case should not be converted into a mortgage, otherwise it is quite conceivable that the plaintiff might claim to redeem the land anywhere within sixty years. The sale remains the same so far as the alienor is concerned, but when succession opens out to the plaintiff, he can recover the land anywhere within twelve years on payment of Rs. 675. The decree of the District Judge is upheld except that the words "the sale is converted into a mortgage for Rs. 675" are omitted.

*Appeal dismissed.*



THAKURAIN GIRRAJ KUNWAR V. CHANDRA SEKHAR.

OUDE JUDICIAL COMMISSIONER'S  
COURT.

RENT APPEALS NOS. 6 AND 7 OF 1920.

May 13, 1920

Present :—Pandit Kanhaiya Lal,  
A. J. C.

Thakurain GIRRAJ KUNWAR—

PLAINTIFF—APPELLANT IN BOTH

versus

CHANDRA SEKHAR AND OTHERS—

DEFENDANTS—RESPONDENTS IN No. 6  
OF 1920

TIRBENI PRASAD—DEFENDANT—

RESPONDENT IN No. 7 OF 1920

Landlord and tenant—Rent—Tenant holding cultivated and uncultivated land—Ejectment from cultivated portion—Rent payable for remainder.

A tenant who holds both cultivated and uncultivated land—the latter under a grove-tenure—at a certain rental, and who is ejected from the cultivated portion, is liable to pay proportionate rent for the remainder. [p. 463, col. 1.]

Appeals from the decree of the District Judge, Rae Bareilly, dated the 23rd December 1919, reversing the order of the Assistant Collector, First Class, Rae Bareilly, dated the 10th February 1919.

The Hon'ble Pandit Gokaran Nath Misra, for the Appellant in both appeals.

Messrs. Bisheshwar Nath Srivastava, Niamat Ullah, Ghulam Hussain and Wajid Ali, for the Respondents in Appeal No. 6.

**JUDGMENT.**—These appeals arise out of a suit for arrears of rent in respect of some grove land held by the defendants. It appears that the ancestors of the defendants were *thekadars* of the entire village in which the said groves are situated. During the currency of their *theka* they planted trees from time to time over land which was till then under cultivation. Before 1263 *Fasli* they converted 112 *bighas*, 15 *biswas* of cultivated land into grove land by planting trees thereon. Between 1263 and 1266, *Fasli* they further converted 125 *bighas*, 14½ *biswas* of cultivated land into grove land by planting trees thereon. At the time of the first Summary Settlement which took place in 1859 the village formed part of the confiscated properties held by the Government. On certain reports made by the persons in immediate charge of the village a rent of Rs. 114 8 0 was assessed on the former area and a rent of Rs. 274 2 6 was assessed on the latter on the ground

that the *thekadars* had no right to deprive the Government of the rent which the said area had been fetching before the trees were planted. The *thekadars* evidently held certain groves besides, which were of old standing.

In the *waib-ul arz* prepared at the first Regular Settlement a portion of plot No. 2,000 *khassra*, measuring 62 *bighas*, 19 *biswas*, 2 *biswansis*, was shown as an old grove held by Bisheshwar Prasad, Ram Narain, Ganesh Prasad and Balbhaddar Prasad rent free from 24 years. The remaining portion was assessed at Rs. 31. Another grove standing on a portion of No. 2672 old *khassra*, measuring 5 *bighas*, was similarly shown as held by the same persons rent-free from 16 years. The remaining portion of that plot was assessed at Rs. 4-6-0. Another plot No. 2034 old *khassra*, measuring 85 *bighas*, 4 *biswas*, 18 *biswansis*, out of which 27 *bighas*, 3 *biswas* were grove land, was shown as rented at Rs. 12-15-0. There was a fourth plot bearing No. 2622 old *khassra*, measuring 2 *bighas*, 18 *biswas*, 18 *biswansis*, which was shown as land held on grain rent amounting to Rs. 15 per year.

By the time the recent Settlement was started, the condition of things appears to have been considerably changed. The *khatauni* for 1299 *Fasli* prepared before that Settlement shows that plot No. 2000 old *khassra*, which contained 62 *bighas*, 19 *biswas*, 2 *biswansis* of grove land held rent-free at the time of the first Regular Settlement, was assessed to a rental of Rs. 11-9-0, due possibly to a portion of the grove land having been brought under cultivation. Plot No. 2672 old *khassra*, which contained 5 *bighas* of grove land and 6 *bighas*, 13 *biswas*, 6 *biswansis* of cultivated land, was assessed at Rs. 6 6 0 instead of Rs. 4 6 0 which was the rent assessed at the time of the Regular Settlement. The third plot No. 2034 old *khassra*, measuring 60 *bighas*, 18 *biswas*, was assessed at Rs. 9 8 0 and was held by Ram Narain, and No. 2034½ old *khassra*, measuring 25 *bighas*, 4 *biswas* was assessed at Rs. 44 and was held by Gaya Prasad. With regard to the fourth plot No. 2622 old *khassra* the rent was shown to have risen from Rs. 15 to Rs. 16-4-0.

LADHA SINGH v. AHMAD YAR.

At the last Settlement the entire area held by the defendants, cultivated and uncultivated, was lumped up together and assessed at a rental of Rs. 167 8 0, representing a total area of 131 *bighas*, 3 *biswas*. Out of the said area the defendants have since been ejected from 26 *bighas*, 13 *biswas* of cultivated land. The present suit has been filed with regard to the remainder of the land which is occupied by trees. The notice issued by the plaintiff to eject the defendants from the latter was disallowed by the Revenue Court on the ground that the land was held under grove-tenure from which the defendants could not be ejected. The Court of first instance decreed the claim for proportionate rent in respect of the grove land in question. The lower Appellate Court disallowed the claim.

The *khatauni* for 1299 *Fasli* indicates the rent which was assessed on the grove lands in question before the last Settlement took place. From the proceedings which took place in 1859 it is evident that the proprietor of the village for the time being assented to cultivated land being converted into grove land on condition that the persons who planted the grove, paid rent therefor at the rate at which rent was levied in respect of it before it was so converted. Whether the groves which now exist are the groves which were then planted cannot definitely be ascertained. Most of the trees then planted may have died out or been cut by the persons to whose shares the land occupied by the said groves may have been allotted by partition. The *thekadars* may not, moreover, have considered it profitable to maintain all the trees after the land was assessed to rent. In any case, in 1299 *Fasli* the rent found assessed on the portion of No. 2000 old corresponding with No. 2208 new *khassas*, measuring 62 *bighas* 19 *biswas* 2 *biswansis*, was Rs. 11-9 0, that assessed on No. 2722 old corresponding with 3133 new *khassas*, measuring 11 *bighas*, 13 *biswas*, 6 *biswansis*, out of which 9 *bighas*, 14 *biswas* are now in dispute, was Rs. 6 6 0, that on the portion of No. 2034 old corresponding with No. 2266 new *khassas* out of which only 27 *bighas*, 18 *biswas*, 13 *biswansis* are now grove lands, was Rs. 9-8-0 and that on No. 2622 old corresponding with No. 3000 new *khassas*,

measuring 3 *bighas*, 18 *biswas*, 18 *biswansis*, was Rs. 16-14-0. The proportionate rent for which the defendants are liable for the grove land in question according to that arrangement is thus Rs. 11-9-0 for land No. 2228, Rs. 5-5-0 for No. 3133, Rs. 9 8 0 for No. 2266 and Rs. 16-14 0 for No. 3000, or Rs. 44-4-0 in all. The claim is for *Rabi* 1323, 1324 and 1325 *Fasli*.

The appeals are, therefore, allowed and the claim of the plaintiff decreed for Rs. 10-2 0 with interest at one per cent. per mensem from the date the rents fell due and proportionate costs here and hitherto and future interest at 6 per cent. per annum from the date of the suit till realization against the defendants, who will bear their own costs throughout.

*Appeals allowed.*

### LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 216 OF 1920.

January 3, 1921.

Present:—Mr. Justice Chevis.

LADHA SINGH—PLAINTIFF

—PETITIONER

versus

AHMAD YAR AND OTHERS—DEFENDANTS

—RESPONDENTS.

*Punjab Alienation of Land Act (XIII of 1900), s. 6—Mortgage by agriculturist in favour of third person in order to pay off debt due to non-agriculturist, validity of.*

There is nothing illegal or opposed to public policy in a third party coming in and taking the land of an agriculturist on mortgage, undertaking in exchange to pay off the debts due by the mortgagor to a non-agriculturist [p. 411, col. 1.]

Petition, under section 44 of Act III of 1919, for revision of the decree of the Senior Subordinate Judge, Gujrat, dated the 28th November 1919, reversing that of the Munsif, First Class, Gujrat, dated the 29th July 1919.

Mr. Beni Pershad Khosla, for the Petitioner.

Mr. Zafulla Khan, for Ahmad Yar, Respondent No. 1.

KUMUD BAN V. TRIPURA CHARAN.

**JUDGMENT.**—The plaintiff in this case was owed Rs. 234 by Ahmad and Muhammad. As the plaintiff is a non agriculturist, the land of Ahmad and Muhammad could not be alienated in his favour, so Ahmad and Muhammad mortgaged some of their land in favour of Ahmad Yar who executed a bond for Rs. 200 in favour of the plaintiff and another bond for Rs. 34 in favour of the plaintiff's son. The plaintiff's son subsequently sued on the bond for Rs. 34 and got a decree against Ahmad Yar for Rs. 80 principal and interest. The plaintiff in the present suit sues on the bond for Rs. 200, claiming Rs. 500 principal and interest. Ahmad Yar's defence is that he was only a nominal mortgagee, introduced merely because the Land Alienation Act was a bar to the land being alienated in favour of the plaintiff. The first Court held that the transaction was a *benami* one but gave a decree for Rs. 200 against Ahmad Yar, remarking that he would retain his interest as mortgagee, and disallowing the claim for interest on the ground that the plaintiff had all along been receiving a share of the produce of the land. The learned Senior Subordinate Judge on appeal held that as Ahmad Yar was only a *benami* mortgagee, no decree could be passed against him, and so the suit was dismissed with costs. The plaintiff applies to this Court for revision.

There is nothing illegal or opposed to public policy in a third party coming in and taking the land on mortgage, undertaking in exchange to pay off the debts due by the mortgagors to a non agriculturist. Farther, in the present case it appears that Ahmad Yar has since attempted to sell his rights as mortgagee to another agriculturist, though I am told that this transaction fell through and mutation of names was refused. I am unable to see any reason for releasing Ahmad Yar from the obligation which he undertook when the land was mortgaged in his favour. There seems to me no sufficient reason for holding that Ahmad Yar's name was merely borrowed and that he never really held any rights as mortgagee. The mere fact that the plaintiff subsequently received a share of the produce does not necessarily point to the transaction being *benami*. Such an arrangement might well have been come to

between himself and the mortgagors in order to prevent interest charges from swelling. I consider, therefore, that Ahmad Yar is liable under the bond which he had executed, but as the lower Courts have found that the plaintiff has been receiving a share of the produce, the plaintiff will recover only the principal sum due under the bond.

As to the amount which the mortgagors will have to pay Ahmad Yar to redeem the land from him, this need not be determined in the present suit; it will probably be a matter for decision should a redemption suit be brought later on.

I accept this application for revision and, reversing the decision of the Senior Subordinate Judge, I give the plaintiff a decree for Rs. 200 against Ahmad Yar. The plaintiff himself complicated matters by taking the produce of the land which was not mortgaged to him, and I leave the parties to bear their own costs in all Courts.

*Application accepted.*

CALCUTTA HIGH COURT.  
CIVIL RULES Nos. 2-5 AND 50 OF 1920.  
July 5, 1920.

Present:—Sir Anant-h Mookerjee, Kt.,  
Acting Chief Justice, and Justice Sir  
Ernest Fletcher, Kt.

KUMUD BAN MOHUNT—PETITIONER

*versus*

TRIPURA CHARAN CHOUDHURY

AND OTHERS—OPPOSITE PARTIES

*Hindu Law—Religious endowment—Mahant, position and powers of—Pronami, whether personal property of Mahant—Residence of Mahant—Cost of upkeep, whether to be borne by endowment.*

The *pronami* offered by the faithful to the Mahant of a Hindu religious endowment is the personal property of the Mahant and is no part of the income of the endowment. [p. 168, col. 1.]

There is a fundamental distinction between the offerings made to the deity and the offerings made to the Mahant personally. If offerings are made to the deity, they belong to the endowment and must be applied by the Mahant for the purposes of the endowment; on the other hand, if offerings are made



## KUMUD BAN V. TRIPURA CHARAN.

by the faithful to the *Mahant* personally, they do not become merged in the income of the endowment. [p. 466, col. 1.]

Whether a particular offering is made to the deity or to the *Mahant* personally, depends upon the intention of the faithful devotee and no inflexible rule can be formulated, nor can any general test be prescribed, for determining whether on a particular occasion the offering was made to the deity or to the *Mahant* personally. [p. 466, col. 2.]

Where by a consent order the *pronami*, or personal offering to the *Mahant* of a religious endowment, is not to be treated as part of the income of the endowment, that order is binding on the parties so long as it stands. [p. 466, col. 2.]

The dwelling-house of a *Mahant*, being part and parcel of a religious endowment, must be maintained in suitable condition as the proper residence of the spiritual head of the endowment, out of the income of the endowment. [p. 466, col. 2.]

Rules against the order of the District Judge, Chittagong.

FACTS appear from the judgment.

Babu Bipin Behari Ghose (Jr.) (with him Babus Chandra Kant Sen and Promathanath Banerjee), for the Petitioner.—The petitioners before your Lordships question the propriety of an order made by the District Judge of Chittagong with regard to the annual budget of a certain Hindu religious endowment, the temple at Sitakundu, which is the subject-matter of a suit under section 92 of the Code of Civil Procedure. By a consent order it was arranged that the *pronami* offered to the *Mahant* of the temple by the faithful would be his personal property and would form no part of the income of the endowment. It is now ordered that as the *pronami* is to go to the *Mahant*, certain items of expenditure of the endowment will not be met by the income of the endowment. According to the consent order, as also in accordance with well-established law, the *pronami* is the personal property of the *Mahant*. That being so, there is no reason why all the legitimate expenses of the endowment should not be met by its income. Moreover, in the budgets as submitted by the *Mahant* there is not a single item of expenditure which is not legitimate. The expenses of repairing the *Mahant's* residence have been disallowed. This cannot be done as the *Mahant* is entitled to maintain his position and dignity as head of the religious endowment. Refers to *Umeshananda Dut Jha v. Ravaneshwar Prosad Singh* (1).

Babu Dasarathi Sanyal (with him Babus Hirulal Chakravarty and Sarat Chandra Mitra), for the Opposite Parties.—The District Judge passed a perfectly correct order. When the consent order was made, it was understood that, as the *pronami* was to go to the *Mahant*, certain items of expenditure would not, in future, be borne by the endowment. This was the most natural arrangement, for the *Mahant* was not to acquire property. Whatever income may come to him as *Mahant* should be spent for religious purposes.

Babu Bipin Behari Ghose was not called upon to reply.

## JUDGMENT.

MOORE, J., ACIG. C. J.—We are invited in this Rule to consider the propriety of an order made by the District Judge with regard to the annual budget of the Sita Kunda Temple, which is the subject-matter of a suit under section 92 of the Civil Procedure Code, in his Court.

The litigation has been pending for many years. On the 20th November 1911 an appeal was preferred to this Court against the decision of the District Judge declining to remove the late *Mahant*. In this Court a decree was made by consent of parties, on the 5th February 1915, and a scheme was drawn up, on the model of the scheme sanctioned by the Judicial Committee in the case of *Prayag Doss Ji Varu v. Terumila Srirangacharla Varu* (2), and applied by this Court in *Umeshananda Dut Jha v. Ravaneshwar Prosad Singh* (1). One of the directions given in the scheme was that the *Mahant*, two months prior to the commencement of every Bengali year, would prepare and file in the District Court a budget of the expenses to be incurred in the ensuing year. There was a supplementary provision that the Treasurer would put the *Mahant* in funds for all disbursements according to the budget and for any further expenditure considered necessary by the *Mahant*; but unless by leave of the District Court such further expenditure was not to exceed Rs. 500 during any one year. The scheme has been in operation for some years, and there have been disputes from time to time as to the items to be inserted in the budget, with the result that by a

(1) 17 Ind. Cas. 969; 16 C. L. J. 431; 17 C. W. N. 841.

(2) 20 M. 138; 11 C. W. N. 442; 9 Bom. L. R. 588; 2 M. L. T. 119; 17 M. L. J. 236; 34 I. A. 78.

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subsequent consent order it was decided that the *pronami*, or personal offering to the *Mahant* by the faithful, should not be treated as part of the income of the endowment. After this order had been made by consent, the budget for the following year was submitted by the *Mahant* to the District Court. Objections were thereupon taken on behalf of some of the plaintiffs who had instituted the suit as representatives of the Hindu community, that certain items of expenditure should be excluded on the ground that as the *pronami* was now to be taken by the *Mahant*, some of the items of expenditure, which in previous years had been met from the income of the endowment, should be thrown upon him. The District Judge has accepted this contention as well founded and has modified the budget accordingly. We are of opinion that this view cannot possibly be supported.

Mr. Sanyal for the plaintiffs has contended that it was understood when the consent order was made with regard to the *pronami* that certain items of expenditure should no longer be borne in future by the endowment. It is impossible for us to entertain this suggestion; whatever the motives of the parties might have been, they are bound by the consent order so long as it stands, and by that consent order the *pronami* is the personal property of the *Mahant*. This, indeed, is in accordance with what is well established law. It was pointed out by Mr. Justice Banerjee in the case of *Girijanund Datta Jha v. Sailajanund Datta Jha* (3) that there is a fundamental distinction between the offerings made to the deity and the offerings made to the *Mahant* personally. If offerings are made to the deity, they belong to the endowment and must be applied by the *Mahant* for the purposes of the endowment: on the other hand, if offerings are made by the faithful to the *Mahant* personally, they do not become merged in the income of the endowment. Illustrations of the applications of this principle will be found in the cases of *Dhadphale v. Gurav* (4), *Kashi Ohandra Ohuckerbutty v. Kailash Ohandra Bandopadhyaya* (5)

and *Kalyana Venkataramana Aiyangar v. Kasturi Ranga Aiyangar* (6) whether a particular offering is made to the deity or to the *Mahant* personally depends upon the intention of the faithful devotee and no inflexible rule can be formulated, no general test can be prescribed, to determine whether on a particular occasion the offering has been made to the deity or to the *Mahant* personally. But so far as the *pronami* is concerned there can be no doubt that it is made to the *Mahant* personally and becomes his personal property. It is, consequently, impossible to maintain the view that, because the *Mahant* takes the *pronami*, certain items of expenditure, which in previous years had been legitimately thrown upon the income of the endowment, should thenceforward be thrown upon the *Mahant* personally. The items have been placed before us, and we are of opinion that they were rightly charged on the endowment in previous years, and should not have been thrown on the *Mahant* in the budget under consideration.

A question has been raised as to whether money should be spent out of the income of the endowment for the repairs of the dwelling-house of the *Mahant*. We are of opinion that the necessary repairs should be effected from the income of the endowment. The dwelling house of the *Mahant* is part and parcel of the endowment and must be maintained in a suitable condition so as to be proper residence for the spiritual head of the religious foundation. As was pointed out in the case of *Umeshanand Dut Jha v. Ravaneshwar Prosad Singh* (1), so long as the *Mahant* remains in office, he must be treated with the dignity which belongs to the holder of that office. In the present case, there is ample indication on the part of the plaintiffs that they have endeavoured to take objections which, if accepted, would seriously affect the dignity and position of the *Mahant*.

The result is that the Rule is made absolute, the order of the District Judge set aside, and the budget approved as submitted by the *Mahant*.

We are finally of opinion that it is not necessary to have an Examining Committee, (6) 88 Ind. Cas. 73; 20 M. L. T. 490; 5 L. W. 625; (1917) M. W. N. 400; 40 M. 212; 31 M. L. J. 777.

(3) 23 C. 645; 12 Ind. Dec. (N. S.) 429.

(4) 6 B. 122; 8 Ind. Dec. (N. S.) 539.

(5) 26 C. 356; 3 C. W. N. 279; 13 Ind. Dec. (N. S.) 331.

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on the obvious ground that multiplicity of machinery always leads to increase of dispute. The Examining Committee must consequently be discharged. Rule No. 50F will be discharged.

FLETCHER, J.—I agree.

*Rules discharged.*

### ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 35 AND 47 OF 1919.  
May 6, 1920.

*Present* :—Pandit Kanhaiya Lal, A. J. C.  
GAURI NATH KAKAJI AND OTHERS—  
PLAINTIFFS—APPELLANTS IN NO. 35  
AND RESPONDENTS IN NO. 47.

*versus*

RAM NARAIN AND OTHERS—DEFENDANTS  
—RESPONDENTS IN NO. 35 AND APPELLANTS  
IN NO. 47

*Temple—Public dedication—Presumption—Mahant,  
powers and position of.*

Where a temple was built for public worship and has been open always to such worship the facts that the first worship was performed by a member of the public; that the temple has received further grants and gifts from the public; that fairs and public worship are annually celebrated, and that admissions as to the temple being *wakf* have been made in previous litigation, are sufficient, in the absence of evidence that the temple was gifted to a particular *Mahant*, to raise the presumption of a public dedication, and the *Mahant* of the institution is not the absolute owner of the whole income derived from the trust property, the assets being vested in him as owner for the time being as trustee for the institution nor, except in cases of necessity, has he any power to alienate the property; nor can he apply the surplus income to his own personal uses but must add the same as an accretion to the trust property. [p. 469, col. 2; p. 470, cols. 1 & 2.]

Appeals from the decree of the Third Additional District Judge, Lucknow, dated the 14th May 1919.

Babu Mahesh Prasad, for the Appellants in Appeal No. 35 and Respondents in No. 47.

Mr. M. N. Chak, for the Respondents in

Appeal No. 35 and Appellants in Appeal No. 47.

**JUDGMENT.**—The dispute in these appeals relates to the Mahabir Temple situated in Aliganj, one of the suburbs of the Lucknow City, and the properties appertaining thereto. The defendants and their ancestors have been in charge of the temple from some generations. The allegation of the plaintiffs is that the defendant, Ram Narain, who describes himself as the *Mahant* of the temple, has been mismanaging the affairs of the temple and neglecting the repairs of the buildings attached thereto; that the other defendants have also been fattening themselves on the income derived from the temple property; that some of the temple property has been wrongfully alienated and the religious services at the temple are neglected. They also allege that the defendant, Ram Narain, has a concubine in his keeping; that some of the other defendants are also men of an undesirable character, and that no accounts of the income and expenditure of the trust property have been kept by them. They sue for the removal of the defendants from the charge of the trust property and ask that a suitable scheme may be framed for the proper administration of the trust.

The defendants deny that the temple was a public trust of a religious or charitable nature. They allege that the temple was their private property, to which the public had no right of access except on such conditions as the manager of the defendants' family might from time to time impose, and that they have kept up the performance of religious services regularly. They admit that they have kept no account of the income and expenditure of the property, and that they have alienated a small portion of the same, but they assert that they have made those alienations for family purposes and have made repairs and reconstructions in the course of their management. They also assert that they have been in adverse possession of the disputed property and that the claim is barred by limitation.

The Court below found that the temple in question, with the property attached to it, was a public trust of a religious and charitable nature; that the defendants had



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mismanaged the trust and neglected to keep the temple property in proper repair, and that one of the defendants, Ram Narain, who described himself as the *Mahant* of the temple, had a concubine in his keeping and was unfit to continue in charge of it. It accordingly framed a scheme for the administration of the trust, the essential features of which were that the defendants, Lachhman Das, Radha Kishan and Ram Chandra, were permitted to realize the income of the trust property and to appropriate 75 per cent. of the income for the maintenance of their respective families and to pay the remaining 25 per cent. to the committee of management for carrying out the purposes of the trust. Both the parties are dissatisfied with that decision.

The first question for consideration is, whether the temple in question, with the property attached to it, is a private trust or a public trust of a religious or charitable nature. It appears from an inscription affixed above the northern door of the main temple building that the temple was built in its present form by Lala Jatmal, in accordance with the suggestion of *Mahant* Khasa Ram, in *Sambat* 1840 or 1783 A. D. The inscription records that the construction of the *mandak*, or dome of the temple, was completed on Tuesday Baisakh Sudi 5, *Sambat* 1840, corresponding with the 6th May 1783; that Lala Jatmal received the grace or blessing of Shri Mahabirji and that Lala Sada Nand performed the worship. It is not possible to say whether the idol of Mahabirji was brought at the time from some other place and installed there or whether some sort of temple or structure containing the idol existed there from before. The latter is, however, more likely, for the date given is not the date of the installation but the date of the completion of the dome, and the worship is said to have been performed not by Jatmal but by Sada Nand. The main temple building contains, in addition to the temple proper, several apartments for the accommodation of pilgrims or visitors and the residence of the *Fujari* or *Mahant*. Round that building is a large enclosure marked as No. 331 in the old Settlement map of Shekhpur, measuring 2 *bighas*, 2 *biswas*, with a large pond and an open piece of land

standing behind it on the west, which was entered in the name of Sheo Din, the then *Mahant*, at the old Settlement. The entire plot with the pond and the land on the west is evidently the property of the temple and has remained in the possession of every successive *Mahant* since except for such alienations, as any of them may have made, the validity of which cannot be determined in this proceeding.

In 1267 *Fasli*, Durga and Ram Shankar, the Chowdhris of Aliganj, executed a *mahearnama*, declaring that 5/6ths of a grove standing in front of the *asthan* Mahabir, had been given by their ancestors to the *Mahant* of the Mahabir Temple and the remaining 1/6th share had been sold by Babu Ram to Moti (Exhibit A-1). As the temple has a door on the west, too, it is not improbable that the land entered in the name of *Mahant* Sheo Din at the old Settlement may have been the site of the grove herein referred to.

In 1269 *Fasli*, Chhedi and Dukhu gave two plots of land in Aliganj to Thakur Das, the *Mahant* of the Temple of Hanumanji (Exhibit A-2); and in the same year Ram Dayal, who held a part of the house of Chheda and Dukhi, sold that part to the *Mahant* (Exhibit A-3). Thakur Das is stated to have been the brother of Hulas Das, the name of whose son, Sheo Din, figures in the *Ahasra* of the old Settlement. The exact identity of these plots is not, however, ascertainable.

On the 18th June 1855 Sheo Din, the then *Mahant* of the temple, mortgaged a *dalan* and a shed standing in the enclosure of the temple with Ram Din. In 1876 *Musammat* Janki, the widow of the younger brother of Ram Din, filed a suit for possession of the same, alleging that she had been wrongfully ejected therefrom by Gopi Nath, the predecessor of the present defendant, in November 1894. The sons and the widow of Gopi Nath, who had died meanwhile, defended that suit on the ground that the whole temple with the buildings appertaining thereto was the property of Mahabirji and was *waqf* property and that no person had a right to mortgage the same (Exhibit 8). They claimed to be in possession of the said property as trustees, and succeeded in establishing that the mortgage made by Sheo Din

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was invalid (Exhibit 7). Sheo Din had died 28 or 29 years earlier, leaving a widow, *Musammât Makhana*, but without issue. He was apparently succeeded in the office of *Mahant* by Gopi Nath, a descendant of another branch of the family, to which Khasa Ram belonged. Gur Sahai, the eldest son of Gopi Nath, was examined in that case. He admitted that the temple was reputed to have been constructed by Jatmal, that he was the *Pujari* of the temple, and that the *Mahant* had the right to the income of the temple but no right to the property attached to the temple (Exhibit 10).

On the 28th March 1898 *Musammât Bitto*, the widow of Gopi Nath, executed a Will, wherein she declared that the whole property in her possession, though inherited, was the *riyasat* or property of Mahabirji and that her sons should divide the offerings at the temple, after paying all the expenses connected with the temple, among themselves in equal shares, but none of them would have any power to alienate the property of the temple (*riyasat mutadliq Asthan Mahabirji*) (Exhibit A-9).

On the 24th June 1904 Gur Sahai executed a Will bequeathing his one-fifth share in the offerings and in the temple property, which he described as his own, to his two sons, treating the grove, pond, trees and land as forming part of the Mahabir Temple (Exhibit A-10).

The defendant's own witnesses admit that the public have a right to go to the temple for worship. Babu Hari Shankar (D. W. No. 1) states that the public go inside the temple for worship and every Hindu has a right to go into it for the purpose. Mohan Lal (D. W. No. 7) and Shiam Bahari (D. W. No. 14) say the same. So does Bhagwant Singh (D. W. No. 2), though he adds that the defendants can stop them if they like, but have never done so. There are several respectable witnesses produced by the plaintiff, who depose that the temple is public property, at which regular worship is performed in the morning and evening and an annual fair is held, which is attended by from 30,000 to 40,000 persons and that the public have a right of worship at the temple. The defendant, Ram Narain, admits that several presents in the shape of brass doors, brass *phandis*

and the like have been made by the worshippers to the temple and that, though the members of the family of Gopi Nath divide the offerings, the temple or the buildings attached thereto cannot be divided or alienated.

In a part of the temple building there is, for instance, a lantern post, made of stone, stating in Hindi that the entire stone work was done by Chandi Din, Mistri, and Janki Prasad in 1802. The main gate of the temple possesses doors plated with brass, which bear an inscription in English, Hindi and Urdu, stating that the doors were constructed by the employees of the Lucknow Iron Works on the 7th June 1910. Above the eastern door of the temple there is another inscription in Hindi, stating that the workmen of the Lucknow Narrow Gauge Railway, under their Mistri Jawahir, had constructed the Tiba in *Sambat* 1965 or 1908 A. D. At another place there is a wooden post for putting up a flag, which is covered with brass plates, bearing an inscription, indicating that the same had been constructed by Pancham Srivastava and another workman of Mashakganj, Lucknow, in *Sambat* 1974 or 1917 A. D. From the main road there is a pathway leading to the temple, on either side of which there are raised platforms for stalls and some apartments in a more less ruined condition, intended either for the use of shop-keepers or for the accommodation of pilgrims at the annual fairs. On the occasions of these annual fairs large offerings are made at the temple which the *Mahant* for the time being has hitherto been appropriating. The worshippers visit the temple and make offerings during the other parts of the year, too, and more particularly on Tuesdays without any let or hinderance.

These facts are inconsistent with the temple having been the private property of the defendants. It was built by Lala Jatmal evidently for public worship and has been open to public worship ever since. There is no evidence that Lala Jatmal made a gift of the temple in favour of *Mahant* Khasa Ram. After the construction of the temple was completed, the first worship was performed by a member of the public and not by Khasa Ram. The temple has received further grants and

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gifts from the public from time to time. The celebration of annual fairs and public worship, read with the inscriptions borne by the temple and the admissions made by the defendants in the previous litigation, go to show that the temple and the land and buildings appertaining thereto are public property. As pointed out in *Mohan Lalji v. Gordhan Lalji Maharaj* (1) and *Lachhman Das Buba v. Rajan Lal* (2) a presumption of a public dedication would not be unjustified in the circumstances.

The next question is, whether *Mahant* Ram Narain and the other defendants have been mismanaging the affairs of the temple and neglecting the performance of regular worship there. The Commissioner reports that he found some of the buildings in the enclosure of the temple in a dilapidated condition. Bhagwant Singh (D. W. No. 2) says that the buildings to the west are in a dilapidated state from seven or eight years. The defendants admit that they have kept no account of the income and expenditure connected with the temple. They also admit that they have been appropriating the entire income derived from the temple and that some portions of the temple property have been alienated or mortgaged by them.

A *Mahant* is not the absolute owner of the whole income derived from the trust property. All the assets of the *Mutt* or *Asthal* are vested in him as the owner thereof for the time being in trust for the institution itself. The nature of the ownership is, as observed by their Lordships of the Privy Council in *Ram Parkash Das v. Anand Das* (3), an ownership in trust for the *Mutt* or institution itself and it must not be forgotten that, although large administrative powers are no doubt vested in the regining *Mahant*, this trust does exist and that it must be respected. The *Mahant* has no power to alienate any property except in cases of necessity (*Murugesam*

*Pillai v. Gnana Sambanda Pandara Sannadhi* (4) and *Palanippa Ohetty v. Deivarikamony Pandara Sannadhi* (5) and even in regard to the surplus income his powers are of a very limited character, for, as pointed out by Lord Shaw in *Arunachellam Ohetty v. Venkatachalapathi Guruswamikal* (6), he cannot apply the surplus income to his own personal purposes other than those connected with his duties or the dignity of his office, but must add the same as an accretion to the trust property. Ram Narain claims to be the present *Mahant*; but he has neglected his duties as *Mahant* and his living with a concubine. His brother, Ram Bharose, is insane. Gur Sahai is dead. No explanation is forthcoming why the repairs of the buildings attached to the temple have not been carried out and no accounts are available to show how the surplus income, if any, has been dealt with. Neither Ram Sahai, nor any of the members of the family of the defendant, can, therefore, be trusted with the sole management of the trust.

The scheme of management framed by the Court below gives a seat on the committee of management to Lachhman Das, one of the members of the family, which has hitherto supplied the successive *Mahants*. The line of *Mahant* Khasa Ram, who was originally in charge of the temple when it was built in its present form by Lala Jatmal, has already become extinct. Sheo Din was the last representative of that line. His widow, *usammah* Makhana, has died too. During her lifetime Gopi Nath, a descendant of Aa Ram, the brother of Khasa Ram, managed the trust and acted as *Mahant*. On the death of Gopi Nath his eldest son, Gur Sahai, succeeded to the office. He was succeeded by Ram Narain, the present *Mahant*, who is unfit to hold that position. Lachhman Das, the next senior member of

(1) 19 Ind. Cas. 337; 35 A. 283; 17 O. W. N. 741; 11 A. L. J. 548; 17 C. L. J. 612; 15 Bom. L. R. 606; (1913) M. W. N. 536; 14 M. L. T. 27; 40 I. A. 97 (P. C.)

(2) 28 Ind. Cas. 800; 20 O. O. 49.

(3) 33 Ind. Cas. 583; 43 C. 707 at p. 714; 43 I. A. 73; 20 C. W. N. 802; 14 A. L. J. 621; (1916) 1 M. W. N. 406; 31 M. L. J. 1; 18 Bom. L. R. 490; 3 L. W. 556; 24 C. L. J. 116; 20 M. L. T. 267 (P. C.).

(4) 39 Ind. Cas. 659; 44 I. A. 98; 21 M. L. T. 288; 32 M. L. J. 869; 15 A. L. J. 281; 1 P. L. W. 457; 5 L. W. 759; 21 O. W. N. 761; 40 M. 402; 19 Bom. L. R. 456; 26 C. L. J. 589; 1917) M. W. N. 487 (P. O.).

(5) 39 Ind. Cas. 722; 44 I. A. 147; 21 O. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 56; 22 M. L. T. 1; (1917) M. W. N. 507; 26 C. L. J. 53; 40 M. 70; 6 L. W. 222 (P. O.).

(6) 53 Ind. Cas. 286; 24 C. W. N. 249 at p. 264; 37 M. L. J. 460; 1919) M. W. N. 850; 17 A. L. J. 1197; 10 L. W. 642; 26 M. L. T. 47; 46 I. A. 204; 43 M. 253; 22 Bom. L. R. 457; 2 U. P. L. R. (P. C.) 10 (P. C.).



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the family, is a fit person to represent the family on the committee. The scheme of management is, however, defective because, though it nominally places the administration of the trust in the hands of the committee, it practically allows three members of the family of Mahant Gopi Nath, namely, Lachhman Das, Radha Kishen and Ram Chandra, to realize the income and appropriate 75 per cent. thereof and to make over the remainder to the committee of management for carrying out the purposes of the trust, inclusive of the repairs of the temple buildings. Two of these persons are not even members of the committee. The percentage of the income allowed to the defendants is, moreover, excessive and leaves an insufficient margin for the repairs of the temple property and carrying out the objects of the trust. It seems desirable, therefore, to alter the scheme so as to entrust the management to five respectable Hindu residents of Lucknow, willing to work on the committee, one of whom should be the representative of the family to which Mahant Khasa Ram belonged. Consistently with the objects of the trust the members of the family cannot be allowed more than 50 per cent. of the total income and that allowance should be liable to forfeiture or reduction, if the member of the family who is placed on the committee or the other members of the family fail to discharge the obligations connected with the regular performance of worship and such other duties as may be assigned to them in connection with the trust in an efficient and faithful manner.

The parties agree that, in the place of Pandit Ram Narain Shukla and Lala Partab Chand, Babu Gar Prasad, a contractor of Lucknow, and Lala Dalli Sab, a cloth-merchant of Aliganj, be placed on the committee. The extent of the trust property, as ascertainable, is sufficiently indicated above. Any further property that may hereafter be found to appertain to the temple shall also be treated as trust property, as also gifts or grants which may henceforth be made for the purposes of the trust by the worshippers or persons interested in the trust.

The appeal of the plaintiffs is, therefore, allowed in so far that the scheme of management framed by the learned Additional Judge will be amended in accordance with

the scheme appended below. The appeal of the defendants is dismissed. The plaintiffs will get their costs here and below from the income of the trust property. The defendants will bear their own costs throughout.

#### THE SCHEME OF MANAGEMENT.

1. The endowment shall be called the Aliganj Shri Mahabirji Trust.

2. Trust shall comprise the temple of Mahabirji in Aliganj, Lucknow, with the lands, buildings, groves, trees, wells and other properties moveable and immoveable appertaining or belonging thereto and shall include any offerings that may be made at the temple on any grants or gifts made therefor and any property that may hereafter be acquired by the Trust or be given or dedicated to it.

3. The objects of the Trust shall be

- (a) to maintain the temple of Shri Mahabirji and the properties appertaining thereto in a proper state of repair and in a good sanitary condition,
- (b) to arrange for the regular performance of the customary religious services and worship thereat,
- (c) to look after and arrange for the convenience of pilgrims or visitors visiting the temple for worship or devotion,
- (d) to do such other acts, religious, educational or charitable as may be considered desirable by the committee for the advancement of learning or religious instruction or for the support of *siddhus*, *fakirs* or indigent students visiting or staying in the precincts of the temple for such instruction.

4. The Trust shall be administered by a committee consisting of five Hindu residents of Lucknow as members, of whom one shall be a representative of the family of Mahant Gopi Nath, related by blood or adoption, so long as such a representative is available, with power to appoint a Secretary and to elect a Chairman from amongst themselves for one year or for such period as the committee may fix.

5. The first committee shall consist of (a) Lachhman Das, representing the family of Mahant Gopi Nath, (b) Babu Basdeo Lal Bhargava, Advocate, (c) Babu Lachhman Prasad Srivastava, Vakil, (d) Babu

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Gur Prasad, contractor and (a) Babu Dalli Sab cloth merchant, Aliganj.

6. The Committee shall meet at least once in every three months to examine accounts, check receipts and expenditure for the preceding months and to devise and adopt measures for carrying out the purposes of the trust and the protection of the trust property. It shall also hold an annual meeting, in the month of Jeth as far as practicable, to pass the annual accounts and to frame the budget for the succeeding year and also to elect a Secretary and a Chairman for the succeeding year or for such period as the Committee may fix.

7. A book showing the proceedings of the Committee and the members attending each meeting shall be maintained by the Secretary.

8. The Secretary shall also maintain at the main-gate of the temple a visitor's book open to the public in which any suggestions which any member of the public or any person interested in the Trust may have to make for the better administration of the Trust and any complaint which he may have against the servants or employees or managers of the Trust could be recorded. The Secretary shall lay the visitor's book for the consideration of the Committee of management at its meetings, or earlier when necessary.

9. Subject to the control and direction of the Committee, the member of the family of Mahant Gopi Nath appointed or hereafter elected on the Committee shall, for the time being, be in immediate charge of the worship and religious services to be daily conducted at the temple and shall keep a regular and accurate account of the offerings received and the expenditure incurred in connection with such worship and religious services from day to day in such manner as the Committee may prescribe, and in lieu of such services shall receive for the maintenance of himself and the other members of the family of Mahant Gopi Nath, so long as they or any of them exist and continue faithfully to discharge those duties, an allowance equal to 50 per cent. of the total income of the Trust, such allowance being liable to forfeiture or reduction for non-fulfilment, neglect or improper discharge of any of the

obligations herein imposed or unwillingness of the members of the said family to undertake the same, on an application made to the principal Court of original jurisdiction by any two members of the Committee.

10. If the arrangement referred to in the preceding rule is at any time found to be unsatisfactory it will be open to the Secretary, subject to the control and direction of the Committee of management, to adopt such measures as may be considered necessary for the performance of the duties therein referred to.

11. Subject to rule 9, the entire management of the Trust shall be vested in the Committee of management who shall be empowered to make such arrangement as may be considered necessary for the keeping and examination of accounts, the realization of the rents and income of the Trust property, the collection and disposal of the daily offerings at the temple and the other dues connected therewith, the engagement, dismissal and punishment of servants and the safe custody or investment of the trust property and funds as may from time to time be considered necessary. Every matter coming up before the Committee, shall, except as hereinafter provided, be decided by a majority of votes. In the absence of the Chairman any member present at the meeting may be elected as Chairman for the time being and in the case of equality of votes the President or Chairman for the time being shall have a second or casting vote.

12. Three members shall form a quorum, but when a meeting has been adjourned for want of a quorum the adjourned meeting shall not, except as hereinafter provided, be governed by this rule.

13. If any member fails to attend the sittings of the Committee for four consecutive meetings or is absent from Lucknow for a period of more than one year he shall be deemed, if the Committee so declares, to have resigned his seat on the Committee.

14. A member of the Committee found guilty of any malfeasance, misfeasance or other improper conduct or otherwise rendered unfit by any physical ailment shall be liable to removal at the instance of any two members of the Committee or any two persons interested in the Trust by an applica-

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tion made to the principal Civil Court of original jurisdiction.

15. On the occurrence of any vacancy in the Committee by death, resignation, removal, or otherwise, the remaining trustees, if not less than three in number, may, subject to the condition laid down in rule 4, by mutual concurrence fill up the vacancy out of the Hindu residents of Lucknow. In case of their failure or disagreement or in any other event, the principal Civil Court of original jurisdiction, Lucknow, may, on the application of any two persons interested in the Trust, select and appoint a person to fill up the vacancy in the manner aforesaid.

16. Till an appointment is made to fill up a vacancy, any act done by the remaining member or members shall, notwithstanding anything contained in rules 4 and 12, be as effectual and binding as if it had been done by the Committee itself.

17. The Committee shall sue and be sued in the name of the Trust through its Secretary and shall have power to do all acts which might be reasonable and proper for the realization, protection, or benefit of the trust property or for the protection of the title thereto, and for carrying out the object of the Trust, including an authority to compromise, abandon, submit to arbitration, or otherwise settle any debt, account, claim or any other thing relating to the Trust, and to execute any agreements, instruments or composition, release and other things as may in the interest of the Trust seem expedient.

18. Any application arising out of this scheme or connected with the Trust shall be made in continuance of these proceedings in the principal Civil Court of original jurisdiction at Lucknow, and it shall be within the competence of that Court at any time to amend and modify this scheme or any of its provisions in any manner it thinks fit either of its own motion or on an application made by not less than two persons interested in the trust and also to issue further or other directions as may appear necessary from time to time.

*Appeal No. 35 partly allowed;  
Appeal No. 47 dismissed.*

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1475  
OF 1911.

June 9, 1920.

*Present:—*Mr. Justice Newbould.

BROJO GOPAL GOSSAIN, HAVING DIED,  
IN HIS PLACE, HIS WIFE AND HEIRESS MON-  
MOHIN DEVI *alias* GOPALI SUNDARI  
DEVI—PLAINTIFF—APPELLANT

*versus*

RAJANI KANTA GHOSE AND OTHERS—  
DEFENDANTS—RESPONDENTS.

*Ejectment—Occupancy holding, non-transferable,  
purchaser of, whether tenant, and liable to ejectment.*

The purchaser of a non-transferable occupancy holding who is recorded in the Rent Roll as being in possession merely, does not acquire the status of a tenant, and is liable to ejectment. [p. 474, col. 2.]

Appeal against the decree of the Second Additional District Judge, Dacca, dated the 7th of April 1919, reversing that of the Munsif, Second Court, at Manikganj, dated the 30th of April 1918.

FACTS appear from the judgment.

Dr. Sarot Chandra Basak (with him Babus Kamani Mohan Chatterjee, Tarakeswar Pal Choudhuri, and Promatha Nath Bandhopadhyaya), for the Appellants.—The plaintiff is the appellant. The appeal arises out of a suit for ejectment on the ground of the defendant having purchased a non-transferable occupancy holding. He is, therefore, in the position of a trespasser. Both Courts have found that the holding was non-transferable, and that the defendant had acquired no rights by virtue of his purchase and further that the landlord had not recognised the transferee. The Court of first instance decreed the plaintiff's suit. But on appeal by the defendant the suit has been dismissed. Now, the defendant bought the holding at a sale held in execution of a mortgage decree and obtained possession on the 12th February 1912. The holding which is a temporarily settled estate has been held by the plaintiff since 1875 under periodical leases. The last Settlement was for 1908-1915. Before the expiry of that Settlement the plaintiff was called upon to execute a *kabuliyat* which was done in 1913. The Settlement thereby was for 15 years, i.e., from 1915-1930. One of the terms of the *kabuliyat* was that the plaintiff would respect the rights of all tenants, sub-tenants and others within the *mahal*. The Rent-Roll of the estate was prepared at



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1914. Then the holding in dispute is recorded as an occupancy holding in the possession of the defendant. The present suit was instituted on the 19th January 1915 at a time when he was perfectly entitled to institute the suit. The learned Judge has relied upon the Rent Rolls and has dismissed the suit. The Rent Roll was finally published during the pendency of the suit. The institution of the suit is the most effective challenge to the entry in the Rent Roll of the name of the defendant as the occupier. The mere entry does not amount to the presumption of the tenancy. Refers to *Tapanidhi Raghunath Puri v. Pitambar Gajendra Mahapaty* (1). They were not recorded as tenants but as possessors. The *kabuliyat* speaks of the existing rights as between the landlord and the defendant. There can, therefore, be no question of estoppel. The defendant was not a tenant at the time the *kabuliyat* was executed. The finding is in my favour that there was no recognition. Refers to section 10, Regulation VII of 1822. Under that section the proprietor appeared before the Collector and accepted settlement when the *kabuliyat* was executed. The cause of action accrued in 1910, when the sale took place. There was no change in the rights of the parties when the suit was instituted in 1915.

Babu Asita Ranjan Ghosh, for the Respondent.—There is only one point, whether under the Record of Rights I have got any right to the land and secondly whether I am liable to be ejected. The other questions raised are wholly concluded by findings of fact. The lower Appellate Court clearly finds that I am a tenant and not a trespasser. The record was prepared before the execution of the *kabuliyat*. The *kabuliyat* also provided that the plaintiff would be bound to recognise tenants, sub tenants and others who would be recorded in the Record of Rights. Refers to *Tapanidhi Raghunath Puri v. Pitambar Gajendra Mahapaty* (1), *Chandramoni Mohanti v. Manmatha Nath* (2), *Jarip Sardar v. Jogendra Nath Chatterjee* (3). I submit the entry of my name in the Record of Rights clearly indicates that I am a tenant of the *mahal*.

Dr. Basak, replied in brief.

(1) 5 O. L. J. 67.

(2) 5 Ind. Cas. 301; 11 O. L. J. 68.

(3) 5 Ind. Cas. 719; 31 O. L. J. 78; 24 C. W. N. 68.

JUDGMENT.—This appeal arises out of a suit in ejectment which was decreed by the Munsif of Manikgunj and dismissed on appeal by the Additional District Judge of Dacca. It is found by both the Courts below that the defendant is a purchaser of an occupancy holding which is non-transferable by custom and that his transfer has not been in fact recognised by the landlord. The plaintiff is the proprietor of a temporarily settled estate. She has been holding this estate since 1871 with renewals of agreement at different periods. The second term of her settlement expired in 1915; but on the 12th June 1913 the plaintiff executed a *kabuliyat* for a term of 15 years from 1915. In that *kabuliyat* there was a clause in the following terms: "I agree to recognise recorded rights of tenants, sub-tenants, Mandals and others within the *mahal*." In the Rent Roll the holding that forms the subject of this dispute was recorded in the following entry:— "Jote Ganda Dewan and others; possessor Rajani Kant Ghose." Rajani Kanta Ghose is the principal defendant. The lower Appellate Court has found that, in consequence of this condition in the *kabuliyat* and this entry in the Rent Roll, the plaintiff is bound to recognise Rajani Kant Ghose as a tenant. Had this defendant been recorded as a tenant, there is ample authority for holding that the plaintiff after executing the *kabuliyat* could not deny the tenancy. See the cases of *Tapanidhi Raghunath Puri v. Pitambar Gajendra Mahapaty* (1), *Chandramoni Mohanti v. Manmatha Nath* (2), and *Jarip Sardar v. Jogendra Nath Chatterjee* (3). But I am unable to agree with the learned Additional District Judge that the entry in the Rent Roll recorded that the defendant had the right of a tenant so as to make the clause of the *kabuliyat* quoted above applicable. The entry was that Rajani Kanta Ghose was in possession of the holding; but it is not recorded that he is a tenant nor is it recorded that he had any right to remain in possession. Such being the case, the plaintiff is in no way barred from bringing this suit in ejectment; and on the finding of both the Courts that the defendant is only in possession as purchaser of a non-transferable occupancy holding, he cannot resist the plaintiff's suit in ejectment.

The result is that this appeal is allowed the decree of the lower Appellate Courts to

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set aside and that of the Munsif restored with costs both here and in the lower Appellate Court.

*Appeal allowed.*

## LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 27 OF 1919.

December 14, 1920.

Present:—Mr. Justice Scott Smith.

INDAR SINGH—PLAINTIFF—PETITIONER  
versus

SHERU—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. V, r. 1, O. IX, r. 3—Date fixed for plaintiff to appear and find out date of hearing—Failure of plaintiff to appear—Suit, whether can be dismissed for default.*

Where no date has as yet been fixed for the appearance of the defendant within the meaning of Order V, rule 1 of the Civil Procedure Code, the Court has no power to dismiss the suit for default under Order IX, rule 3 of the Code. [p 475, col. 2.]

The failure of a plaintiff to appear on a date fixed for him to attend and find out what date has been fixed for the appearance of the defendant does not empower the Court to dismiss the suit for default. In such a case the Court should, notwithstanding the default of the plaintiff, fix a date for the appearance of the defendant and if, on the date so fixed, the plaintiff does not appear it can dismiss the suit under Order IX, rule 3. [p. 475, col. 2; p. 476, col. 1]

Petition, under section 44 of Act III of 1914, for revision of the order of the Munsif Second Class, Moga, District Ferozpor, dated the 17th August 1918.

Mr. L. O. Mehra, for the Petitioner.

Mr. O. L. Gulati, for the Respondent.

**JUDGMENT**—This is an application for revision of an order of the Munsif of Moga rejecting an application to readmit a suit purporting to have been dismissed in default under Order IX, rule 3, of the Civil Procedure Code. The suit was filed in the Court on the 15th June 1918, the process-fees for the summoning of the defendant being filed along with the plaint. Upon the plaint the Court endorsed an order that the case was to come up on the 27th June after *partial*. On the 27th June the Court recorded two orders. The first is that the plaintiff is not present, that the suit be entered in the register and that the plaintiff

be waited for till the rising of the Court. The second order is that the plaintiff is absent, that he was waited for till the rising of the Court, and that the case is, therefore, sent to the record-room in default. The plaintiff, on the 25th July, applied for restoration of the case on the ground that he was prevented by illness from appearing on the 27th June. The Munsif, on the 17th August 1918, rejected this application on the ground that he did not believe that the plaintiff was prevented by illness from appearing on the day fixed.

The plaintiff has filed a petition for revision in this Court, and it is contended on his behalf that the procedure of the Munsif was wrong and that he had no power to dismiss the case in default on the 27th June. Order IV of the Civil Procedure Code shows that every suit shall be instituted by presenting a plaint to the Court. Rule 2 lays down that the Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Order V deals with the issue and service of summons. Rule 1 lays down that, when a suit has been duly instituted, a summons shall be issued to the defendant to appear and answer the claim on a day therein specified. Order IX deals with the consequences of the non-appearance of parties on the day fixed in the summons for the defendant to appear and answer. Rule 1 lays down that the parties shall appear on the day fixed in the summons. Rule 2 lays down that the suit may be dismissed on the day so fixed where the summons has not been served in consequence of plaintiff's failure to pay the necessary costs. Rule 3 provides for dismissal in default where neither party appears when the suit is called on for hearing. Now, in the present case no date was ever fixed for the appearance of the defendant within the meaning of Order V, rule 1, of the Code, and, therefore, the Court had no power to dismiss the suit in default under Order IX, rule 3. The 27th June was not a date fixed for the hearing of the case but was apparently a date fixed for the plaintiff to attend and find out what date had been fixed for the appearance of the defendant. It was quite unnecessary for

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plaintiff to appear on that date. What the Court should have done was to fix a date for the appearance of the defendant and if, on the date so fixed, the plaintiff did not appear, it could have dismissed the suit under Order IX.

I, therefore, allow the revision and, setting aside the order of the lower Court dismissing the suit in default, direct that it be restored to the pending file and be proceeded with in accordance with law. Costs in this Court shall abide the result.

*Revision allowed.*

### PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 66 OF 1918.

February 2, 1921.

Present:—Mr. Justice Das and Mr. Justice ROSE.

Mr. N. G. R. LLEWSELLIN—DEFENDANT  
—APPELLANT

versus

Maulvi ALI ASGAR AND OTHERS  
—PLAINTIFF—RESPONDENTS

Landlord and tenant Lease—Breach of covenant  
—Right of re-entry—Waiver.

A right to re-enter for breach of a covenant in a lease is waived by the lessor's bringing an action for rent accruing subsequently to the breach with knowledge of its existence. [p. 477, col. 1.]

Appeal from a decision of the Second Subordinate Judge, Saran, dated the 27th February 1918.

Messrs. Lochmi Narain Singh and Harnandan Sahai, for the Appellant.

Mr. Md. Hasan Jan, for the Respondents.

### JUDGMENT.

DAS, J.—This was a suit for rent by the respondents against the appellant and for ejectment of the appellant from the tenure on the ground that there was default in the payment of rent for three successive instalments.

The material facts are as follows: The respondents granted to the appellant a permanent *mokarari* lease of certain properties

which are described in the lease. One of the terms of the lease was as follows: "In case of default, the *maliks* aforesaid, shall be at liberty to bring a suit for arrears of rent together with compensation at 25 per cent. and for cancellation of this *mokarari patta* and to obtain a decree therefor". The plaintiffs' case is that there has been default in the payment of rent for three successive instalments and that they have become entitled to eject the defendant from the leasehold properties.

It appears that there was a previous suit for rent by the respondent against the appellant in respect of three *kists* from March 1916 to January 1917. If the condition mentioned in the lease be a good condition, then, undoubtedly, the plaintiffs were entitled to re-enter on default having been made by the appellant in the payment of rent for three successive instalments. The previous suit, however, was a suit for rent and the plaintiffs did not ask in that suit for ejectment of the defendant. The present suit is for recovery of rent for March and June *kists* and it is quite clear that there has not been any default in the payment of rent for three *kists* entitling the plaintiffs to re-enter on the terms of the lease. The learned Subordinate Judge has passed a decree for ejectment against the defendant.

It was argued before us on behalf of the appellant that the term in the lease providing for cancellation of the lease is not a lawful term at all and that section 65 of the Bengal Tenancy Act completely protects him from ejectment. The learned Subordinate Judge, however, has not given effect to this plea. The question, in my view, is not an easy one, and if it is necessary for us to decide this question we would have to consider not only section 65 of the Bengal Tenancy Act but also section 179. But, in the view which I take of this case, it is unnecessary for us to decide this point.

In my view there has been a complete waiver on the part of the plaintiffs of the forfeiture incurred by the defendant. It will be remembered that there was a default on the part of the defendant in the payment of rent for three successive instalments. On the terms of the lease, therefore, the defendant had incurred the forfeiture. The plaintiffs were thereupon



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entitled either to take advantage of the forfeiture incurred and re-enter upon the land or to overlook the forfeiture and affirm the lease; in other words, they might either affirm the lease or avoid it. The condition in the lease was for their advantage and there is no doubt whatever that that advantage is capable of being waived. In our view, on the facts of the case, it must be held that they overlooked the forfeiture incurred by the defendant. It is well established that a right to re-enter for breach of a covenant in a lease is waived by the lessor's bringing on action for rent accruing subsequently to the breach with knowledge of its existence" *Cundy v. Nicholl* (1). The present suit for rent after the plaintiffs became entitled to re-enter upon the land must, therefore, amount to a waiver of the forfeiture incurred by the defendant.

We must accordingly vary the decree passed by the learned Subordinate Judge. The decree as regards the rent must stand but that portion of the decree which declares that the defendant is liable to ejectment must be discharged. As the point was not argued in the Court below, we make no order as to costs.

Ross, J.—I agree.

*Decree varied.*

(1) (1858) 4 C. B. (N. S.) 276; 27 L. J. C. P. 220; 6 W. R. 502; 31 L. T. (O. S.) 134; 114 R. R. 773; 140 E. R. 1180.

# LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 792 OF 1920.

December 23, 1920.

Present:—Mr. Justice Scott-Smith.

DHARM NARAIN—DEFENDANT—  
APPELLANT

*versus*

LABH SINGH—PLAINTIFF—  
RESPONDENT.

*Transfer of Property Act (IV of 1882), s. 108 (c)—  
Lessor and lessee—Interruption caused by paramount  
owner—Lessee, remedy of.*

Where a lessee is interrupted in his enjoyment of

the demised premises and the interruption caused by the paramount owner of the property and not by a stranger, the lessor is bound to remove the interruption, and, if he fails to do so, he must indemnify the lessee. [p. 478, col. 2.]

Defendant leased one of the *bungas* round the Golden Temple, of which he was the owner, to the plaintiff for use as a *halwai's* shop on *amawas* days. The manager of the Golden Temple prevented the plaintiff from using the *bungas* for the purpose for which it had been leased to him:

*Held*, that the defendant was liable to indemnify the plaintiff. [p. 478, col. 2.]

Second appeal from the decree of the District Judge, Amritsar, dated the 5th January 1920, reversing that of the Munsif, First Class, Amritsar, dated the 21st August 1919.

Lala Jagan Nath, for Mr. Bishen Narain, for the Appellant.

Lala Tirath Ram, for the Respondent.

JUDGMENT.—The facts of the case out of which the present second appeal arises are, to all intents and purposes, undisputed and are briefly as follows. The defendant-appellant is the owner of one of the houses or *bungas* which surround the tank situated in the enclosure of the Golden Temple at Tarn Taran. It has been the custom in past years for *halwai's* shops to be carried on in these buildings on the *amawas* fair days which occur once a month. Labh Singh, plaintiff-respondent, took a lease of one of these buildings from the defendant-appellant for 11 months at a rent of Rs. 45 a month and paid the whole of the 11 months' rent prior to taking possession. He stated in the plaint that on the first *amawas* day when he went to open his shop in the building in question he was prevented from doing so by the manager of the Golden Temple and that on the second *amawas* day he was again prevented and fined. He, therefore, sued the defendant for Rs. 495, rent paid by him, and for Rs. 100, by way of damages. The first Court held that he was not entitled to recover anything from the defendant because he had been prevented by a third person, namely the manager of the Golden Temple, from carrying on a *halwai's* shop in the building leased to him. The lower Appellate Court held that, having regard to the facts, it did not appear that the plaintiff was ever put in possession of the leased property by the defendant because it was clearly the intention of the parties that the premises

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should be used as a *halwai's* shop on certain fixed days in the year and the plaintiff had not used the premises without interruption on any one of those days. It further held that as the use of the shop for the purposes for which it was leased became impossible owing to a reservoir being built in front of it by the manager of the Golden Temple, the agreement became void under section 56 of the Contract Act, and under section 65 the defendant was bound to restore the advantage which he had gained under it. On both these grounds it gave the plaintiff a decree for the amount of the rent paid by him, namely, Rs. 495.

From this decree the defendant has filed a second appeal in this Court and it is urged on his behalf that he did not in the lease undertake that the plaintiff should be allowed the use of the leased property as a *halwai's* shop and that he was not liable because the plaintiff had been prevented from so using it by a third person. In support of the appeal Lala Jagan Nath cited *Devi Dayal v. Bainsi Ram* (1) and *Newby v. Sharpe* (2). The first of these is distinguishable and in regard to the second it is sufficient to say that the law is not the same in England as that laid down in section 108 of the Transfer of Property Act. The lower Appellate Court admits in its judgment that the plaintiff obtained the key of the shop from the former lessee and, therefore, it is quite clear that he obtained possession so far as the lessor is concerned. Moreover, from the pleadings of the parties it is quite clear that he did obtain possession but was merely restrained from using the premises as a *halwai's* shop by the manager of the temple.

Counsel for the respondent does not support the lower Appellate Court's view as to the applicability of section 56 of the Contract Act and, in my opinion, that section does not apply because in the present case there was no contract to do an act which had become impossible. There can, however, be no doubt that the plaintiff took a lease of the premises with the intention of carrying on a *halwai's* shop in them on the fair days and the defendant knew

perfectly well, that that was the plaintiff's intention. The rent stipulated for was a high one and it is clear that the plaintiff would never have agreed to pay that sum had he not hoped to make a profit by opening a *halwai's* shop. Respondent's Counsel relies upon section 108 (c) of the Transfer of Property Act, which lays down that "the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption." This provision of the law was discussed in *Tayawa v. Gurshidappa* (3), wherein it was held that the words "without interruption" in section 108, clause (c), of the Transfer of Property Act, give a lessee in India the same rights as he would have under what is known in England as a covenant for quiet enjoyment in an unqualified form. In other words, the lessee is protected against interruption by whomsoever it is occasioned. It was held that where the interruption is caused by the paramount owner of the property, and not by a stranger, the lessor is bound to remove the interruption, and if he fails to do so, he must indemnify the lessee. Now, it has never been stated that the action of the manager of the temple in closing the *halwai's* shops was tortious and that he had not the power to close them. The Transfer of Property Act no doubt is not in force in the Punjab but its principles are based upon justice and equity. Under section 108 (c), as I understand it, the defendant was bound to indemnify the plaintiff for the loss caused to him by the action of the manager in forbidding the opening of the *halwai's* shop. The decree of the lower Appellate Court is not contrary to any Statute law and it appears to me to be in accordance with the principles of justice and equity.

The appeal fails and is dismissed with costs.

*Appeal dismissed.*

(3) 25 B. 269; 2 Bom. L. R. 1070.

(1) 51 Ind. Cas. 412; 42 P. R. 1919.

(2) (1878) 8 Ch. D. 39; 47 L. J. Ch. 617; 38 L. T. 583; 26 W. R. 685.

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PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 28 OF 1920.

February 2, 1921.

Present :—Sir Dawson Miller, Kt.,  
Chief Justice, and Mr. Justice Adami,  
LACHMI NARAIN MARWARI—

APPELLANT

versus

BAL MAKUND MARWARI AND OTHERS  
—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 109—  
Partition suit—Preliminary decree—Dismissal of suit  
for plaintiff's default—Order setting aside dismissal,  
whether final order.*

An order of the High Court setting aside an order of a Subordinate Court dismissing a partition suit for the plaintiff's default after a preliminary decree in the suit has been passed is a final order within the meaning of section 109 of the Civil Procedure Code. [p. 481, col. 1.]

Application for leave to appeal to Privy Council against the decision of Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Mullick, dated the 8th June 1920, setting aside the decree of the Subordinate Judge, Ranchi, dated the 5th November 1919.

Messrs. S. M. Mullick and P. O. Banerji,  
for the Appellant.

Messrs. S. Ahmad and G. O. Pal, for the  
Respondents.

## ORDER.

MILLER, C. J.—This is an application on behalf of the defendants seeking leave to appeal to His Majesty in Council from an order of this Court dated the 8th June 1920. The order appealed from is an order setting aside a decision of the Subordinate Judge dismissing the plaintiff's suit for want of prosecution. The plaintiff brought a suit for partition and the suit eventually came before the High Court and, by consent of the parties, a preliminary decree was passed ordering partition of the property in question in four equal parts, the plaintiff and the other branches of the family each taking a fourth share in the property. The case was then sent down to the lower Court for the purpose of effecting the partition and when the record was received back in the Court of the Subordinate Judge he passed an order that the parties should take necessary steps by the 5th November 1919. What the necessary steps were to be taken at that time did not appear upon the face of the order but the preliminary decree had been passed

whereby the rights of the various parties had been determined in certain shares and, therefore, all that remained to be done before the final decree was passed by the Subordinate Court was that the property should be divided by metes and bounds and the shares of the various claimants ascertained. There were also certain questions which had been pending before the suit went on appeal to the High Court upon the preliminary decree which had been stayed pending that appeal and which still remained to be determined by the lower Court. When the 5th November arrived, by which date it had been ordered that the parties should take the necessary steps, nobody appeared before the Court on behalf of the plaintiff and the learned Judge, purporting apparently to act under Order XVII, rule 2 or rule 3, dismissed the suit for want of prosecution. The effect of that dismissal of the suit, unless it should be set aside, was that the plaintiff was precluded from bringing a fresh action and, further, he lost his right to his one-fourth share in the property on partition. The matter then came before this Court on revision and this Court held that the learned Judge was acting without jurisdiction in dismissing the suit on the ground of the non appearance of the plaintiff or his Pleader on the 5th November 1919 and that all that had to be done upon that occasion was some interlocutory matter and not the hearing of the suit in the ordinary sense. The Court thereupon set aside, the order of the Subordinate Judge and directed that the case be restored to the file of the Subordinate Judge for hearing.

The question for determination in the present application is, whether that order made by the High Court on the 8th June 1920 is a final order within the meaning of section 109 of the Code of Civil Procedure, such as would entitle the Court to grant a certificate for leave to appeal to His Majesty in Council. There is no question as to the value of the property, which admittedly amounts to more than Rs. 10,000. A number of cases have been cited before us on both sides in support of the arguments of the respective parties and the view I take of the order which it is sought to appeal from is that it is in fact a final order and one in respect of



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which we ought to grant the certificate prayed for. The order of this Court undoubtedly set aside what was in effect a final order and unless that order were set aside the result would be that the plaintiff who, before the preliminary decree had been adjudged entitled to a partition of a one-fourth share in the property, would no longer be entitled to a partition of such a share. The effect of the order of this Court was to determine that the plaintiff, notwithstanding the order which was made by the Subordinate Judge, was nevertheless still entitled to a partition of a one-fourth share in the property and to that extent it was, to my mind, a decision upon a cardinal point in the case and one which finally affected the rights of the parties. The only decision which appears to be directly in point upon a case of this nature, which has been drawn to our attention, is that of *Meghrai v. Bidyabati Koer* (1). That case decided that an order by which a decree of dismissal of suit for default under Order IX, rule 8 of the Code of Civil Procedure has been set aside, is a final order within the meaning of section 109 of that Code. The decision in that case was delivered by Mr. Justice Mookerjee and dealt with in this manner:—

"The order of this Court sets aside the final decree of the original Court which was in favour of the appellant. Before the decree was set aside, he was in the position that the litigation against him had finally terminated. The position now is, that he has been deprived of the benefit of the final decree and the suit as against him is to be tried.

"An order which has this effect may, we think, be regarded as a final order within the meaning of section 109 of the Code."

The learned Judge then referred to the case of *Rai Radha Kishen v. Collector of Jaunpore* (2). That case has been relied upon by the respondents, the defendants in the suit, as an authority in their favour. In my opinion, the decision in *Rai Radha Kishen's case* (2) does not determine the question which has to be determined in the present case. That was a case where an application by the defendant under section

108 of the Civil Procedure Code then in force for an order setting aside the decree issued was disallowed without the Court being satisfied by any investigation as to whether or not the defendant had been prevented by any sufficient cause from appearing when the suit was called on for hearing. The High Court on appeal reversed the order holding that the decree was an *ex-parte* one within the meaning of section 108 and remanded the case under section 562 of the Civil Procedure Code to be disposed of on the merits. It is to be observed in that case that their Lordships of the Privy Council treated the order of the High Court not as an order setting aside the decree but as an order setting aside the decision of the lower Court in which it had refused to accede to the application of the defendant and ordered the matter to be retried again upon a consideration of whether or not any sufficient cause had been shown for non appearance. Had it been an order restoring or setting aside a decree, the decision in that case might have been very different. Their Lordships say: "The appellant represents that by this order the High Court have set aside the decree of the 19th March 1896, and have remanded the original suit to be disposed of on the merits. The respondents disclaim for the order any such sweeping effect and hold that what is remanded is merely the application immediately before the Court, to wit the application to set aside the decree, and that it is this application which the Subordinate Judge will under the remand proceed to dispose of, by allowing the respondent to endeavour to satisfy him of the conditions specified in section 108, and then if this be done by setting aside the decree. Their Lordships are clearly of opinion that the respondent's is the just construction of the order of the High Court," and upon that basis they proceeded to deal with it and came to the conclusion that the order of the High Court was a purely interlocutory order and did not decide the rights of the parties which still remained to be decided by the Subordinate Judge upon hearing the application according to law. The difference between that case and the present case is that the order of this Court was an order setting aside an order dismissing the suit and not an order directing the Judge

(1) 28 Ind. Cas. 567; 21 O. L. J. 279.

(2) 28 I. A. 28; 28 A. 220; 5 O. W. N. 153; 11 M. L. J. 66; 3 Bom. L. R. 78 (P. C.).

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to re-hear an application to dismiss the suit. In my opinion, following the decision in *Meghraj v. Bidyabati Koer* (1), the proper conclusion to arrive at is that the order of this Court was a final order, and that a certificate should be granted that the case complies with the provisions of section 110 of the Civil Procedure Code.

ADAMI, J.—I agree.

Order accordingly.

### LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 537 OF 1920.

December 23, 1920.

Present :—Mr. Justice Abdul Raouf.  
THE SHOP HAR PARSHAD-DALIP  
SINGH, THROUGH DALIP SINGH AND  
ANOTHER—DEFENDANTS—PETITIONERS

versus

THE SHOP SEWA RAM-JADO RAI,  
THROUGH SEWA RAM AND ANOTHER—  
PLAINTIFF—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 20, 115—  
Jurisdiction—Sale of goods—Suit for damages—Place  
of suing—Interlocutory order—Revision, whether  
lies.

Plaintiff residing at M. ordered certain goods from defendant who carried on business at S. Plaintiff sued defendant at M. for damages on the allegation that the goods supplied were short in quantity and inferior in quality. Defendant objected that the cause of action having arisen at S., the Court at M. had no jurisdiction to hear the suit. This objection was overruled. On revision:

Held, (1) that the cause of action arose at S. and that, therefore, the Court at M. had no jurisdiction to hear the suit:

(2) that the High Court had jurisdiction in revision to set aside an interlocutory order, and that that jurisdiction ought to be exercised in this case.

Petition, under section 44 of Act IV of 1919, for revision of the order of the Munsif, First Class, Leiah, District Muzaffargarh, dated the 15th June 1920.

Bakhshi Tek Chand, for Lala Fakir Chand, for the Petitioners.

Mr. Devi Dayal, for the Respondents.

JUDGMENT.—Sewa Ram and Jadoo Rai of Leiah, District Muzaffargarh, sent a telegram to Messrs. Har Parsbad and Dalip Singh, Commission Agents, residing at Sonapat, District Rohtak, requesting them to pur-

chase 275 maunds of black sugar. Sewa Ram and Jadoo Rai are the plaintiffs in this case. They came into Court on the allegation that the sugar sent by the defendants was short in quantity and inferior in quality. They, therefore, claimed damages from the defendants, and a suit was instituted in the Court of the Munsif at Leiah. The defendants raised the question of want of jurisdiction on the allegation that the cause of action had arisen at Sonapat. The Court framed a preliminary issue on this point and overruled the objection holding that a part of the cause of action had accrued at Leiah. The defendants have come up in revision objecting to the decision of the Court below on this preliminary point.

Two questions arise for consideration, viz., (1) whether this Court ought to interfere in revision with an interlocutory order; and (2) whether, on the facts disclosed in this case, the Leiah Court had jurisdiction. It is not necessary to write a detailed judgment in this case as both the points raised are fully covered by a recent decision of this Court in *Firm Dabri Shah-Thakar Ram v. Firm Ruliz Mal-Dogar Mal* (1). The facts were almost similar and the learned Judge of this Court held that the place of residence of the defendant was the place where the cause of action arose. The learned Judge also held that, "although this Court does not ordinarily interfere with interlocutory orders, yet in exceptional cases it does interfere with such orders." The head-note attached to the report fully deals with all the points dealt with in the judgment and runs as follows:—

"The plaintiffs, who resided at Ludhiana, sent orders to the defendant, who resided at Darbhanga, for the purchase of a large quantity of oilcakes. The plaintiffs alleged that the goods supplied were of inferior quality and they accordingly instituted this suit for compensation for the loss at Ludhiana. The defendants pleaded that the Court in Ludhiana had no jurisdiction to try the suit. It appeared that the plaintiffs had remitted a part of the purchase-money to Darbhanga but the defendants were unwilling to despatch the goods without payment and suggested that the Railway

(1) 2 L. L. J. 555.

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Receipts should be sent V. P. P. To this the plaintiffs agreed but subsequently, when it was found that the Post Office did not issue a V. P. P. for a sum in excess of Rs. 1,000, the sum payable by the plaintiffs being Rs. 7,070, they sent receipts through an agent of their own who obtained payment in Ludhiana :

"Held, that the Court at Ludhiana had no jurisdiction to entertain the suit.

"*Salig Ram v. Ohuba Mal* (2) followed. *Roseck & Co. v. Mandleston* (3) distinguished.

"Held, also, that where payment was, according to the contract, to be made in one place but was made in another owing to the plaintiffs' own default, advantage cannot be taken of that fact to give him a choice of jurisdiction.

"Held, further, that the High Court has power to interfere with interlocutory orders in exceptional cases, and the present case is one in which interference is demanded as, if the case proceeds in Ludhiana, there will be irreparable waste not only of time and money of the defendants but also of the time of the Punjab Courts."

The decision in *Salig Ram v. Ohuba Mal* (2) also lays down a similar rule. Having regard to the decisions in these two cases, I must accept this petition for revision and set aside the decision of the Court below. The Court is directed to return the plaint to the plaintiff to be presented to the proper Court. The petitioner is entitled to his costs.

*Petition accepted.*

(2) 11 Ind. Cas. 712; 34 A. 49; 8 A. L. J. 1160.

(3) 70 P. R. 1906; 123 P. W. R. 1906.

# PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO 812  
OF 1919.

January 18, 1921.

Present.—Mr. Justice Das.

Babu GOBIND PRASAD THAKUR

PLAINTIFF—APPELLANT

versus

CHATTARBHUI THAKUR AND OTHERS

DEFENDANTS—RESPONDENTS.

Record of Rights, entry in, rebuttal of, proof of—

*Admission of opposite party, when can be relied on—  
Hindu Law—Joint family—Separation—Presumption—  
Burden of proof.*

When a circumstance is relied upon as negating the presumption of the correctness of the Record of Rights, that circumstance must not only be inconsistent with the Record of Rights, but it must be incapable of explanation upon any other reasonable hypothesis than that the Record of Rights must be wrong [p. 483, col. 1.]

When reliance is placed upon an admission made by a witness examined by the opposite party, the whole of the admission must be taken into consideration. [p. 494, col. 2.]

Where in the case of a joint Hindu family one party admits separation prior to the institution of the suit, the onus is still on the party who relies upon separation prior to the date of a certain transaction to establish that the separation did take place before the date of that transaction. [p. 483, col. 2.]

Appeal from a decision of the District Judge, Mczafferpur, dated the 9th August 1919, affirming that of the Munsif, First Court, Mczafferpur, dated the 21st March 1919.

Mr. Lakshmi Narain Singh, for the Appellant.

Mr. Jalgobind Prasad Sinha, for the Respondents.

**JUDGMENT.**—This was a suit by the appellant for recovery of joint possession of certain land specified in the plaint. His case was that he and the defendants first party were jointly recorded in respect of this land in the Record of Rights and that they have a joint title to this land. The land was in 1895, when the Record of Rights was finally published, in the possession of Babu Thakur under two mortgage bonds. Babu Thakur was recorded in the Record of Rights as mortgagee in possession. In 1909 the mortgagee was paid off, and, according to the allegation of the plaintiff, he and the defendants first party recovered joint possession of the property. The plaintiff's case is that, he was subsequently dispossessed and he accordingly instituted the suit out of which this appeal arises for recovery of joint possession.

The Record of Rights is undoubtedly in favour of the plaintiff, and the whole question in this case is, has the presumption afforded by the Record of Rights been rebutted by the evidence in the case. The learned Judge does say that it has been rebutted and if that finding is a legal finding then it is binding on me in second appeal.

The learned Judge in dealing with the



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evidence started by discarding all the oral evidence in the case. He said that it was worthless and should not be considered at all. Then he said that his decision must depend upon the documentary evidence which consisted of the Record of Rights, the two mortgage documents, and the *chalan* by which the mortgage-money was paid into Court. His view is that the two mortgage documents and the *chalan* rebutted the presumption of the correctness of the Record of Rights. Now, in my view it is impossible to hold without proof that the family was separate that those documents could possibly rebut the presumption of the correctness of the Record of Rights. It is quite true that the mortgage bonds were executed by Bansī Thakur, the ancestor of the defendants first party. But they would be executed by Bansī Thakur, if Bansī Thakur was the *karta* of the joint family and the family was joint. In my view, when a circumstance is relied upon as negating the presumption of the correctness of the Record of Rights, that circumstance must not only be inconsistent with the Record of Rights, but incapable of explanation upon any other reasonable hypothesis than that the Record of Rights must be wrong. Can it be said then that there is any conflict between the mortgage bonds and the Record of Rights? The mortgage bonds were executed by Bansī Thakur, the ancestor of defendants first party, and the argument is that, in so far as the mortgage bonds show that the property belonged to Bansī Thakur, there is a clear conflict between these documents and the Record of Rights. In my judgment, Bansī Thakur was the proper person to execute the bonds on behalf of the entire joint family, and, provided it is established that, at the time when the bonds were executed, the plaintiffs and the defendants first party were all joint, there is no inconsistency whatever between the mortgage bonds and the Record of Rights. The *chalan* stands on no better footing. If the family were joint, and Bansī Thakur was the *karta* of the joint family then the *chalan* would undoubtedly be in the name of Bansī Thakur. That, again, is a circumstance consistent both with the case of the plaintiff and the defendants and cannot be relied on as negating the presumption of the correctness of the Record of Rights;

but, of course, if the family was separate, then the case will stand on a different footing altogether. The parties were members of a joint Hindu Mitakshara family and the presumption is that they are joint, and it is necessary for the party who alleges separation to prove separation; but the case is complicated by the fact that the plaintiff in the first paragraph of the plaint admits that they were separate. And the whole question is, did this separation take place before the mortgage documents were executed, or did it take place after the mortgage documents were executed? It has been held by the Full Bench of this Court that when the plaintiff admits separation prior to the institution of the suit, the onus is still on the defendants who rely upon separation prior to the date of a certain transaction to establish that the separation did take place before the date of that transaction. *Kanhu Lal v. Palu Sahu* (1)

I find that it is impossible to dispose of this appeal on the materials that are before me. The circumstances that are relied upon by the learned Judge as rebutting the presumption of the correctness of the Record of Rights are inconclusive, unless there is a finding that they were in fact separate. The learned Judge does say in one portion of his judgment that the evidence of witness No. 1 for the plaintiff "supports to some extent the defendants' case that their branch of the family separated from the plaintiffs in their grand-fathers' time;" but it is as well to point out that the admission relied upon by the learned Judge, if the whole statement is taken into consideration, does not support the case of the defendant. If you are going to rely upon the admission made by a witness examined by the opposite party, you must take the whole of the admission into consideration, and, in my view, it is impossible to separate one portion from the other.

I must allow the appeal, set aside the judgment and decree passed by the learned District Judge, and remand the case to him for disposal.

Now, it is necessary for the learned Judge in the first place to come to a

(1) 57 Ind. Cas. 353; 5 P. L. J. 521; 1 P. L. T. 546; 2 U. P. L. R. (Pat.) 171; (1920) Pat. 305.

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conclusion on the question when the separation between the two branches actually took place. If it did take place before the mortgage transactions in question, then, of course, the plaintiff's suit must fail. If, on the contrary, it took place since the mortgage transaction in question, then there is no inconsistency between the mortgage-bonds and the *chalan* on the one hand and the Record of Rights on the other, and the case must be decided on evidence.

I make no order as to the costs incurred in this Court. The costs incurred in the Courts below will abide the result and will be disposed of by the lower Appellate Court.

*Appeal allowed.*

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 510 OF 1920.  
December 22, 1920.

*Present*:—Mr. Justice Scott-Smith.

MITHA MAL AND ANOTHER—PLAINTIFFS  
—APPELLANTS  
*versus*

SHIV RAM AND ANOTHER—DEFENDANTS  
—RESPONDENTS.

*Registration Act (XVI of 1908), s. 17—Document reciting what has been done in respect of certain property, whether compulsorily registrable—Hindu Law—Joint family—Compromise entered into by manager, whether binding on other members.*

A document which does not of itself effect any partition of immoveable property, but is merely a recital of what has been done in regard to certain property does not require registration. [p. 485, cols. 1 & 2]

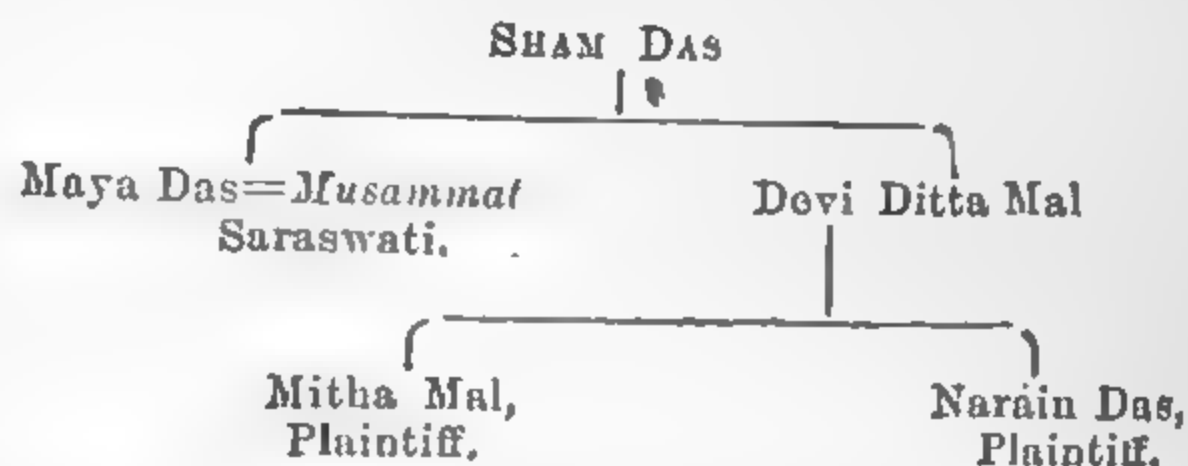
A deed of compromise affecting immoveable property binds not only the parties who actually sign it, but it also binds the other parties to the suit who stand by and do not object to it for a long time. [p. 485, col. 2; p. 486, col. 1]

The manager of a joint Hindu family is entitled to represent the co-parcenary in all suits and proceedings affecting its interests, to make contracts, to refer to arbitration, to compromise any claim or dispute affecting it, and generally to do all such acts as he may consider necessary or to its benefit. [p. 486, col. 1.]

Second appeal from the decree of the District Judge, Attock at Campbellpur, dated the 20th October 1920, reversing that of the Subordinate Judge, First Class, Attock at Campbellpur, dated the 18th May 1919.

Lala Durga Das, for the Appellants.  
Mr. M. S. Bhagat, for the Respondents.

JUDGMENT.—The following pedigree-table will be useful for the better understanding of the facts of the case out of which the present appeal arises:—



In 1904 Mitha Mal brought a suit against Musammal Saraswati and her brother, Shiv Ram, for a declaration that an alienation by Musammal Saraswati, widow of Maya Das, in favour of her brother of certain moveable property should not affect his reversionary rights, and for an injunction restraining Musammal Saraswati from alienating her deceased husband's property. Upon an objection taken by the defendants Narain Das, brother of Mitha Mal, who had not joined in bringing the suit, was impleaded as a defendant. Mitha Mal at that time stated that Narain Das had become a *faqir* and had abandoned worldly affairs. That suit was withdrawn with the leave of the Court on the 10th May 1906, and the finding is that the suit was withdrawn in consequence of an agreement between the parties dated the 17th March 1906. The present suit was brought for the possession of three houses said to have been left by Musammal Saraswati who died two months before the institution of the suit in April 1918. It is admitted, however, that only one house is in possession of the defendants and I am only concerned with that in the present appeal. The plaintiffs' suit having been dismissed by the lower Appellate Court they have filed a second appeal in this Court.

It was conceded in the lower Appellate Court, and is not denied now, that the house in dispute was gifted by Musammal Saraswati to Bawa Lachhman Das when she was ill in 1903. It is now in possession of Shiv Ram, the brother of Musammal Saraswati, who, according to his Counsel's

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admission in the Trial Court, purchased it in the name of his wife from the donee. A deed of sale relating to this house in favour of *Musammāt Saraswati's* husband is on the record and an endorsement on the back of it shows that it was transferred to Shiv Ram's wife on the 18th *Bisakh Sambat* 1968, corresponding to the 20th April 1911. The lower Appellate Court has found that under the agreement of the 17th March 1906 Mitha Mal acquiesced in the gift in favour of Bawa Lachhman Das and that he, therefore, cannot now claim it from anyone who has acquired it from the donee.

The first point argued before me was, whether the agreement of the 17th March 1906 was inadmissible for want of registration. I have considered this deed very carefully and I have no doubt that the lower Appellate Court has rightly held that it does not require registration because it does not of itself, within the terms of section 17 of the Registration Act, purport or operate to create or declare, whether in present or in future, any right, title or interest to or in immovable property. It refers to the case at that time pending in the Court and states that the parties have come to terms. It goes on to state that *Musammāt Saraswati* has given possessor of two houses to Mitha Mal and that the latter will have no connection with the rest of her property so long as she lives, and that after her death he and Narain Das, his brother, will be the owners of any property which remains. In regard to the house gifted to Bawa Lachhman Das the words are: "*jo makan Musammāt Saraswati mazkurah ne Bawa Lachhman Das wa Ram Das ko pun diya hua, us makan ke malik Bawa mazkurah honge aur apne pas rakhenge. Shiv Ram us makan ko kharid na karega. Agar Shiv Ram mazkur kharid karega to muzhir dawa karega.*" Lala Durga Das urges that this deed is in reality a deed effecting partition of immovable property and that, therefore, it requires registration as the property concerned is worth more than Rs. 100. I am unable, however, to accept this view. As to the nature of the document, it does not of itself effect any partition of immovable property, but is merely a recital of what has been done in regard to certain property. I, therefore, hold that

registration of it is not compulsory and it has rightly been admitted in evidence.

The next argument of Lala Durga Das was, that Mitha Mal's acquiescence in the gift to Bawa Lachhman Das was a conditional one, the condition being that the property gifted was not to be bought by Shiv Ram. It is true that Mitha Mal, after stating his acquiescence in the gift, goes on to say that Shiv Ram will not buy the house and that if Shiv Ram does buy it, then he (Mitha Mal) will make a claim. He does not state what sort of claim he will make. In my opinion, this clause in the deed cannot be taken as qualifying his acquiescence in the gift. Mitha Mal acquiesced in the gift in consideration of the fact that possession of the rest of *Musammāt Saraswati's* immovable property was given to him then and there. He was not entitled to the possession of it until after her death but in consideration of getting immediate possession he acquiesced in the gift to Bawa Lachhman Das. In my opinion, his acquiescence must be considered to have been absolute and thereafter Bawa Lachhman Das could deal with the property in any way he pleased.

The remaining question is, whether Narain Das is bound by the agreement entered into by Mitha Mal alone. Now, in the previous suit Mitha Mal said that Narain Das had become a *faqir*. Narain Das never appeared in that case or in the present case in the Trial Court and apparently has taken no interest in the litigation. If he has become a *faqir*, he has abandoned worldly affairs; if he has not, then he is presumably joint with his elder brother, Mitha Mal. Mitha Mal purported to bind Narain Das by the agreement of March 1906. Narain Das, as already stated, was made a party to the previous suit, and he has never at any time come forward to object to the compromise made during the pendency of that suit. The arrangement was a family one and I think it must be taken, under the circumstances, he acquiesced in it. In the case reported as *Amrin Chand v. Devi Ditta* (1) it was held that "a *razinama* or deed of compromise affecting immovable property does

(1) 11 Ind. Cas. 469; 90 P. W. R. 1911,



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not only bind the parties who actually sign it, but also binds the other parties to the suit who stand by, and do not object to it for a long time." In the Hindu Code by Gour, at page 511, the manager of a joint Hindu family is said to be entitled to represent the co-parcenary in all suits and proceedings affecting its interests, to make contracts, to refer to arbitration, to compromise any claim or dispute affecting it and generally to do all such acts as he may consider necessary or to its benefit. Similarly, in Trevelyan's Hindu Law, second Edition, at page 277, it is stated that the manager in the absence of fraud or collusion can bind the joint family estate by a compromise. In *Ramdas Chabildas v. Chabildas Lallobhoy* (2) it was laid down that, "in family arrangements the father represents and has power to bind his minor sons, in the absence of fraud or other circumstances sufficient in law to vitiate the transaction." It was pointed out that, "in such a case what has to be looked to is whether, having regard to the circumstances surrounding the transaction and its object, the father acted so as to bind both himself and his minor sons." Having regard to these authorities and to all the circumstances of the case, I think it must be held that Mittha Mal had full power to make the compromise both on behalf of himself and his brother, and the fact that the latter for many years never raised any objection is a ground for holding that he acquiesced in it. It is also worthy of note that the fact that Narain Das did not join in the agreement was not made a ground of attack in the present suit. There were no pleadings in regard to it and, consequently, no issue was framed on the point. It was only raised at the time of arguments. I, therefore, fully agree with the decision of the lower Appellate Court and dismiss the appeal with costs.

*Appeal dismissed.*

(2) 7 Ind. Cas. 134; 12 Bom. L. R. 621.

## PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 17  
OF 1918.

January 28, 1921.

Present:—Mr. Justice Das and  
Mr. Justice Rose.

Babu SUDARSHAN PRASHAD  
NARAIN SINGH—PLAINTIFF—  
APPELLANT

versus

SARJUG SINGH AND OTHERS—DEFENDANTS  
—RESPONDENTS.

*Hindu Law—Widow, alienation by—Necessity—  
Burden of proof.*

Where a widow purports to alienate a portion of her husband's property in order to meet expenses of litigation incurred for the protection of the estate against a hostile attack, necessity is not established unless it is proved that at the time the money was actually advanced there was no money in the coffer sufficient for the protection of the estate, and it is for the creditor to establish that there were no funds in the hands of the widow sufficient for the protection of the estate against the hostile attack. [p. 486, col. 2.]

Appeal from a decision of the Subordinate Judge, Muzafferpur, dated the 31st July 1917.

Mr. Sureshi Okaran Mitter, for Mr. Baikuntha Nath Mitter, for the Appellant.

Messrs. Ganesh Dutta Singh and Jagobind Prasad Singh, for the Respondents.

## JUDGMENT.

DAS, J.—On the 16th of December 1895 Musammot Ram Nandan Koer executed a *zawajshgi* lease in respect of the property in dispute and three other properties in favour of Gandour Singh and Bramhdeo Narain Singh to secure a loan of Rs. 1,397-3-4. On the 20th of August 1902 she sold the property in dispute to Bramhdeo Narain Singh for the sum of Re. 1,500. On the 22nd of December 1915 this action was commenced by the plaintiff as the reversionary heir of the last male holder of the estate for setting aside the alienation made by the lady in favour of Bramhdeo Narain Singh and for certain other reliefs. The learned Subordinate Judge, in the course of a very careful judgment, considered all the evidence in the case and came to the conclusion that the plaintiff was not entitled to have the alienation set aside. In my view, the judgment of the learned Subordinate Judge is right and ought to be sustained.

The onus is undoubtedly on the creditor to establish that there was a necessity to

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raise the loan, but it must be remembered that this action was brought not only after the death of the reversioner immediately entitled to succeed to the estate, but actually nearly 12 years after the death of the widow. The position at the time when the action was heard was that the widow and Bramhdeo Narain were both dead and that Gandour Singh, the only person who could give evidence in favour of legal necessity, was certainly not on friendly terms with Bramhdeo Narain, the purchaser of the property. That is the position, and, therefore, the action having been brought nearly 12 years after the death of the widow, and nearly 20 years after the date of the mortgage transaction, we are bound to consider the recitals in the document in relation to the facts established in the case.

Therefore, it is, in the first place, necessary to consider the recital in the mortgage-bond (Exhibit P). The recital is as follows:—"A sum of Rs. 1,397-3-4 as decretal money on account of principal with interest and costs was found to be justly due by me to Sarjug Singh and others, decree-holders, under decree No. 45 of 1881, dated 29th May 1882 passed by the Court of first instance and under decree No. 43 of 1882, dated 17th February 1885 passed by the District appellate Court and (also) under decree No. 1011 of 1885, dated 14th May 1887, passed on appeal by the Hon'ble High Court, and I paid to the decree holders on the 15th February 1895 Rs. 400 towards it (the amount due) on taking a loan from Gandour Singh and Bramhdeo Narain Singh, residents and shareholding proprietors of Mouza Madhopur, Pergana Rati, and paid the same to the aforesaid. Now Rs. 997-3-4, principal with interest up to 16th December 1895 is due by me, the executant, as decretal money for the satisfaction of which my residential house including 10 *bighas* of land situate in Mouza Dharphari, Pergana Rati has been put up for sale to be held on the 16th December 1895. It is apprehended that I, the executant, will be put to loss on account of the sale of the house including 10 *bighas* of my land, as it is impossible for me, the executant, to pay off at present the decretal money due to the aforesaid decree-holders without executing a *zarpeshgi thicca patta*. I, the

executant, have, therefore, of my own free will and accord in a sound state of body and mind, etc., etc." The recital in the sale-deed (Exhibit C) is as follows: "A sum of Rs. 1,397-3-4 is payable by me, the executant, to Gandour Singh and Bramhdeo Narain Singh of Madhopur Buzarg, Pergana Rati, under a registered *zarpeshgi thicca patta* dated the 12th December 1895 executed by me, the executant, and at present also I stand in need of Rs. 102-12-8 for meeting my necessary household expenses, etc. I, therefore, made a request to Bramhdeo Narain Singh, etc., to get back the *zarpeshgi* deed executed by me, on payment of Rs. 698-9-8 out of Rs. 1,397-3-4 to Gandour Singh aforesaid, to deduct the amount of Rs. 698-9-8 due to him and to pay the balance Rs. 102-12-8, in cash to me. Accordingly, the aforesaid Bramhdeo Narain Singh and others acceded to my request. Therefore, I, the executant, have of my own free will and accord, in a sound state of body and mind, etc., etc."

There can be no doubt whatever that if the recitals in these deeds are correct then if she was entitled to incur the expenses in connection with the litigation which is referred to in the *zarpeshgi* deed, there was a valid necessity for her to raise the money by the *zarpeshgi* lease. Two questions, then, have to be considered by me in dealing with the appeal; *first*, whether the widow was entitled to incur the expenses in connection with the litigation referred to in the *zarpeshgi* lease, and, *secondly*, did she in fact incur these expenses?

The first question that has been argued before us by Mr. Sureshi Charan Mitter on behalf of the appellant is that she was not bound to incur any expenses in connection with the litigation which is referred to in the *zarpeshgi* deed.

It is necessary, therefore, to consider what was the litigation in connection with which she incurred the expenses. It appears from the evidence in the record that her husband, Kamala Prasad, and the co sharers of Kamala Prasad, including the father of the plaintiff, obtained a decree for possession of certain *chir* lands as appertaining to the estate of Kamala Prasad and his co sharers. There was an appeal by the defendants in that action and that appeal was com-

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promised on certain terms out of Court. The compromise was not filed in Court, but there can be no doubt, and it has been found by the Court in a subsequent litigation, that a compromise was in fact effected between the parties, by virtue of which Kamala Prasad and his co-sharers got a certain portion of the disputed land, they agreeing to give up the remaining portion of the lands to the defendants. It further appears that Kamala Prasad and his co-sharers executed the decree for possession and actually recovered possession of the entire area before the compromise was arrived at, and refused to make over possession of any portion of the land in terms of the compromise after the compromise was effected between the parties. Kamala Prasad subsequently died and his widow continued to be in possession of the property which was in dispute in that litigation. The result was that the defendants in that litigation instituted a suit against the widow of Kamala Prasad and the other co-sharer landlords for possession of the property which was adjudged to them by the compromise arrived at between the parties. All the co-sharers including the widow defended that action and, ultimately, the litigation ended unfavourably to the widow and her co-sharers and a decree for costs was passed against the widow and her co-sharers. The argument of Mr. Saroshi Charan Mitter is this. The compromise having given a portion of the land which was in dispute in that litigation to the opposite party she had no business to defend the action which was instituted by the opposite party for possession of that portion of the land. In my view this argument is unsustainable. By an act of her husband the property in dispute had become annexed to the estate which was of the husband. At the time when Kamala Prasad died the property which was in dispute in that litigation was part of the property left by Kamala Prasad and in my view it was her clear duty to defend the property against a hostile attack made on that property by the opposite party. It is quite true that it was subsequently held in that litigation that her husband had no title to the property but when the action was actually brought against her she could not possibly assume that her husband's act was unjustifiable and that he

had no title whatever to the land. As a widow in possession of the property it was her duty to defend the property against any hostile attack that was made on that property. I hold, therefore, that she was within her rights in defending her title to the property against the attack made on her title by the plaintiffs in that litigation and that the decree for costs was a decree that, was binding on her not personally but as representing the estate in her hand.

The next question that has been argued before us by Mr. Saroshi Charan Mitter is that, she had sufficient funds in her possession from which she could have paid off the decretal amount. I take it to be the settled law that necessity is not established unless it is proved that, at the time the money was actually advanced, there was no money in the coffer sufficient for the protection of the estate. *Dharam Chand Lal v. Bhawani Misra* (1). I take it also to be the settled law that the onus is upon the creditor to establish that there was no fund in the hands of the widow sufficient for the protection of the estate against the hostile attack. But in considering the evidence in this case we must not omit to take into consideration two important facts. The first is, that this suit has been instituted many years after the transaction in question; and, secondly, on the admission of the plaintiff's own witnesses all the books of account are in the possession of the plaintiff. When the question is raised whether there was sufficient funds in the hands of the widow out of which she could have paid off the decretal amount, it is, I think, relevant to enquire why the books of account, admittedly in the possession of the plaintiff, have been suppressed. The fact found by the learned Subordinate Judge is that the total income of the estate at the time when the mortgage was executed was Rs. 5,000 a year. The widow was highly connected and we must assume that she was obliged to incur many expenses which are incurred by ladies in her station of life. Mr. Saroshi Charan Mitter's argument is that Rs. 15 a month was sufficient for her maintenance. I am unable to take that view myself. It is quite true that she had an income

(1) 25 C. 189 (P. C.); 24 I. A. 183; 1 C. W. N. 697; 7 Sar. P. C. J. 249; 13 Ind. Dec. (N. S.) 128.



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of Rs. 500 a month, but then, having regard to her position in life, it does not follow that there would necessarily be a saving to her after all the expenses had been met. The problem whether there was any saving at the time when the transaction was entered into could only be solved by the production of the books of account. Those books of account have not been produced by the plaintiff who could, if he had chosen, have produced them. There is nothing to indicate that there was any saving at all at the time when the transaction was entered into. The only two persons who could have given evidence on this point are dead, namely, the lady and Bramhdeo Narain Singh, one of the mortgagees. The other mortgagee, Gandour Singh, is undoubtedly alive, but it has been proved that he was not on good terms with Bramhdeo Narain Singh. In fact, there has been considerable litigation between them. It has been proved that ever since the widow came into possession of the estate, she has been involved in considerable litigation which has been going on for several generations. In these circumstances I am not prepared to differ from the learned Subordinate Judge on the question whether there was sufficient funds in her hands out of which the mortgage-deed could be paid off.

The third argument which was advanced by Mr. Saroshi Charan Mitter is that it has not been established that there was any legal necessity in respect of Rs. 102 0 0 which was appropriated by the widow. It is quite true that there is no other evidence except the recital in the document but I am not prepared to hold that the transaction must be set aside because as to a small portion of money advanced the legal necessity has not been established. I would, in this connection, refer to the following passage in the judgment of the Judicial Committee in the case of *Girdhars Lall v. Kantco Lall* (2), "Then there was some small portion of which the application was not accounted for. But it is not because there was a small portion which was not accounted for, that the son, probably at the instigation of the father, has a right to turn out the

*bona fide* purchaser who gave value for the estate, and to recover possession of it with meane profits. This he is endeavouring to do after the purchaser has been in possession for a period of ten years; for the purchase was completed in 1856, and the suit was not brought until 1866, when the son says that the right of action accrued to him upon his attaining his majority. Even if there was no necessity to raise the whole purchase-money the sale would not be wholly void."

It may be that the plaintiff has another remedy in respect of Rs. 102 as to which legal necessity has not been established. But he cannot go into that question in this suit which is a suit to set aside the alienation and for recovery of possession of the property conveyed. I desire to say nothing as to the question whether the plaintiff has any other remedy in respect of Rs. 102. I hold that in this litigation he cannot ask us to set aside the alienation on the ground that legal necessity has not been established in respect of Rs. 102.

The last question that was argued was to the effect that the property was sold at a gross under-value. The only reliable evidence on this point is the *khewat* (Exhibit N.). That document shows that the income of this property is Rs. 116-12-0. Government revenue and cesses comes to Rs. 19 and we must deduct at least Rs. 6 for collection charges. The net income of the property will, therefore, come to Rs. 90. At 20 years' purchase, the value of the property would come to Rs. 1,800. The property was actually sold for Rs. 1,500. I am not prepared to say that the property has been sold at a gross under-value, especially when we have regard to the fact that the purchaser purchased the property with certainty of an expensive litigation.

The only other point is that the widow conveyed certain properties to an idol directly after the mortgage transaction involved in this suit, and it was suggested by Mr. Saroshi Charan Mitter that that showed that there were ample funds in the hands of the widow. I am not prepared to accede to that argument at all. The act of dedicating certain properties was the act of the widow and it may

(2) 22 W. R. 56; 14 B. L. R. 187 (P. C.); 1 I. A. 321; 8 Sar. P. C. J. 380.

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be that she did not hesitate to impoverish herself on account of something which in her eye was a meritorious act. If she exceeded her authority, the reversioners would be entitled to set aside that alienation and I understand that the reversioners have succeeded in setting aside that alienation. But the transaction in suit must be judged on its own merits and I do not think that, in judging the transaction in suit, we ought to take into consideration the circumstances attending other transactions.

On the whole, I am of opinion that the learned Subordinate Judge has taken a correct view of the matter and I would dismiss this appeal with costs.

Ross, J.—I agree.

*Appeal dismissed.*

# LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1868 OF 1916.

December 10, 1920.

*Present* :—Mr Justice Chevis and

Mr. Justice Abdul Raoof.

NATHA SINGH AND OTHERS—PLAINTIFFS—  
APPELLANTS

*versus*

GANGA RAM AND OTHERS—DEFENDANTS  
—RESPONDENTS.

*Mortgage—Redemption—Interest, whether charge on land.*

A mortgage-deed provided that interest on the principal sum would be paid every year, and in default of such payment compound interest would be paid, and that the mortgage would be redeemed on payment of the mortgage-money ;

*Held*, that the expression "mortgage-money" did not include interest on the principal sum lent [p. 492, col. 2.]

First appeal from the decree of the Senior Subordinate Judge, Ferozepore, dated the 31st March 1916.

The Hon'ble Pandit Sheo Narain, R. B., for the Appellants.

Lala Moti Sargar, R. S., for the Respondents.

JUDGMENT.—The plaintiffs in this case sue for redemption of land which belonged

to Sarfar Diwan Singh. There are five mortgages in question :—

(1) On the 18th June 1888 Diwan Singh mortgaged 332 *kanals* of land with possession for Rs. 1,800. Produce was to be set off against interest.

(2) On the 25th August 1888 he mortgaged 560 *kanas* of land with possession for Rs. 5,500. Here, too, produce was to be set off against interest and the deed further provided that if the land was not redeemed within four years, it was to be considered as sold.

(3) On the 20th June 1890 he raised a further sum of Rs. 800 on the land agreeing to pay interest on this further sum every year at the rate of Rs. 1-6 per cent. per mensem. If interest was not paid, compound interest was to be charged.

(4) On the 25th October 1890 he raised a further sum of Rs. 800. Here, again, interest and compound interest were to be charged at Rs. 1-8 per cent. per mensem.

(5) On the 1st April 1891 he mortgaged 12 *kanals* with possession for Rs. 37-8.

The plaintiffs, who are the representatives of Diwan Singh, now sue for redemption of all the land on payment of the principal sum, *viz.*, Rs. 8,937. The defendants-mortgagees claim that the land can be redeemed only on payment of the principal *plus* interest and compound interest. The lower Court, having decided in favour of the defendants, has given a decree for redemption on payment of Rs. 19,800 interest *plus* Rs. 8,937-8 principal *plus* future interest at the rate of six per cent. per annum on the sums of Rs. 800, Rs. 800 and Rs. 19,800. The plaintiffs appeal. On behalf of the defendants a preliminary objection has been raised to the effect that Ishar Singh, who is one of the plaintiffs, has sold his share in the land to certain persons by a sale deed according to which the mortgages have themselves acquired  $\frac{2}{3}$ th of Ishar Singh's share while the remaining  $\frac{1}{3}$ th has gone to one Rikhi Ram. It appears that Sher Singh who is also a reversioner of Diwan Singh and is a *pro forma* defendant in the case sold his  $\frac{1}{3}$ th share in 1914, and Ishar Singh brought a suit for pre-emption and obtained a decree. In order to raise money to pay this decree Ishar Singh sold his own share by the deed already mentioned,  $\frac{2}{3}$ th of his share passing to the mortgagees and  $\frac{1}{3}$ th to Rikhi Ram who

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is not a party to the suit. Counsel for the respondents states that Ishar Singh did not pay any pre-emption money and so his pre-emption decree has lapsed, and he now holds no share at all in the land in suit. This, however, is not admitted. Counsel on both sides, however, are agreed that the present appeal may be decided on the merits, it being left to the executing Court to determine what shares the plaintiffs still own in the land in suit and the suit being decreed for redemption of those shares only. We see no objection to this course. The mortgagees have themselves become part proprietors in the land in suit and so the plaintiffs should now be allowed to redeem whatever shares are still held by them on payment of a proportionate share of the mortgage-money.

The main question for consideration is, whether interest is a charge on the estate. If this question be decided in favour of the plaintiffs the whole appeal will be disposed of. In order to decide this question we have to examine the terms of the two deeds dated the 2<sup>nd</sup> June 1890 and the 25<sup>th</sup> October 1890. The first deed contains the following words:—"Manmusir rahin ath sau rupaya ka sud ba sharah Rs. 1-6-0 har sal muttakinan ko wasul de aia karunga. Jis kodar rakam sut baki rahega uska sud ba sharah mukarrar dunga. Man musir rahin jab zar-i-rahn sabika wa hal muttakinan ko wasul dunga arazi marhuna fakurrahn kara lunga." The terms of the second deed are to the same effect, but we note that in this deed the mortgagor agrees to pay back the sum of Rs. 800 with interest in three instalments, and the clause regarding compound interest comes at the end of the deed and after the clause providing that redemption can be made on payment of the "zar-i-rahn sabika wa hal." The decision of the question depends on whether we regard the term *sar-i-rahn* as meaning the principal sum for which the land was mortgaged or the whole amount due on the mortgage including interest at the time of redemption.

The first case cited on behalf of the appellants is *Aulia Khan v. Kanshi Ram* (1). This was a case in which land was mortgaged

for Rs 1,300. The mortgagees were put in possession and produce was to be regarded as equal to the interest on Rs. 650 while interest on the remaining Rs. 650 was to be charged at Rs. 1 per cent. per mensem. This interest was to be paid annually and in default compound interest was to be charged at the same rate. No period was fixed for redemption, but the mortgagors were at liberty to redeem the land in the month of *Har* of any year on payment of the *zar-i-marhuna*. As regards the recovery of the interest payable on Rs. 650 it was further stipulated that the mortgagees would have the option either to charge compound interest or to recover the same from the mortgagors by suit. The learned Judges noted that the phrase *zar-i-marhuna* was used several times during the deed and in some parts of the deed the phrase clearly refers to the principal sum. They held that the land could be redeemed on payment of the principal sum only. One thing we regard as beyond all doubt and that is, that there is no difference in meaning between the two phrases *sar-i-rahn* and *zar-i-marhuna*.

*Lok Chand v. Hazzar Khan* (2) was also a case in which the income was to cover interest on a part of the sum for which the land had been mortgaged, while the remaining part was to carry interest at Rs. 2-1-4 per cent. Here, too, the deed provided for redemption on payment of the *zar-i-marhuna*, and it was held that from the use of the same expression in other parts of the deed it was clear that *sar-i-marhuna* simply meant the mortgage money apart from the interest.

In *Ghumandi Lal v. Kanhai Lal* (3) there was a clause for redemption at the end of five years on payment of the *sar-i-rahn*, but in that case it seems to have been admitted that interest for the five years at the end of which the land was to be redeemed was a charge on the property mortgaged, and so redemption was allowed on payment of the principal plus interest for the period of five years plus interest by way of damages for six years prior to suit.

In *Jawahir Mal v. Raja Shah* (4) it was held

(1) 11 Ind. Cas. 59; 95 P. R. 1917; 107 P. W. R. 1517.

(2) 52 Ind. Cas. 320.

(3) 95 P. R. 1902; 21 P. L. R. 1903.

(1) 17 Ind. Cas. 677; 45 P. R. 1913; 25 P. W. R. 1918; 145 P. L. R. 1913.



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that interest was a charge on the land but the exact terms of the deed are not given in the judgment.

In *Radha Kishen v. Muhamdu* (5) the mortgage was originally without possession, but under the terms of the deed the mortgagee subsequently took possession in default of payment of interest. At the time of redemption he was allowed to charge interest for the period for which he had been out of possession. This is obviously a different kind of case, and, unless there is anything to the contrary, we think it clear that in such cases interest for the period during which the mortgagee had not had possession should be added to the principal sum. *Sheo Chand v. Ohunna* (6) is a similar case.

*Bur Singh v. Soheli Singh* (7) is cited on behalf of the respondents. It is there laid down that the general rule is that the mortgagee, in the absence of any contract to the contrary, is entitled to treat interest due under the mortgage as a charge on the estate. We fully agree with this dictum, but the question before us is, whether in this particular case the deeds do not themselves provide for redemption on payment of the principal only.

*Wadhoo Shah v. Mian Fakir Ahmad* (8) is next cited, but this was a peculiar case in which it was held that the mortgagor had been guilty of fraud and that in equity a fraudulent clause in the mortgage-deed should be treated as non-existent and interest should be allowed.

Counsel for the respondents admits that the mortgagees could have sued to recover arrears of interest. It would have been perfectly easy for the respondents to have had inserted in the deeds that the payment of interest should be a condition precedent to redemption. It would have been perfectly easy to have made the phrase of redemption run:—*jab zar-i-rahn sabika wa zar-i-rahn hal asl mai sud wasul dunga fakurrah kara lunga*. We have to consider the whole terms of the deed and to decide, to the best of our ability, what the parties meant by those terms. It is easy to argue that the mortgagees could not have intended to allow redemption without payment of interest and

that their omission from the beginning up till now to recover interest by suit is a clear indication that they have all along regarded interest as a charge on the land. On the other hand, had the interest been intended to be a charge on the land, there was no necessity for the mortgagor to promise that he would pay interest every year. It seems to us most probable that the mortgagor never contemplated that the interest charges would not be met regularly, and we do not suppose that he ever contemplated that interest and compound interest should be added on to the mortgage charge, swelling the original amount of the debt from about Rs. 9,000 to a sum which would render redemption extremely expensive unless the land was redeemed within a short period. We are, therefore, of opinion that the phrase "*sar-i-rahan sabika wa hal*" in the two documents under consideration refers simply to the principal mortgage-debt and has no reference to interest. The mere fact that in the later deed the clause as to compound interest follows the clause as to redemption, in our opinion, makes no difference. It is also argued that the clause in the second deed as to payment of the money with interest by instalments shows that the interest and principal were both regarded as forming part of the mortgage-debt, but we are unable to see that the agreement to re-pay by instalments affects the interpretation of the clause as to redemption. There seems to us no difference between *Aulia Khan v. Kanshi Ram* (1) and the present case except that in *Aulia Khan v. Kanshi Ram* (1) there was only one mortgage, whereas in the present case the land was first mortgaged with possession for a sum, the interest on which was to be set off against profits, and a subsequent charge was afterwards created which was to bear interest.

Further arguments were addressed to us with regard to *post diem* interest, but, as we have held that interest is not a charge on the land at all and that the land can be redeemed simply on payment of the principal sum, nothing need be said regarding these arguments.

We accept the appeal and give the plaintiffs a decree for redemption of whatever share in the mortgaged land is still owned

(5) 57 P. R. 1888.

(6) 73 P. R. 1892.

(7) 121 P. R. 1894.

(8) 8 Ind. Cas. 978; 116 P. L. R. 1909; 162 P. W. R. 1909.

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by them on payment of a proportionate share of the principal debt, viz., Rs. 8,937 8. The plaintiffs will get costs in both Courts in proportion to their share. The cross objections are dismissed.

*Appeal accepted.*

**PATNA HIGH COURT.**

**CIVIL REVISION No. 148 of 1920.**

**December 14, 1920.**

**Present:—Mr. Justice Jwala Prasad.**  
**Sheikh FARZAND ALI AND OTHERS—**  
**PETITIONERS**

*versus*

**Sheikh ABDUL HAMID AND OTHERS—**  
**OPPOSITE-PARTY.**

*Limitation Act (IX of 1908), ss. 4, 12—Time requisite for obtaining copy of judgment—Limitation, expiry of, during vacation—Application made immediately on re-opening of Court—Time spent in obtaining copy, whether can be deducted—Civil Procedure Code (Act V of 1908), s. 149, O, XLI, rr. 8, 11—Extension of time for payment of deficit Court-fee, when to be allowed—Appeal dismissed as barred by time—Order, whether appealable.*

Where the limitation for filing an appeal expires during the vacation of the Court, the appellant is entitled to make an application for copies on the day on which the Court re-opens after the vacation, and is entitled to add to the period of limitation the time spent in obtaining the copies, [p. 494, col. 2.]

In order to enable a party to take advantage of the provisions of section 149 of the Civil Procedure Code, permission to deposit the deficit Court-fee must be given by the Court after considering the circumstances of the case and the reason for not filing the entire Court-fee in the first instance. [p. 495, col. 1.]

If a memorandum of appeal is drawn up in proper form it cannot be rejected under rule 3 of Order XLI of the Civil Procedure Code, but if the appeal is barred by limitation it has to be dismissed under rule 11 of that Order. The rejection of an appeal on the ground of limitation, therefore, amounts to a dismissal thereof, and such order of rejection is appealable. [p. 495, col. 2.]

Revision against the decision of the District Judge, Purneah, dated the 6th January 1920.

**Mr. Janak Kishore, for the Petitioners.**

**Mr. Muhammad Hasan Jan, for the Respondents.**

**JUDGMENT.**—This is an application asking us to revise and set aside the order of the District Judge of Purnea, dated the 26th April 1920. By this order the District Judge refused to review his order of the 6th January 1920 passed on the memorandum of appeal presented by the petitioner before him.

The petitioner presented an appeal on the 3rd of November 1919 from a decree passed by the Additional Munsif of Araria which was signed on the 17th September 1919. The petitioner made an application for copies of the judgment and the decree on the 16th September and was required by the office to file the requisite stamps and folios on the 18th September 1919. The note on the back of the copies shows that the requisite stamps and folios were filed on the 27th October. The copies were ready on the 31st October and were delivered to the applicant on the 1st November 1919. The 2nd of November being Sunday, the appeal was filed on the 3rd of November on a Court-fee of 8 annas, whereas the proper Court-fee required was Re. 1-8.

Along with the appeal the applicant also filed an application saying that, under section 12 of the Limitation Act, in computing the period of limitation the entire time from the 17th September to the 1st of November be excluded on the ground that the said period was occupied in obtaining copies of the judgment and the decree and also praying, in the alternative, for an extension of the period of limitation under section 5 of the Act in case his appeal be held not to have been filed in time.

On the 18th November 1919, the office of the District Judge submitted its report on the back of the first page of the memorandum of appeal, saying that (1) the Court-fee paid was insufficient, and (2) the appeal seemed to be barred by limitation unless the appellant's allegation that the requisite stamps and folios were filed on the 19th September, and not on the 27th October as noted on the back of the first sheet of the copy, be correct. Upon the note of the office the Court ordered on the 25th November: "The matter to be put up in the presence of the appellant's Pleader."

On the 1st December the Court directed the applicant to file an affidavit in support of the petition within two days. This was

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not done and on the 6th January the Court passed the following order :—"Affidavit not filed as directed. The appeal seems to be evidently time-barred. The appeal is, therefore, rejected." Against this order, on the 24th January, the applicant made an application under Order XLVII, rule 1 of the Code of Civil Procedure for a review. The Court rejected the application on two grounds, namely, (1) that the appeal was time barred and (2) that the Court-fee filed was insufficient.

The learned Vakil on behalf of the applicant challenges the correctness of both the aforesaid grounds. As to the first ground it is said that the petitioner made an application on the 16th September, a day before the decree was signed, and he filed folios and stamps on the 19th of September, a day after they were notified to him on the 18th September, and that, inadvertently, on account of his not being able to procure the sufficient number of folios he filed one deficit folio on the 27th October, the day on which the Court re-opened after the *Puja* holidays, and that consequently the delay was not caused by his laze and that he is entitled to the deduction of the entire period. In support of the allegation that he filed folios and stamps on the 19th September he relies upon the dates of sale put on most of the stamps fixed to the copies. It may be that the applicant filed them on the 19th September as alleged by him, but, admittedly, the stamps and folios filed by him were short by one folio which was filed by him on the 27th October. His explanation as to the reason for not filing all the folios on the 19th September has not been accepted by the Court below and I see no reason to differ from this view of the Court below. It must, therefore, be held that the requisite number of stamps and folios were not actually filed by the applicant before the 27th October 1919. It would have been well if, where the number of folios are filed on different dates, all these dates were noted on the back of the copy granted so as to enable the Court to find out whether the applicant was in fault or not and also to see whether the case was such in which, under section 5, extension of time should be granted to the applicant or not. Be that as it may, it will be sufficient for the purpose of this

case to hold, in agreement with the Court below, that the requisite number of stamps and folios were actually filed on the 27th October 1919. The decree being dated the 17th September 1919, ordinarily the appeal should have been filed within 30 days from that date, that is, on the 17th October 1919, which was in the midst of the *Puja* holidays. The appeal, therefore, under section 4 of the Limitation Act, could be preferred on the re-opening day, namely, the 27th October. The applicant was entitled to make an application for copy on that day: *vide Bibi Fakhrunissa v. Rambhajan Singh* (1) and also the decision of Sir Lawrence Jenkins, C. J., in the case of *Pandharinath Sakha Ram v. Shankar Narayan Joshi* (2). His Lordship pointed out that this was the correct interpretation of the law and the invariable rule of practice and was affirmed by the judicial decisions, notably in the case of *Siyadat-un-nissa v. Muhammad Mahmud* (3). Having carefully considered the law on the subject, I have no hesitation in following the decision of Sir Lawrence Jenkins, C. J., and I accordingly hold that the applicant was entitled to make an application for copy on the 27th of October, the day on which the Court re-opened after the *Puja* holidays, and he was consequently entitled to file the deficit Court-fee on that date and that, further, by so filing his application of the 16th September was kept alive. That being so, he was entitled to an extension of time for three days, from the date of the application up to the date of the notification of the requisite stamps and folios, that is, the 17th September, 18th September and the 27th October. Thereafter, time was taken for the preparation of the copy up to the 31st of October when it was ready for delivery, that is the 28th, 29th, 30th and the 31st October. The learned District Judge allowed him the first three days, but not the latter four days. Adding, therefore, seven days (3—4) to the date on which the appeal should have been filed, the appeal filed on the 3rd of November was within time. There can be no question that he was at least entitled to six days. In that view, the appeal should have been

(1) 49 Ind. Cas. 1000.

(2) 25 B. 5-6; 8 Bom. L. R. 244.

(3) 19 A. 342; A. W. N. (1897) 76; 9 Ind. Dec. (N. S.) 225.



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filed on the 2nd of November which was Sunday. Therefore, again under section 4, he was entitled to file his appeal on the 3rd of November. Taking any view of the case, the appeal filed on the 3rd of November was, therefore, well within time and the Court below was wrong in rejecting it on the ground that it was time-barred.

The aforesaid finding, however, does not give any practical benefit to the applicant, inasmuch as the Court below has held that the appeal was presented on insufficient Court-fee. This was no doubt not the ground upon which the appeal was rejected on the 6th of January 1920. The objection, however, was set forth in the report of the office, dated the 18th November 1919. The applicant contends that the deficiency of the Court-fee should not debar him from having his appeal admitted and considered on merits, inasmuch as he filed the deficit Court-fee on the 19th November with an application. This is no doubt true, but there is nothing to show that the Court allowed him to pay the deficit Court-fee so as to entitle him to have the benefit of section 149 of the Code of Civil Procedure. It is contended that the Court-fee must be deemed to have been accepted, inasmuch as the deficit Court fee was filed just the day following the report of the office and thereafter the Court did not press the objection in its orders of the 15th November 1919, 1st December 1919 and the 6th of January 1920. This is, however, not sufficient for the purpose of applying section 49, which says distinctly that the deficit Court-fee must have been allowed to be paid by the Court and when so allowed and paid, the payment will have the force and effect as if it was made in the first instance. The permission to deposit the deficit Court-fee must be given by the Court after considering the circumstances of the case and the reason for not filing the entire Court fee in the first instance. I, therefore, agree that the appeal was not presented on sufficient Court-fee and, therefore, under section 5 of the Court Fees Act, the appeal was not presented in time. The fact that the Court did not reject the appeal on that ground will not make the appeal fit and competent and remedy the statutory bar imposed upon it under section 5 of the Court Fees Act.

The result, therefore, is that the appeal,

even if it be held, as already observed, to have been filed in time, was not a competent appeal and it cannot now be entertained. The application must, therefore, be rejected. In this view, it is not necessary to consider the objection of the respondent that the application to this Court is incompetent in view of the fact that the order of the Court of the 6th January 1920 rejecting the appeal amounts to an order dismissing it and was, therefore, appealable. But, as the point has been raised and the learned Vakil has seriously sought my decision thereon, I venture to give my own views.

The memorandum of appeal is rejected under Order XLI, rule 3, when it "is not drawn up in the manner prescribed hereinbefore," that is, as laid down in that Order. If the memorandum of appeal is drawn up in proper form it cannot be rejected under that rule, but that if it is barred by limitation it has to be dismissed under rule 11. The rejection of an appeal on the ground of limitation, therefore, amounts to a dismissal thereof. Such an order is no doubt appealable. The applicant was, therefore, entitled to prefer an appeal from the order of the Court, dated the 6th January 1920. He was also entitled to have the order reviewed under Order XLVII, rule 1, provided he did not file an appeal that Order, *vide* Order XLVII, rule 1 (A).

No appeal was filed. Therefore, his application for review was competent. The application for review was rejected and there is no appeal from an order rejecting a review, *vide* Order XLVII, rule 7. The applicant was, therefore, entitled to come to this Court in revision against the order passed by the learned District Judge rejecting his application for review, which involved the consideration of the order passed on the 6th of January dismissing the appeal. The application of the petitioner to this Court was, therefore, not incompetent.

But on the other grounds, already adverted to, the application is rejected and costs allowed to the opposite party. Hearing fee one gold mohur.

*Application rejected.*

ABBAS KHAN v. NUR KHAN.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1308  
OF 1920.

January 5, 1920.

Present:—Mr. Justice Le-Rossignol.

ABBAS KHAN—JUDGMENT-DEBTOR

—APPELLANT

versus

NUR KHAN AND OTHERS—DECREE-HOLDERS—  
RESPONDENTS.

*Ex-parte decree, whether final—Pre-emption decree  
—Order refusing to extend time for payment—Appeal,  
whether lies.*

An *ex parte* decree is final, till it is set aside by either the first Court or the Court of Appeal.

No appeal lies against an order refusing to extend the time fixed for payment of the decretal amount under a decree for pre-emption.

Miscellaneous second appeal from the order of the District Judge, Mianwali, dated the 1st April 1920, reversing that of the Munsif, First Class, Mianwali, dated the 8th December 1919.

Mr. Mukand Lal Puri, for the Appellant.

Messrs. Devi Dayal and Obbard, for the Respondents.

**JUDGMENT.**—On 5th August 1919 the respondent secured an *ex parte* decree to pre-empt and it was a condition of the decree that the price was to be paid into Court on or before 15th October 1919.

After the issue of the *ex parte* decree, an application was made to have it set aside, but it was in fact never set aside.

The decree-holder failed to satisfy the condition of the decree by 15th October, but on 5th December 1919 he applied to the Trial Court to be allowed to deposit the price of the property pre-empted. The Munsif refused, but the District Judge in appeal gave the plaintiff a further period up to 15th April 1920 within which to deposit the money in Court.

The learned Judge held that the first Court's decree was not a final decree till the application for setting aside the *ex parte* decree had been rejected.

In this view I am unable to concur, but hold that an *ex parte* decree is final, till it is set aside by either the first Court or the Court of Appeal.

Nor do I think an appeal lay to the learned Judge, for the appeal was not from the decree, but from the order refusing to extend time, from such an order no appeal

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is given by the Code. An appeal from the decree would have been time-barred, nor had the decree holder any grievance against the decree at the time it was granted. The District Judge's order was, therefore, without jurisdiction and the Munsif's order was correct.

I accordingly accept the appeal and set aside the District Judge's order extending the time within which the decretal condition could be satisfied.

Appellant to have his costs in this Court.

*Appeal accepted.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 885  
OF 1919.

January 20, 1921.

Present:—Mr. Justice Das.

HARDEO SINGH AND OTHERS—PLAINTIFFS

—APPELLANTS

versus

BHAWANI SAHAI AND OTHERS—

DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. II, r. 2,  
applicability of—Test—"Cause of action", meaning  
of.*

There is nothing in Order II, rule 2 of the Civil Procedure Code to compel a plaintiff to include in one and the same action different causes of action even though they arise from the same transaction. [p. 497, col. 2.]

The test is this: If the plaintiff, on the allegations made in the plaint, is entitled to make a claim which he does not put forward in his suit he shall not be allowed in a subsequent suit to put forward that claim. To allow him to do that would be to permit him to split his cause of action; but if, on the allegations made in the plaint, he was not entitled to put forward a claim, there is nothing in Order II, rule 2, which prohibits him from putting forward that claim in a subsequent litigation. [p. 498, cols. 1 & 2.]

The expression 'cause of action' means every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court [p. 498, col. 1.]

The expression refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. [p. 498, col. 1.]

HARDEO SINGH v. BHAWANI SAHAI.

Appeal from a decision of the Subordinate Judge, Ohupra, dated the 9th June 1919, modifying that of the Additional Munsif, Ohupra, dated the 24th August 1915.

Mr. Nirsu Narayan Sinha, for the Appellants.

Mr. Ganesh Dutt Singh, for the Respondents.

**JUDGMENT.**—The only point which I have to decide in this appeal is, whether the provision of Order II, rule 2 of the Code bars the plaintiffs' suit. In order to appreciate the point that has been argued before me, it is necessary to state that I am in this litigation concerned with a plot of land which has been found to appertain to the *ijmali* lands in *khewat* 1/6. The village Bajraha was some time ago divided into several *pattis* by partition. One of the *pattis*, consisting of 8 pies share, is entered in *khewat* 1/2. The plaintiff is the sole proprietor of this *patti*. Another *patti*, consisting of 4-annas 10-pies share, is entered in *khewat* 1/3. In this *patti* the plaintiff has 3-annas 5-pies share. As I have mentioned before, the *ijmali* lands of both 1/2 and 1/3 are entered in *khewat* 1/6.

Some time in 1911 the plaintiff instituted a suit against defendant No. 5 for ejectment on the ground that defendant No. 5 had purchased a non-transferable holding. The allegations of the plaintiff in that suit were, that the disputed land was in the *patti* 1/2 of which he was the sole proprietor. His case was that the previous tenant had sold the occupancy holding to defendant No. 5 and that he was entitled thereupon to enter into possession of the same. The Court of first instance, as well as the lower Appellate Court, dismissed the plaintiffs' action on the ground that the plot of land in respect of which the action had been brought was situated not in *patti* 1/2 of which the plaintiff was the sole proprietor but in *patti* 1/6. The lower Courts thought that, as there were other co-sharers interested in that *patti* and as they were not parties to that litigation, the plaintiff was not entitled to any relief at all. The plaintiff appealed to the Calcutta High Court. The learned Judges in the Calcutta High Court thought that the plaintiff was entitled to eject the defendant in proportion to the rent which the plaintiff was, on the admission of the de-

fendant, entitled to recover from the defendant. That litigation decided once for all that the plot of land was not situated in *patti* 1/2 but was situated in *patti* 1/6, and as the plaintiff was, on the admission of the defendant, entitled to some rent from the defendant in respect of that *patti*, the Calcutta High Court thought that he was entitled to eject the defendant in respect of that land.

The plaintiff accordingly succeeded to a certain extent but did not get complete relief in that litigation inasmuch as the co-sharers of *patti* 1/6 were not parties to that litigation.

The present suit was thereafter brought by the plaintiff for ejectment of the defendant. The plaintiff has in this litigation brought on the record as parties defendants, the co-sharers of *patti* 1/6 and he claims in this litigation to eject the defendant on the ground that he has taken a transfer of a non-transferable occupancy holding. He was met by the defendant with the plea that Order II, rule 2, barred his suit. This contention has found favour with the Courts below, and the only question which I have to decide in this appeal is, whether the Courts below have taken a correct view of the scope and effect of Order II, rule 2, of the Code?

In my view, Order II, rule 2 has no application to this case at all. The first paragraph of the rule runs as follows:—“Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.” This rule expresses the general intention of the Legislature that a plaintiff shall not be permitted to split his cause of action in parts and bring separate suits in respect thereof. There is, however, nothing in the rule which compels a plaintiff to include in one and the same action different causes of action even though they arose from the same transaction. See *Saminathan Chetty v. Palanipattu Chetty* (1). That is the general intention of the Legislature, and

(1) 26 Ind. Cas. 228; 41 I. A. 142 at p. 148; 18 C. W. N. 617; 17 New Law Rep. 53; 83 L. J. P. C. 131; (1914) A. C. 618; 110 L. T. 913 (P. C.).



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the second paragraph of the rule, upon which the Courts below have relied, merely provides the penalty for non-compliance with the first paragraph of the rule. The question, in my view, comes to this: was the plaintiff in the previous suit entitled to the reliefs which he now claims? That depends on the meaning which we must assign to the expression "cause of action".

Now, as I understand the law, "cause of action" means every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. See *Chand Kour v. Partab Singh* (2).

Applying this principle to the facts of the present case, can it be argued that the plaintiff in the previous litigation could have put forward the claim which he now puts forward as a part of the cause of action which he then alleged in the plaint? In my view, he could not. His cause of action in the plaint in the previous suit was as follows:—

"(1) That he was the sole proprietor of *khewat* No. 1/2.

(2) That the defendant was the transferee of a non-transferable occupancy holding situated in plot No. 1/2."

On these allegations he asked for the ejection of the defendant from the plot of land situated, as he asserted, in *khewat* No. 1/2. That claim failed because it was held by the Courts that the plot of land was not situated in *khewat* No. 1/2 but was situated in *khewat* No. 1/6. Now, what is his cause of action in the present suit? He now alleges that the plot of land is situated in *khewat* No. 1/6 of which he and the other defendants are the proprietors, that the principal defendant is the transferee of a non-transferable occupancy holding, and that he, along with the other defendants, are entitled to eject the defendant from this holding. In my view, the test is this: If the plaintiff, on the allegations made in the plaint, is entitled to make a claim which he does not put forward in

his suit he shall not be allowed in a subsequent suit to put forward that claim. To allow him to do that would be to permit him to split his cause of action; but if, on the allegations made in the plaint, he was not entitled to put forward a claim, there is nothing in Order II, rule 2, which prohibits him from putting forward that claim in a subsequent litigation.

In my view, on the allegations made in the plaint in the former litigation, he could not put forward the claim which he now puts forward. That being my view, I must hold that the Courts below have erred in dismissing the suit on the ground that the plaintiff's action is barred by the provision of Order II, rule 2.

I must allow this appeal, set aside the judgments and decrees passed by the Courts below and remand the case to the lower Appellate Court with instruction that it should remand the case to the Court of first instance for decision according to law.

The appellants are entitled to the costs of this appeal and in the Court below. The costs incurred in the Court of first instance must abide the result and will be disposed of by that Court.

*Appeal allowed.*

CALCUTTA HIGH COURT.  
APPEAL FROM APPELLATE DECREE NO. 600  
OF 1917.

June 28, 1920.

Present:—Sir Asutosh Mookerjee, Kt.,

Acting Chief Justice, and Justice

Sir Ernest Fletcher, Kt.

*Khaja* SAMSHUDDIN *alias*

*Khaja* SUEKROO—DEFENDANT NO. 5—

APPELLANT

*versus*

PYARI LAL DAS, CHAIRMAN, DACCA  
MUNICIPALITY, PLAINTIFF, AND OTHERS

—DEFENDANTS—RESPONDENTS.

*Bengal Municipal Act (III B. C. of 1834), s. 85 (b) 86 (d), (f), 103, 279, 322 (1)—Municipal rates in respect of holding—"Occupier" and "owner" distinction between—Owner not occupier, whether liable to pay water rate and latrine-rate.*

(2) 16 C. 99 (P. C.); 15 I. A. 156; 5 Sar. P. C. J. 243; 12 Ind. Jur. 331; 8 Ind. Dec. (N. S.) 65.

Bare ownership of a holding within a Municipality does not constitute rateable occupation; or, in

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other words, every owner is not an occupier just as every occupier is not an owner. In order to constitute rateable occupation there must be a use and enjoyment which is or is capable of being beneficial. [p. 500, col. 1.]

Appeal against the decree of the Subordinate Judge, First Court, Dacca, dated the 31st of October 1916, affirming that of the Officiating Munsif, Additional Court at that place, dated the 4th of May 1916.

**FACTS** appear from the judgment.

Babu *Gunada Charan Sen*, for the Appellant.—Defendant No. 5 is the appellant. The appeal arises out of a suit for recovery of arrears of Municipal rates in respect of a holding, by the Chairman of the Dacca Municipality. The holding which is within the jurisdiction of the Municipality belongs to all the five defendants jointly. I alone did not reside in the holding where my co-sharers resided and my defence was that I was not an occupier. The Courts below do not accept my defence and have held that my occupation of the holding is to be taken legally as constructive possession. Under the Bengal Municipal Act the Municipal rates have been divided into three classes, *vis*, house-rates, water-rates and latrine-rates. Section 103 of the Act deals with house rates which are leviable from the owners of the holdings. The Municipality imposed upon me a house-tax which was assessed on the basis of the annual value of the holding. I admit that I am liable for such house-tax. But I contend that I am not liable for water-rates and latrine-rates which are payable by the occupiers. Refers to sections 86, 279 and 322 of the Bengal Municipal Act.

[**MOOKERJEE**, ACRO. C. J.—“What is the definition of an occupier?”]

There is no definition of the word “occupier” in the Bengal Municipal Act, although it gives the definition of an “owner.” The Courts have found that I am an occupier. The test is not that of constructive possession but of actual occupation. The holding was not in my occupation. My co-sharers were in actual occupation and enjoyment of the holding. It would be too hard on me to hold me liable as an occupier which in fact I never was. My other point is that part of the claim is barred by limitation.

**Dr. Sarat Chandra Bose**, for the plaintiff-Respondent.—The appellant's defence was that he could not be liable as he was not

in possession of the holding. But the fact of his remaining away was not notified to the Chairman of the Municipality,—the plaintiff. The name of the defendant No. 5 is on the rate-payer's roll. Under the circumstances, how could the Chairman come to know whether after all these things the appellant was not in actual possession? If he was not in actual possession why did he not notify the fact to the Chairman or object to the assessment of taxes? The facts are patent enough to make his possession a constructive possession.

[**MOOKERJEE**, ACRO. C. J.—Why did you bring this suit?]

Some of the defendants are under the Court of Wards. Of course, we could realise by distress. Then you should consider the unanimous findings of the Courts below that the names of all the defendants appear on the Municipal register.

[**MOOKERJEE**, ACRO. C. J.—But not as occupier?]

Of course, it might be by mutual arrangement that some of them lived in that house, and the others elsewhere.

Babu *Surendra Chandra Guha*, and Babu *Bepin Chandra Bose* for Babu *Kunja Lal Das*, for the Defendants-Respondents.—A partition has been effected of the property. It is admitted that defendant No. 5 is not in occupation. The sole question, therefore, would amount to this, whether he would be liable for taxes or not, I submit he would not be liable.

Babu *Gunada Charan Sen* replied briefly.  
**JUDGMENT.**

**MOOKERJEE**, ACRO. C. J.—This is an appeal by the fifth defendant in a suit instituted by the Chairman of the Commissioners of the Dacca Municipality for recovery of arrears of Municipal rates in respect of a holding within the jurisdiction of the Municipality. There is no dispute that all the five defendants are owners of the holding. The fifth defendant, however, pleaded that he was not an occupier of the holding, which was really occupied by his co-sharers, the first four defendants. The claim is for a sum of Rupees 740.4 annas made up as follows:—

	Rs.	A.	P.
House-rate ...	420	0	0
Water rate ...	210	0	0
Latrine-fee ...	110	4	0

NIBARAN CHANDRA v. PRATAP UDAI NATH SAHI DEO.

It is clear from section 103 of the Bengal Municipal Act, read with section 85 (b), that the house rate is leviable from all the owners. Section 273 (3), read with section 83 (d), makes the water-rate payable by the occupiers while section 322 (1), read with section 83 (f), makes the latrine-fee payable by the occupiers. The Courts below have overruled the defence of the fifth defendant on the ground that he was in constructive occupation of the holding. We are of opinion that this view cannot possibly be maintained.

The Bengal Municipal Act defines the term 'owner' but does not define the term 'occupier'. The meaning of 'occupation' in a similar connection was discussed in the case of *Reg. v. St. Pancras Assessment Committee* (1). It was there pointed out that occupation for purposes of assessment of rates includes actual possession as its primary element, for legal possession does not of itself constitute occupation. An example was given to illustrate the meaning of this test. The owner of a vacant house is in legal possession, but as long as he leaves it vacant, he is not rateable for it as an occupier, yet, if he furnishes it, and keeps it ready for occupation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year; on the other hand, a person who, without having any title, takes actual possession of a house or piece of land, whether by leave of the owner or against his will, may well be the occupier of it. [See also *Mayor of Southend-on-Sea v. White* (2), *Yates v. Chorlton-upon-Medlock Union* (3)]. The substance of the matter is that bare ownership does not constitute rateable occupation [*Smith v. New Forest Union* (4)]; or, in other words, every owner is not an occupier just as every occupier is not an owner; in order to constitute rateable occupation, there must be a use and enjoyment which is or is capable of being beneficial [*Liverpool Corporation v. Oberey Union Assessment Committee & Withnell Overseers* (5), *North Manchester Overseers*

*v. Winstanley* (6)]. In the case before us, the materials on the record show that the fifth defendant was not in occupation of the holding which was really in the occupation of his co-sharers. Under such circumstances, we are of opinion that the fifth defendant is not liable for the water-rate, and latrine fee, when neither he nor any member of his family really enjoyed the benefit of the water or the latrine.

The result is, that this appeal is allowed and the decree made by the Court below modified: the decree will be in favour of the Municipality for the sum of Rs. 420 on account of house rate against all the defendants, and there will also be a decree for the balance of the claim, namely, Rs. 320-4 annas against the first four defendants, on account of water-rate and latrine fee.

The plaintiff Municipality will pay the fifth defendant half his costs in all the Courts.

FLECKER, J.—I agree.

*Appeal allowed.*

(6) (1903) 1 K. B. 835 at p. 836; 77 L. J. K. B. 661; 98 L. T. 781; 72 J. P. 171; 6 L. G. R. 427; 24 T. L. R. 388 affirmed in (1910) A. C. 7; 79 L. J. K. B. 95; 101 L. T. 616; 74 J. P. 49; 8 L. G. R. 75; 54 S. J. 80; 26 T. L. R. 90.

### PATNA HIGH COURT.

PRIVY COUNCIL APPEAL NO. 41 OF 1920.

February 4, 1921.

Present :—Sir Dawson Miller, Kt.,  
Chief Justice, and Mr. Justice Adami.  
NIBARAN CHANDRA CHATTERJEE  
—APPELLANT

versus

Maharaja PRATAP UDAI NATH SAHI  
DEO —RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 110—  
Defendant who has taken no interest in suit, whether  
entitled to appeal to Privy Council.

A defendant who leaves the entire conduct of the case in the hands of his co-defendants and fails to

(1) (1877) 2 Q. B. D. 581; 46 L. J. M. C. 243; 37 L. T. 126; 25 W. R. 827.

(2) (1903) 83 L. T. 408.

(3) (1884) 48 L. T. 872; 47 J. P. 630.

(4) (1889) 61 L. T. 870; 54 J. P. 324.

(5) (1912) 1 K. B. 270; 81 L. J. K. B. 428; 106 L. T. 205; 76 J. P. 161; 10 L. G. R. 165; 58 S. J. 187; 23 T. L. R. 177.



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take any interest in the proceedings is not entitled to prefer a separate appeal to His Majesty in Council.

Application for leave to appeal to the Privy Council against the decision of Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Jwala Prasad.

Messrs. K. B. Joydas and D. N. Sarkar, for the Appellant.

Messrs. S. M. Mullick and B. N. Mitter, for the Respondent.

#### JUDGMENT.

MILLER, C. J.—This is an application on behalf of one of the defendants, Nibaran Chandra Chatterjee, in a suit for resumption of the property known as the Barwe Raj in which the Maharaja of Chota Nagpore was the plaintiff and the principal defendants were the Raja of Barwe and his son. The petitioner was added as a defendant in that suit, because it appeared that he claimed to have derived certain forest and mineral rights in Perganra Barwe, which was the subject of the suit, from the predecessor-in interest of the principal defendant under an instrument, dated the 16th December 1913. The applicant was served with notice of the suit but he took no steps to defend it. He put in no written statement and left his interests entirely in the hands of the real defendants in the suit, namely, the Raja of Barwe and his son. The suit failed in the Court of first instance whereupon the Maharaja of Chota Nagpore appealed to the High Court and again, although the present applicant was a formal respondent in that appeal, he took no steps whatever to defend the action or to oppose the appeal, adopting the same attitude as he had done in the lower Court. This Court allowed the appeal and granted a declaration to the plaintiff, that he was entitled to resume the property in question. The effect of that decision may be, and probably will be, to affect the interests of the present applicant. The real defendants in the suit have applied for leave to appeal to His Majesty in Council and a certificate has been granted in that application and the appeal is at present pending before His Majesty in Council. The present applicant now presents this petition asking that he also may be granted a certificate so that he also may appear and argue the appeal before their Lordships of the Privy Council.

No authorities have been quoted to us which deal with such a situation and, therefore, we must deal with this case as one of first impression. Having regard to the attitude which throughout has been taken up by the present applicant, I think it must be assumed that he was content throughout to leave his interests in the hands of those who were the real defendants in the suit and who were defending the suit and who are now prosecuting the appeal to His Majesty in Council. In these circumstances, seeing that the appeal is being prosecuted by the real defendants, the present applicant's interests will be amply protected in the appeal which is now pending before His Majesty in Council and I can see no reason why the respondents should be unduly harassed by a second appeal which must, from the nature of the case, deal with exactly the same questions which will have to be determined in the appeal which is now pending. The applicant, having failed to put in any written statement or to take any part in the suit in the Court of first instance or to take any part in the appeal and having elected to leave his interests entirely in the hands of the real defendants, is not entitled, in my opinion, to turn round now and say that he is also entitled to present a separate appeal. I would reject the application with costs. Hearing fee five gold mohurs.

ADAMI, J.—I agree.

*Application rejected.*

#### CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 740 AND 936 OF 1919.

August 5, 1920.

Present:—Mr. Justice Newbould and Mr. Justice Panton.

IN NO. 740 OF 1919

MANMATHA NATH BISWAS AND  
ANOTHER—DEFENDANTS—APPELLANTS

IN NO. 936 OF 1919

JITENDRA NATH ROY—DEFENDANT—  
APPELLANT

*versus*

KHIROD GOBINDA CHOWDHURI AND  
OTHERS—PLAINTIFFS—RESPONDENTS IN BOTH.  
*Bengal Tenancy Act (VIII of 1885), s. 101-H—R. 113*

**MUHAMMAD MUMTAZ HUSSAIN V. NAURANG AHMAD.**

*settled in Record of Rights, finality of—Plea of title contrary to entry in Record of Rights, whether can be raised in rent suit.*

Section 104 H of the Bengal Tenancy Act confers finality on the rent settled in the Record of Rights.

It is not open to a defendant in a rent-suit to urge the plea of title contrary to the entry in the Record of Rights.

Appeals against the decrees of the Officiating Subordinate Judge, Pabna, dated the 1st of February 1919, reversing that of the First Munsif at Pabna, dated the 29th of April 1918.

FACTS appear from the judgment.

Babu Rajendra Ohandra Guha, for the Appellants.—The entry in the Record of Rights and the decision of the Settlement Officer cannot operate as a bar to my raising a plea of title. Section 104H of the Bengal Tenancy Act gives me a right to challenge the entry in the Record of Rights finally published under section 103A of the Bengal Tenancy Act.

Babu Jogendra Narayan Majumdar (with him Babu Amulya Kumar Bhattacharjee), for the Respondents.—An entry in the finally published Record of Rights, unless altered by means of a suit brought under section 104H of the Bengal Tenancy Act, is conclusive. See *Prasanna Kumar Adhikary v. Ruchimuddin Howladar* (1). Refers also to *Baikuntha Nath Ghose v. Sadananda Mahapatra* (2). In a suit for rent based on the finally published Record of Rights, the defendant is not entitled to raise a plea of title contrary to the entry in the Record of Rights.

Babu Rajendra Ohandra Guha replied.

JUDGMENT.—These two appeals arise out of two rent-suits. The plaintiffs claim rent on the Record of Rights from which it appears that the plaintiffs held as settlement-holders under Government in a *khas mahal* and the defendants are tenants under them.

The defence set up is that the defendants held the land by virtue of a *kaimi* lease granted by certain *patnidars*, the plaintiffs in this suit having also an interest in that *patni*.

The first Court held that the defendants established their plea and dismissed the suit.

(1) 15 Ind. Cas. 327; 17 C. W. N. 153.

(2) 46 Ind. Cas. 287; 23 C. W. N. 516.

On appeal, the Subordinate Judge reversed this decision and decreed the suite, holding that section 104 H of the Bengal Tenancy Act gave a finality to the rents settled in the Record of Rights. The defendants, we should mention, had attacked the Record of Rights by a suit under section 104 H which was dismissed. In our opinion, the view taken by the learned Judge is right and it is clearly supported by the authority of the cases of *Prasanna Kumar Adhikari v. Ruchimuddin Howladar* (1) and *Baikuntha Nath Ghose v. Sadananda Mahapatra* (2).

On behalf of the defendants-appellants it is contended that the entry and decision of the Settlement Officer are no bar to their raising this plea of title. Whether such a plea can still be raised in a suit properly brought for the purpose, it is not necessary to decide. On the authorities cited, it is quite clear that the plea cannot be raised in a rent suit.

We accordingly dismiss these appeals with costs in each case.

*Appeals dismissed.*

**LAHORE HIGH COURT.**

FIRST CIVIL APPEAL No. 2741 OF 1920.

January 3, 1921.

*Present* :—Mr. Justice LeRoissignol and Mr. Justice Wilberforce.

**MUHAMMAD MUMTAZ HUSSAIN KHAN—DEFENDANT—APPELLANT**

*versus*

**NAURANG AHMAD—PLAINTIFF—RESPONDENT.**

*Evidence Act (I of 1872), s. 116—Landlord and tenant—Estoppel—Lessee, whether can evict landlord after expiry of lease.*

A tenant who has been let into possession by his landlord cannot deny the landlord's title however defective it may be, so long as he has not openly restored possession by surrender to him. [p. 504, col. 1]

A lessee, however, whose lease has expired cannot evict the landlord who is legally in possession of the property even if the landlord had been let into possession by the *quoniam* lessee. [p. 504, col. 1.]

MUHAMMAD MUMTAZ HUSSAIN v. NAURANG AHMAD.

First appeal from the decree of the Senior Subordinate Judge, Delhi, dated the 30th November 1920.

The Hon'ble Mian *Fazl-i-Hussain*, K. B., for the Appellant.

Lala *Moti Sagar*, R. S., Bakhshi *Tek Chand* and Babu *Kishen Dial*, for the Respondent.

**JUDGMENT.**—A brief history of this case is as follows. The property in suit, the Civil and Military Hotel at Delhi, was the property of two brothers who in July 1913 leased it to Mrs. Smith for a period of seven years, the tenancy commencing on 1st October 1913. The tenancy expired, therefore, on 30th September 1920. An option of extension for three years was, however, given to Mrs. Smith and the real question in this case is, whether the right of exercising this option has passed to the transferee from Mrs. Smith. The case, however, has been decided on other grounds.

Mrs. Smith transferred her rights to Naurang Ahmad, the present plaintiff, in February 1915. He sub-let the property to Mrs. Harris, who has been made a defendant, for one year commencing from the 1st October 1919. Mrs. Harris in turn sub-let her remaining rights with effect from 1st April 1920 to the defendant, Mumtaz Hussain. He had then purchased the property from the original owners by a deed executed in February 1920. Mumtaz Hussain, thus, was the owner of the property and a sub-tenant under Naurang Ahmad, the present plaintiff, who sued for his eviction from the property in a suit instituted on 14th April 1920. The ground of the suit was that Mumtaz Hussain was acting adversely to the title of the plaintiff in that he was altering the nature of the premises. The plaintiff, therefore, asked for immediate possession and for an injunction that the property should be restored to its original condition and for damages. He first obtained a temporary injunction ordering Mumtaz Hussain to effect no alterations in the premises but this was set aside by this Court on 26th June. On the 4th of October 1920, as the position had changed owing to the expiry of the lease, unless the option was exercised, the plaintiff asked to be allowed to amend his claim. The main amendment was that the plaintiff was entitled to immediate possession as the lease to Mrs. Harris, which had been transferred to

Mumtaz Hussain, had expired on the 30th of September. This amendment was allowed, and rightly so in our opinion, as the amendment was necessary for the purposes of determining the real question in controversy between the parties. Such amendment may, it is true, not have been in accordance with the law as it stood previously, but in the present Code of Civil Procedure, Order VI, rule 17, is framed with the object of allowing all reasonable amendments so as to secure an adjudication in the matter in dispute between the parties.

The lower Court has decreed the plaintiff's claim on the ground that Mumtaz Hussain being a tenant of the plaintiff in that he stands in the shoes of Mrs. Harris is estopped from denying his landlord's title. The lower Court has based its decision on the Privy Council judgment reported in *Bilas Kunwar v. Desraj Ranjit Singh* (1) and on *Ekoba Govindshet v. Dayaram Narayan* (2) and *Makhan Singh v. Baisakhi Ram Shah* (3), in the latter two of which it is laid down that the provisions of section 116 of the Evidence Act that a tenant is estopped from denying his landlord's title only during the continuance of the tenancy is not exhaustive. This view of the law is not seriously contested by Mr. *Fazl-i-Hussain* but he urges that no question of the applicability of section 116 of the Indian Evidence Act arises in this case, inasmuch as the defendant Mumtaz Hussain does not and never has denied the plaintiff's title but merely urges as a defendant in the suit that plaintiff's title under the lease granted by the landlord in 1913 has determined and that plaintiff, therefore, is no longer a lessee and possesses no legal status by which he can evict the owner of the property. It is clear to us that this contention must prevail, unless the plaintiff can establish that, owing to the option clause, he is still the lessee. In such a case he would have the right to continue his possession under the terms of his lease irrespective of the provisions of section 116. The authorities cited by the lower

(1) 20 Ind. Cas. 299; 37 A. 557; 17 Bom. L. R. 100; P. C. : 13 A. L. J. 991; 19 C. W. N. 1207; 22 C. L. J. 516; 29 M. L. J. 335; 18 M. L. T. 248; (1915) M. W. N. 757; 2 L. W. 540; 42 I. A. 204 (P. C.).

(2) 55 Ind. Cas. 53; 22 Bom. L. R. 82.

(3) 50 Ind. Cas. 591; 123 P. R. 1919.



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Court and again relied on before us for the respondent are, it is true, clear authorities that a tenant who has been let into possession by his landlord cannot deny that landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. They are, however, not authorities to the effect that a tenant whose lease has determined can evict a landlord legally in possession of the property, even if that landlord has been let into possession by the *quondam* tenant.

We disagree, therefore, with the view of the law taken by the first Court and remand the case for trial on the merits. The costs will be costs in the cause and the Court fee on appeal will be refunded. The lower Court should take steps to dispose of this case as soon as practicable.

*Case remanded.*

### CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 120 OF 1919.  
May 18, 1920.

*Present:*—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice  
Sir Ernest Fletcher, Kt.

ABHOYA CHANDRA GHOSH AND OTHERS  
—PLAINTIFFS—APPELLANTS

*versus*

RAJ KUMAR GHOSH AND OTHERS—  
DEFENDENTS RESPONDENTS.

*Easement of necessity, meaning and limits of.*

When the necessity for an easement of necessity terminates, the easement also terminates. [p. 505, col. 1.]

An easement of necessity is an easement which, under particular circumstances, the law creates by virtue of the doctrine of implied grant to meet the necessity of a particular case. It is an easement which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one without which that tenement cannot be used at all. Such an easement lasts only so long as the necessity exists; for a grant arising out of the implication of necessity cannot be carried further than the necessity of the case requires [p. 505, col. 2.]

A right of way limited by the necessity which creates it, ceases if, at any subsequent period the party entitled can approach the place to which it led by passing over his own land, [p. 505, col. 2.]

Letters Patent Appeal against the decree of Justice Sir Syed Shamsul Huda, Kt., dated the 25th of August 1919, in Appeal from Appellate Decree No. 2001 of 1916.

FACTS appear from the judgment.

Dr. Sarat Chandra Fynck and Babu Bepin Chandra Bose, for the Appellants—The plaintiffs are the appellants. The appeal arises out of a suit for establishment of the right of way from the homestead of the plaintiffs to the *khal* and tank of the defendants.

Before 1882 there was a way of necessity. Once there is an implied grant of easement of necessity, that grant does not come to an end. It has been found that, some time before 1882, there has been an easement. The question is that by the construction of the public road the easement has been extinguished. The learned *Munsif*, as well as the lower Appellate Court, hold that the right of way or easement has been extinguished. Refers to section 8 of the Transfer of Property Act. As soon as the Local Board road came into existence that right has disappeared. Before 1882 this right was enjoyed by Mahabharat as appurtenant to his homestead and when the homestead has passed to his heir, the right of way also passed to him. The construction of the Local Board road does not extinguish the right. The road came into existence in 1882. Up to 1880 there was no passage or outlet from the land. Since the existence of the public road the easement of necessity that was appurtenant to the tenement has come to an end.

That is not a correct view of the law as the lower Appellate Court holds. The right, namely, the easement enjoyed by Mahabharat by way of necessity was attached to the tenement. It is not a personal right. The right was appurtenant to the tenement granted to my clients. Refers to *Holmes v. Goring* (1). When the original grant was made to the previous tenant, the land belonged to the landlord then.

Babus Sarat Chandra Ray Chowdhury with him Babus Manmatha Nath Mukherjee, Satindra Nath Mukherjee and Brij Mohan Mondal, for the Deputy Registrar, for the Respondents, was not called upon.

(1) (1821) 2 Bing 76; 17 R. R. 549; 9 Moore 166; 2 L. J. O. P. 184; 130 E. R. 233.

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## JUDGMENT.

MOOKERJEE, ACIO, C. J.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Shamsul Huda in a suit for declaration of a right of way and for a perpetual injunction to restrain interference therewith. The Court of first instance dismissed the suit, and that decision has been successively confirmed by the Subordinate Judge and by Mr. Justice Shamsul Huda. We are of opinion that the view which has commended itself to all the Judges concerned is correct and must be upheld.

The plaintiffs based their title on a *putni* lease granted to them by the defendants on the 24th October 1882. The question has been discussed in the Courts below as to whether the plaintiffs as tenants can acquire a prescriptive right of way as against the landlords-defendants. In our opinion, that question does not really arise on the facts of this case. The title of the plaintiffs is based upon the grant of 1882. Under section 8 of the Transfer of Property Act, the effect of that grant was to transfer to the plaintiffs the legal incidents of the property demised and such incidents included the easements annexed to the land. The point for consideration, accordingly, is, whether, at the date of the grant, there was an easement annexed to the land demised. Now, it has been found that up to 1880 the tenants then in occupation of the land had a way of necessity, but after 1880, when the Local Board established a public way, the way of necessity ceased to be necessary for the enjoyment of the holding. In these circumstances, Mr. Justice Shamsul Huda has held that, as the necessity for the way of necessity came to an end, the way also must be taken to have terminated. If this view be correct, the easement in question had terminated before the grant in favour of the plaintiffs was made. Consequently, under section 8 of the Transfer of Property Act, it cannot be maintained that the way now claimed was an incident of the property demised to the plaintiffs. We have thus to consider, whether it can be affirmed as a proposition of law that when the necessity for an easement of necessity terminates, the easement also terminates. We are of opinion that the answer must be in the affirmative.

An easement of necessity is an easement which, under particular circumstances, the law creates by virtue of the doctrine of implied grant to meet the necessity of a particular case. It is an easement which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one without which that tenement cannot be used at all. Such an easement lasts only so long as the necessity exists, for a grant arising out of the implication of necessity cannot be carried farther than the necessity of the case requires. Reference may, in this connection, be made to the decision in *Holmes v. Goring* (1), which is an authority for the proposition that an easement limited by the necessity which creates it, ceases if, at any subsequent period, the party entitled can approach the place to which it led by passing over his own land. The appellant, however, has argued that the correctness of this decision has been doubted in subsequent cases, and has invited us to hold that the view just mentioned is not well-founded on principle. We are unable to accept this contention as well founded.

In *Proctor v. Hodgson* (2) Baron Parke referred to the decision in *Holmes v. Goring* (1) in the following terms: "The extent of the authority of *Holmes v. Goring* (1) is that, admitting a grant in general terms, it may be construed to be a grant of a right of way as from time to time may be necessary. I should have thought it meant as much a grant for ever, as if expressly inserted in a deed, and it struck me at that time that the Court was wrong: but that is not the question now." Baron Alderson added: "Probably, if this case be taken to a Court of Error, *Holmes v. Goring* (1) will be reviewed." These observations of Baron Parke were cited by Blackburn, J., in delivering the judgment of the Court in *Pearson v. Spencer* (3), in the following terms: "We certainly do not feel inclined to extend the authority of *Holmes v. Goring* (1) so far as to hold that the person into whose possession the servient tenement comes, may from time to time vary the direction of the way of necessity, at his pleasure, so long as he substitutes

(2) (1855) 10 Ex 824 at p. 828; 102 R. R. 652; 3 Com L. R. 755; 24 L. J. Ex. 195 156 E. R. 674.

(3) (1861) 124 R. R. 656; 1 B. & S. 571 at p. 584; 7 Jur. (N. S.) 1156; 4 L. T. (N. S.) 769; 121 E. R. 527.

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a convenient way." This does not show that Mr. Justice Blackburn was inclined to question the correctness of the view that a way of necessity terminates when the necessity itself comes to an end. This is clear from the following observation: "We think we must hold that the way of necessity, once created, must remain the same way as long as it continues at all." This indicates that a way of necessity may come to an end. This is also clear from the observation of Erle, C. J., in the Exchequer Chamber, *Pearson v. Spencer* (4): "A way of necessity, strictly so called, ends with the necessity for it and the direction in which the plaintiffs says the way ought to go would so end." This view, in our opinion, is well-founded on reason, and shows that *Holmes v. Goring* (1) has been doubted upon a point which does not touch the question in controversy before us [*Deacon v. South Eastern Ry. Co.* (5)]. We hold, accordingly, that the view taken by Mr. Justice Shamsul Huda is correct and his decision must be affirmed.

The result is that this appeal is dismissed with costs.

FLETCHER, J.—I agree.

*Appeal dismissed.*

(4) (1863) 3 B. & S. 781; 8 L. T. (N. S.) 166; 11 W. R. 471; 1 N. R. 873; 122 E. R. 285; 124 R. R. 667.

(5) (1889) 61 L. T. 377.

## LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO 933  
OF 1920.

January 3, 1921.

Present :—Mr. Justice Scott Smith.

SALIG RAM—JUDGMENT DEBTOR

—APPELLANT

versus

THE OFFICIAL LIQUIDATOR, INDIAN  
EXCHANGE BANK, LIMITED, LAHORE,

AND ANOTHER—DECREE HOLDERS

—RESPONDENTS.

*Companies Act (VI of 1882), s. 150—Payment order, whether can be made in respect of debt which has been sold to third person. Court, duty of. Payment-order, made without jurisdiction, whether can be disregarded.*

The duty of a Court in liquidation proceedings is to realise the assets of the Company and to discharge its liabilities so far as possible. It is no part of its duty, however, to help third persons who have purchased debts due to the Company to realise those debts [p. 507, col. 1.]

Therefore, once a debt has been sold to a third person the Court cannot make a payment-order in regard to it under section 150 of the Companies Act. [p. 507, col. 1.]

A decree which is a nullity may be disregarded without any proceeding taken to set it aside. Similarly, a payment-order which is a nullity may be disregarded by a Court whose assistance is sought for its execution. [p. 507, col. 1.]

Miscellaneous second appeal from the order of the District Judge, Lahore, dated the 8th January 1920, affirming that of the Subordinate Judge, First Class, Lahore, dated the 14th August 1919.

Lala Balwant Rai, for the Appellant.

Mr. S. K. Mukerji for Notan Das, Respondent.

**JUDGMENT.**—This is a second appeal by Mr. Salig Ram, Pleader, a judgment-debtor in execution proceedings, from the order of the lower Courts allowing Notan Das to execute against him a payment-order passed in liquidation proceedings under section 150 of the Indian Companies Act, VI of 1882. Salig Ram was a share-holder in the Indian Exchange Bank, Limited, which went into liquidation. On the 8th of August 1918 the Official Liquidator issued a notice to the contributories under which he agreed to accept from them Rs. 25 per share if payment was made by them into the Bank of Bengal by a certain date. Salig Ram is said to have been one of the persons who did not make the payment due from him by the fixed date and on the 7th of September 1918 the Judge of the Liquidation Court signed a payment-order for Rs. 1,000 against him under section 150 of the Companies Act.

Notan Das is the transferee of the assets of the Company which was under liquidation and he seeks to execute this payment-order as if it were a decree and the Courts below have allowed him to do so. One of the grounds of appeal in the lower Appellate Court was that the assets of the Company under liquidation having been sold to Notan Das on the 30th August 1918 any payment order passed in favour of the Official Liquidator after that date was a



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nullity and, therefore, the Court had no jurisdiction to execute it.

The decision of the Privy Council in the case of *Khierajmal v. Daim* (1) is authority for the proposition that decrees which amount to a nullity may be disregarded without any proceeding to set them aside. The case is reported as *Khierajmal v. Daim* (1) and was followed in *Hanuman Prasad v. Muhammad Ishaq* (2). It is, therefore, clear that if the payment-order is a nullity it may be disregarded by a Court whose assistance is sought for its execution. In *Black on Judgments*, which is referred to in *Gurdeo Singh v. Ohandrika Singh* (3), it is laid down, in section 215, that: "A Court cannot adjudicate upon a subject-matter, which does not fall within its province as defined or limited by law. In order to the validity of a judgment, the Court must have jurisdiction of the persons, of the subject-matter, and of the particular question which it assumes to decide. It cannot act upon persons who are not legally before it, upon one who is not a party to the suit, and so on."

Now, it is contended before me that the duty of a Court in liquidation proceedings is to realise the assets of the Company and to discharge its liabilities so far as possible. Now, the debt of Salig Ram to the Company was discharged so far as the Liquidator was concerned when it was sold to Lala Notan Das, and it is urged that it is no part of the duty of the Court to help Lala Notan Das to realise the debt due to him from Salig Ram. I think that there is great force in this argument and, indeed, Mr. Mukerji on behalf of the respondent admits that once a debt has been sold to a third person the Court cannot make a payment-order in regard to it under section 150 of the Companies Act, 1882. He has cited *Tharya Ram v. Popat Ram* (4), but in that case the assignment was made after the payment-order had been drawn up. Mr. Mukerji urges, how-

ever, that the payment-order was really of the 30th August 1918 and was made prior to the sale to Lala Notan Das which took place on the same day but at a subsequent time. He refers to an order of the Judge of that date which states that the Official Liquidator reports that certain contributories have taken advantage of the remission of 15 per cent. allowed for prompt payment and goes on as follows:—"I have directed that payment-orders be prepared against defaulting contributories." In accordance with this order the payment-order was drawn up and was signed by the Judge on the 7th of September as already stated. The Judge did not, on the 30th August, make payment-orders against any particular persons. The list of contributories had to be scrutinized and it had to be ascertained who were the defaulters, and this apparently accounts for the slight delay that occurred in drawing up the payment-orders. The sale of the assets took place by auction on the 30th of August 1918 and on that day the purchaser made a part payment, namely, Rs. 6,000, and the sale was, therefore, complete under section 78 of the Contract Act. I, therefore, hold that the payment order of the 7th September, which was subsequent to the sale, was *ultra vires* and, was a nullity and that it is not binding upon Salig Ram, appellant.

I accordingly accept the appeal and, setting aside the orders of the lower Courts, dismiss the application of Lala Notan Das for execution of his so-called decree, and direct that he do pay appellant's costs throughout.

*Appeal accepted.*

# CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 105  
OF 1919.

July 13, 1920.

*Present*:—Mr. Justice Tennon and  
Mr. Justice Newbould.

RAJ KUMAR DAS—DEFENDANT NO. 1  
—APPELLANT

*versus*

PANCHKORI TALUQDAR—PLAINTIFF  
—RESPONDENT.

*Bengal Tenancy Act (VIII B. C. of 1885), s. 86 (2).*

(1) 82 I. A. 23; 32 C. 296; 1 C. L. J. 584; 8 Sar. P. C. J. 734; 9 C. W. N. 201 (P. O.); 2 A. L. J. 71; 7 Bom. L. R. 1.

(2) 28 A. 127; A. W. N. (1905) 229; 2 A. L. J. 615.

(3) 1 Ind. Cas. 913; 36 C. 193 at p. 206; 5 C. L. J. 611.

(4) 47 Ind. Cas. 997; 92 P. R. 1918; 168 P. W. R. 1918.

## RAJ KUMAR DAS V. PANCHORI TALUQDAR.

—Registered sub-lease in perpetuity by raiyat, whether admissible in evidence—Estoppel, applicability of doctrine of.

A sub-lease by a raiyat granted and registered in contravention of the provisions of section 85 (2) of the Bengal Tenancy Act is inadmissible in evidence.

A raiyat is not precluded from questioning the validity of a sub-lease, purporting to be a lease in perpetuity, by reason of the doctrine of estoppel where there was no misrepresentation by him as to the extent of his interest or as to his status as raiyat. In such a case the doctrine of estoppel has no application.

Appeal against the decree of the Subordinate Judge, Second Court, Bakarganj, dated the 13th of July 1918, reversing that of the Munsif, Fifth Court, at Barisal, dated the 24th of May 1917.

FACTS appear from the judgment.

Babu Asitaram Chatterjee, for the Appellant.—Although the lease is in contravention of the provisions of section 85 of the Bengal Tenancy Act, it is binding as between the lessor and the lessee. See *Gonesh Mondol v. Thanda Namasundrani* (1). My lease is a permanent one. It cannot, therefore, be terminated by notice. The case in *Chanli Charan Nath v. Somla Bibi* (2) was the case of a lease from year to year. The lease was thus terminable by notice to quit. There was thus no question either of the applicability of section 85 of the Bengal Tenancy Act or of estoppel. It is only the landlord who can question the lease. See *Manik Borai v. Bani Charan Mandal* (3). The lease is, therefore, binding on the raiyat because the grantor cannot be permitted to derogate from the grant. Refers to *Madan Chandra Kapali v. Jaki Karikar* (4), *Tamiruddi v. Argar Houladar* (5), *Bipin Behari Hoti v. Amrita Lal Bha't cherni* (6), *Arab Ali v. Rachimaddi* (7), *Ali Mohammad Fesari v. Nozan Rajah Bhuiya* (8), *Eaman las Bhattech ryua v. Nilmadhub Saha* (9).

(1) 88 Ind. Cas. 499; 24 C. L. J. 539.

(2) 44 Ind. Cas. 254; 22 C. W. N. 179 at p. 181; 28 C. L. J. 91.

(3) 10 Ind. Cas. 469; 13 C. L. J. 649 at p. 650.

(4) 6 C. W. N. 377.

(5) 1 Ind. Cas. 442; 36 C. 256 at p. 259; 13 C. W. N. 188.

(6) 8 Ind. Cas. 655; 9 C. L. J. 76.

(7) 10 Ind. Cas. 582; 13 C. L. J. 676.

(8) 13 Ind. Cas. 92; 15 C. L. J. 121; 16 C. W. N. 620 note.

(9) 35 Ind. Cas. 754; 20 C. W. N. 1340 at p. 1345; 24 C. L. J. 541; 44 C. 771.

Apart from the lease, my possession is sufficient to establish the tenancy which I claim.

Babu Manindra Kumar Bose for M. Wahed Hossain, for the Respondent, was not called upon.

JUDGMENT.—This appeal arises out of a suit brought to eject an under raiyat after notice. The findings of fact arrived at by the Court of first appeal are as follows. Plaintiff is a raiyat. He granted to the defendant a lease which purported to be a lease in perpetuity. He brings this suit in ejectment after service of a sufficient notice to quit under the provisions of section 49 (b) of the Bengal Tenancy Act. On the authority of, amongst other cases, the case of *Jarip Khan v. Durfa Bewa* (10) and the case of *Gonsh Mandal v. Thanda Namasundrani* (1) it must be held that the lease in question, having been granted and registered in contravention of the provisions of section 85 (2) of the Bengal Tenancy Act, is inadmissible in evidence. It is contended before us that the plaintiff a raiyat is precluded from questioning the validity of this lease by reason of the doctrine of estoppel; but here the finding of fact is that there was no misrepresentation by the plaintiff as to the extent of his interest or as to his status as raiyat. The doctrine of estoppel, therefore, has no application.

The appellants' Pleader next seeks to rely upon the proof of his client's possession. No doubt, that possession, apart from the lease, would be sufficient to prove his tenancy. However, that is not sufficient to prove his permanent lease. Moreover, by the service of the notice to quit the tenancy has terminated.

It follows that the defendant must submit to the decree made against him for possession. The appeal is, therefore, dismissed with costs.

*Appeal dismissed.*

(10) 15 Ind. Cas. 76; 16 C. L. J. 144; 17 C. W. N. 59.

FATIMA BIBI v. SHAH NAWAZ.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2610 OF  
1916.

December 20, 1920.

Present :—Mr. Justice LeRossignol and  
Mr. Justice Wilberforce,Musammât FATIMA BIBI AND ANOTHER  
—PLAINTIFFS—APPELLANTS

VERSUS

SHAH NAWAZ AND OTHERS—DEFENDANTS  
—RESPONDENTS*Custom—Riwaj-i-am, entry in, applicability of—Succession to acquired property—Jats of Jhelum District—Sisters versus remote collaterals—Custom and personal law—Suit based on custom—Custom not established—Procedure.*

Unless there is a provision to the contrary, the rules laid down in the *riwaj-i-am* must be taken to refer to ancestral and not to self-acquired property. [p. 509, col. 2.]

Among Muhammadan Jats of the Jhelum District there is no custom governing the succession to the acquired property of the last male-holder when the contest is between his sisters and collaterals in the ninth degree. [p. 510, col. 1.]

Where no custom is established in a case the personal law of the parties should be applied, notwithstanding that the parties themselves relied upon custom. [p. 510, col. 2.]

Second appeal from the decree of the District Judge, Jhelum, dated the 3rd May 1916, affirming that of the Senior Subordinate Judge, Jhelum, dated the 14th March 1916.

Mr. Mukand Lal Puri, for the Appellants.

Mr. Nanak Chand, for the Respondents.

**JUDGMENT.**—The two original plaintiffs in this case were two sisters of the last male holder. They obtained possession of his land and, owing to an unauthorised order of the revenue officials which they have unwisely thought fit to obey, they have instituted the suit out of which this appeal arises against collaterals in the 9th degree that they are entitled to retain possession of their brother's land. The first Court held that they had failed to prove that they were entitled by custom to their brother's land. The lower Appellate Court, considering the judgment of the first Court to be very cursory and that custom was not *prima facie* in favour of the claim of very remote collaterals to exclude sisters, re-framed the issues and remanded the case for a further enquiry. It directed that the whole question of custom should

be left as open as possible and it did not think that mere failure on one side or the other to prove its case would necessarily conclude the question. After remand the learned District Judge considered that there was a distinct presumption that by the custom of the main agricultural tribes in the Punjab sisters never inherit. It, therefore, thought that the onus lay upon the sisters and, after considering numerous judgments of the High Court and the evidence in the case, it came to the conclusion that the plaintiffs had entirely failed to prove their title to inheritance, although the land was not ancestral. The plaintiff's suit was, therefore, dismissed and they have preferred a second appeal on a certificate of the District Judge.

The main ground argued in the appeal is that, although the parties are admittedly governed by custom in matters of inheritance, there is no ascertained rule of custom applying to the present case and that, therefore, the lower Appellate Court should have fallen back upon the personal law of the parties. We have no difficulty in agreeing with the contention of Counsel that no custom has been ascertained as to the rights of sisters of a last male-holder as against collaterals of the 9th degree in the case of acquired property. The evidence in the case produced by both parties was contemptible and neither the appellants nor the respondents have placed any reliance upon it. Counsel for the respondents, however, relies upon an entry in the *riwaj-i-am* and also on the general rule of custom as laid down in Rattigan's Digest of Customary Law, section 24. The tribe of the parties is apparently included among the Jats of the district and the entry in the *riwaj-i-am* relied upon after giving the replies of some special tribes lays down that among other tribes, among whom Jats are included, a sister or her sons can never inherit. We do not consider that this entry in the *riwaj-i-am* can give us much help in the decision of this case. The learned District Judge himself admits that this *riwaj-i-am* has often been called in question and its value discounted. We also consider that it is a safe rule to accept, unless there is a provision to the contrary, that the rules laid down in the *riwaj-i-am* refer to ancestral and not acquired property. In



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*Rai Kaur v. Talok Singh* (1) Sir Donald Johnstone, Chief Judge, held that the rules laid down in the *riwar-i-am* must usually be taken to apply only to ancestral property and the same opinion is expressed in *Budhi Parkash v. Chander Bhan* (2). As for the general rules laid down in paragraph 24 of Rattigan's Digest of Customary Law, it is open to the same criticism, namely, that it is based mainly on authorities regarding ancestral property and on the generally accepted principles of agnatic succession which do not apply in the case of acquired property. There is, it is true, one reported decision cited by the learned author in which sisters were excluded by collaterals of the 10th degree in the case of acquired property. This is a case of the Lahore District and is based on the special custom thought to be prevailing there. [The judgment in question is printed as *Barnamon v. Santa Singh* (3)]. There are also other decisions of the same district, namely, *Utter Kour v. Atma Singh* (4) and *Ali Mohammad v. Siraj-ud-din* (5). In the latter case the land was ancestral and in the former it appears to have been so. There are also other decisions affecting various tribes of the Punjab, many of which have been noticed by the lower Appellate Court. We do not consider that any general rule can be deduced from these judgments. We hold, therefore, that no special custom was proved in the present case, and that there is no general rule so widely accepted among the agricultural tribes of the Punjab that would justify us in coming to any definite conclusion based on custom. We agree, therefore, with Counsel for the appellants that, although the plaintiffs themselves relied in their plaint on Customary Law, the Court should have fallen back upon the personal law of the parties for the decision of this case. This is clearly provided for in section 5 of the Punjab Laws Act. This principle has been widely followed by the

Chief Court even though the plaintiff has based his case upon custom [see *Sardar Bibi v. Sayed Ali Shah* (6), *Khanan v. Jatti* (7) and *Khuda Bakhsh v. Fattah Khan* (8)]. Moreover, in the present case, although the plaintiffs themselves came into Court basing their claim upon custom, and although they failed to prove any specific custom in their favour, the defendants-respondents can have no complaint against our decision that the question in issue must be decided by Muhammadan Law as the issues were so widely framed by the lower Appellate Court that they had every opportunity to tender all the possible evidence in their favour.

For the above reasons, we accept the appeal and decree the plaintiffs' case with costs in all the Courts.

*Appeal accepted.*

(6) 4 P. R. 1888.

(7) 116 P. R. 1892.

(8) 46 Ind. Cas. 679; 13 P. R. 1919; 140 P. W. R. 1918.

### CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2456  
OF 1917.

May 20, 1920.

*Present:*—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice Sir  
Ernest Fletcher, Kt.

ABHOY CHARAN DUTTA, AND ON HIS  
DEATH HIS HEIRS AND LEGAL REPRESENTATIVES, SURENDRA NATH DUTTA  
AND OTHERS—PLAINTIFFS—  
APPELLANTS

*versus*

MONORANJAN RAI CHOUDHURY,  
AND ON HIS DEATH HIS HEIRS AND  
LEGAL REPRESENTATIVES, LUKHA KANTA  
ROY AND OTHERS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), s. 15—Omission by heirs of a tenure-holder to notify succession to landlord, effect of—Decree for rent against recorded tenants in actual occupation, whether operates as rent-decree.*

The representatives of the original holders of a tenure did not follow the provisions of the law for giving notice of succession to the landlord and did not deposit

(1) 83 Ind. Cas. 992; 88 P. R. 1916; 99 P. W. R. 1916.

(2) 48 Ind. Cas. 813; 128 P. R. 1918.

(3) 18 Ind. Cas. 711; 98 P. W. R. 1912; 122 P. L. R. 1912.

(4) 47 P. R. 1870.

(5) 10 Ind. Cas. 236; 18 P. R. 1912; 162 P. L. R. 1911; 199 P. W. R. 1911.

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the fee prescribed by the Bengal Tenancy Act. Two of them abandoned the tenure. The others remained in possession and had their names recorded in the books of the landlord as tenants in actual occupation. Default was thereafter made in the payment of rent in respect of the tenure, with the result that the landlord sued the recorded tenants and obtained a decree against them :

*Held*, that the tenure was fully represented in the suit and the decree which was obtained against the recorded tenants operated as a rent-decree. [p. 512, col. 1.]

Appeal against the decree of the Additional District Judge, Khulna, dated the 27th of August 1917, affirming the decree of the Munsif, Second Court, at Bagerhat, dated the 5th of June 1916.

FACTS appear from the judgment.

Babu Sures Chandra Talukdar, for the Plaintiffs-Appellants.—The plaintiffs purchased the tenure in execution of a mortgage decree. The same tenure was purchased by the defendants in execution of a rent decree. The defendants further took steps under section 167, Bengal Tenancy Act, to annul the encumbrance which was the interest of the plaintiffs. I beg to submit that the rent-decree obtained by the defendants operates as a decree for money and so my clients ought to recover possession on declaration of title. I do not venture to dispute that if the rent-decree really operates as a rent-decree under the Bengal Tenancy Act my clients have no case. In the suit for rent by the landlords in which they obtained a decree they did not make the widows of Meherulla parties to the suit and so the decree cannot be regarded as a decree for rent because the entire tenure was not represented in that suit. Refers to *Girish Chandra Guho v. Khagendra Nath* (1).

Babu Biraj Mohan Marumdar, for the Deputy Registrar, was not called upon.

#### JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal by the plaintiffs in a suit for recovery of possession of land on declaration of title. The subject-matter of the litigation is a tenure which was purchased by the plaintiffs in execution of a mortgage decree. The identical tenure was purchased in execution of a rent-decree by the defendants who took steps in accordance with section 167, Bengal Tenancy Act, to annul

the interest of the plaintiffs as an incumbrance. The substantial questions in controversy between the parties is, whether the rent-decree operated as a decree for rent under the Bengal Tenancy Act or only as a decree for money. It is not disputed that, if it operated as a rent-decree, the plaintiffs cannot possibly succeed in this suit.

The Courts below have found the circumstances under which the rent-decree was passed. The tenure belonged in equal halves to one Abdul and to three brothers Meherulla, Arjannulla and Sonanulla. On the death of Meherulla, his share devolved on his two widows, his mother and the two surviving brothers. Similarly, on the death of Arjannullah, his share devolved on his widow, his mother and his surviving brother. Finally, on the death of Sonanullah, his share devolved on his mother, his widow and his sons. The widows of Meherullah re-married after the death of their husband and went to live in the houses of their second husbands. The tenure remained in the actual occupation of the other persons just mentioned, and their names were entered in the books of the landlord as those of the tenants in possession. Default was thereafter made in the payment of rent, with the result that the landlord sued the recorded tenants and obtained a decree against them. It is now argued that, as the two widows of Meherulla were not joined as parties to the suit, the decree could not be treated as a decree for rent, inasmuch as the entire tenure was not represented in that litigation. In support of this contention, reliance is placed upon the case of *Girish Chandra Guho v. Khagendra Nath* (1). But that case is clearly distinguishable. There, upon the death of the tenant, his representatives had taken steps to pay the prescribed fee under the provisions of the Bengal Tenancy Act. Notwithstanding this, the landlord sued some of the representatives of the original tenant: the excuse he offered was that he did not receive the fee and that the notice issued by the Collector did not reach him. This Court held that the representatives of the tenant had performed their duty and had complied with the requirements of the law, when they deposited the fees with the Collector. Upon payment of such fee, their title as tenants became perfected, with the result that the

(1) 9 Ind. Cas. 1001; 13 C. L. J. 613; 16 C. W. N. 64.

GOPAL DAS v. PARMANAND.

landlord, if he desired to pass the entire tenure at a sale in execution of a decree for arrears of rent, was bound at his peril to join all the representatives of the original tenant. In the case before us, the representatives of the tenant did not follow the provisions of the law and did not deposit the fee prescribed by the Bengal Tenancy Act. Two of them abandoned the tenure and went to live with their second husbands. The other tenants remained in possession and had their names recorded in the books of the landlord as tenants in actual occupation. In these circumstances, we are of opinion that the tenure was fully represented in the suit, and the decree which was obtained by the landlord against the recorded tenants operated as a decree for rent. This conclusion is supported by the decisions in *Nitayi Eehari Saha v. Hari Govinda Saha* (2), *Jogut Tara Dasya v. Doulati Beua* (3), *Gagan Sheikh v. Abajin Khatun* (4). It follows that the view taken by the District Judge is correct and his decree must be affirmed.

The result is that this appeal is dismissed without costs, as the costs of the infant respondents have already been paid.

FLETCHER, J.—I agree.

*Appeal dismissed.*

(2) 26 C. 677; 13 Ind. Dec. (N.S.) 1033.

(3) 2 Ind. Cas. 695; 87 C. 75; 13 C. W. N. 1110.

(4) 10 Ind. Cas. 16; 14 C. L. J. 180.

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1025 OF 1920.

December 22, 1920.

*Present*:—Mr. Justice Martineau.

GOPAL DAS AND ANOTHER—DEFENDANTS  
—APPELLANTS

*versus*

PARMANAND—PLAINTIFF—

RESPONDENT.

*Court Fees Act (VII of 1870), s. 7 (v) (x)—Suit for possession of land on payment of balance of consideration—Court-fee payable.*

Plaintiff alleged that defendant had sold certain land to him and had received part of the sale consideration. Plaintiff now sued for possession of the land and also prayed that defendant be ordered to

execute a deed of sale and have it registered on receipt of the balance of the price:

*Held*, that the suit was one for possession of land, the prayer as to the execution of the sale-deed being merely ancillary, and that Court-fees were payable in accordance with clause (v) of section 7 of the Court Fees Act.

Second appeal from the order of the District Judge, Sialkot, dated the 26th March 1920, reversing that of the Subordinate Judge, Second Class, Sialkot, dated the 21st February 1920.

Lala Amar Nath Bhatia, for the Appellants.

Lala Fakir Chand, for the Respondent.

JUDGMENT.—The plaintiff in this case alleges that the defendants orally sold some land to him for Rs. 4,250, received Rs. 100 out of the price, and agreed to execute a deed of sale, and he asks in his plaint that he may be given possession of the land and that the defendants may be ordered to execute a deed of sale and have it registered on receiving the balance of the price.

He treated the suit as one for possession of land and paid Court-fees on ten times the revenue. The Munsif held that the suit was one not only for possession, but also for specific performance of a contract to sell the land, and ordered the plaintiff to pay Court-fees on Rs. 4,250, and as the deficiency was not made good he rejected the plaint.

On appeal, the District Judge held that the suit had been properly valued by the plaintiff as one falling under section 7 (v) of the Court Fees Act, and he set aside the first Court's order and remanded the case.

The defendants have filed a second appeal in this Court.

The decision of the learned District Judge is clearly correct. When the plaintiff distinctly alleges that a sale had taken place the suit cannot possibly be regarded as one for specific performance of a contract to sell.

The suit is one for possession of the land alleged to have been sold, and the additional prayer that the defendants may be ordered to execute a sale-deed is an ancillary relief.

I dismiss the appeal with costs.

*Appeal dismissed.*



HAKO v. SULTAN MUHAMMAD KHAN.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1273 OF 1920.

January 5, 1921.

Present:—Mr. Justice Chevis.

HAKO AND OTHERS—DEFENDANTS—

APPELLANTS

versus

SULTAN MUHAMMAD KHAN

AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Punjab Tenancy Act (XVI of 1887), s. 59—Joint tenancy and tenancy-in-common, distinction between—Survivorship, principle of, applicability of.*

There is a distinction between a joint tenancy and a tenancy-in-common, the test being whether definite shares have been specified.

It is only in the case of a joint occupancy tenancy that the principle of survivorship applies.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 6th April 1920, reversing that of the Munsif, First Class, Hoshiarpur, dated the 8th January 1920.

Mr. *Devi Dayal*, for the Appellants.

*Sheikh Niaz Muhammad*, for the Respondents.

**JUDGMENT.**—The plaintiffs in this case are the landlords who sue for possession of land of which Budhu was the occupancy tenant. After Budhu's death his widow, *Musammât Kirpo*, held the land as tenant. She is now dead and the landlords sue for possession, alleging that the tenancy is extinct. Jai Dial and Hako, cousins of Budhu, resist the claim, alleging that the land was occupied by the common ancestor and also that they are entitled to succeed by survivorship, the tenancy being joint. Both the lower Courts held that it is not proved that the common ancestor occupied the land, and though the finding on this point has been challenged in the grounds of appeal to this Court nothing has been said in arguments. As regards the defendants' claim that the tenancy was a joint one, the first Court held that this contention was correct and dismissed the suit. The learned District Judge on appeal noted that *Musammât Kirpo* had been cultivating separate land from the defendants for some years past and also that she had alienated a small portion of the land in favour of one *Hira Singh*. Therefore, in spite of the fact that the parties are shown as joint tenants in the revenue papers, he held that there had been a partition of the tenancy

and he decreed the suit in plaintiff's favour.

Hako and Jai Dial appeal to this Court as also does *Hira Singh*, to whom a small portion of the land was gifted by *Musammât Kirpo*. The only point which has been argued before me is the question whether the tenancy was a joint one; and for the appellants reliance is placed on two Revenue rulings *Agar Singh v. Dhana* (1) and *Ohanda Singh v. Jivan Singh* (2). In both of these rulings the learned Financial Commissioners have declined to draw any distinction between a joint tenancy and a tenancy in common, laying down as the sole test the question of a partition having taken place. On the other hand, there are the decisions of this Court, *Mohru v. Mutsaddi* (3) and *Khan Singh v. Hardit Singh* (4), which clearly hold that there is a distinction between a joint tenancy and a tenancy in common, and lay down as the test whether definite shares are specified. Now, in the present case although the revenue records show the parties as joint tenants, their shares have all along been specified and, therefore, even supposing that there has been no actual partition, it is a case of a tenancy-in-common and not a joint tenancy. The distinction between the two kinds of tenancies is, I consider, a real one and, in my opinion, it is only in the case of a joint tenancy that the doctrine of survivorship applies. I need not state my reasons at length as they have been fully set forth in the two judgments of this Court already referred to. Following these rulings, I hold that the principle of survivorship does not apply in the present case which is a case of a tenancy in common and not a joint tenancy.

I, therefore, dismiss the appeal with costs.

*Appeal dismissed.*

(1) 6 P. R. 1902 Rev; 11 P. L. R. 1903.

(2) 42 Ind. Cal. 87, 6 P. R. 1917 Rev; 5 P. W. R. 1917 Rev.

(3) 100 P. R. 1814.

(4) 100 P. R. 1917; 45 P. W. R. 1907.

RAM BAHADUR SINGH v. DAMODAR PERSHAD SINGH.

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECISIONS NOS. 476  
AND 477 OF 1919.

February 2, 1921.

Present:—Mr. Justice Das and

Mr. Justice Ross.

RAM BAHADUR SINGH AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

Babu DAMODAR PERSHAD SINGH

AND ANOTHER—DEFENDANTS—RESPONDENTS

*Contract Act (IX of 1872), s. 5—Limitation Act (IX of 1908), s. 19—Acknowledgment whether promise to pay—New contract, what constitutes—Debt due by joint family—Acknowledgments of several liability by different branches of family, whether create new contracts.*

There is a distinction between an acknowledgment which is sufficient for the purposes of section 19 of the Limitation Act and the promise which is required by section 25 of the Contract Act. An acknowledgment no doubt implies a promise to pay, but in order to create a new contract, as required by section 25 of the Contract Act, it is necessary that the promise to pay should be expressed. [p. 515, col. 1.]

Where a debt due by a joint Hindu family was divided into three equal portions and each of the three branches of the family acknowledged a several liability to pay one portion of the debt:

*Held*, that this limitation of liability was in itself sufficient consideration to support a new contract which might be implied from the terms of the acknowledgment apart altogether from the provisions of section 25 of the Contract Act. [p. 515, col. 2.]

Appeal from a decision of the District Judge, Muzafferpur, dated the 17th February 1919, affirming that of the Munsif, Muzafferpur, dated the 6th July 1917.

Mr. Sorashi Ch. Mitter, for Mr. Sudhansu Kumar Mitter, for the Appellants.

Messrs. Lachmi Narayan Singh and Sant Prasad, for the Respondents.

### JUDGMENT.

Ross, J.—The material facts are these. The plaintiff advanced money to a joint family, of which the defendants in these two suits were members, some time before 1305 *Fasli*. In 1311 *Fasli*, that is, long after the debt had become barred by time, there was a settlement of accounts between the parties. On the date of settlement, namely, the 8th of *Jeth* 1318 *Fasli*, a total sum of Rs. 3,525 3 was found to be due by the members of the defendants' joint family jointly. This debt was split up into three equal parts

of Rs. 1,220-12-6 each and the managing members of each of the three branches of the joint family acknowledged their several liability for that sum in the following terms: "Account of Babu Damodar Prasad Singh and Babu Palak Deo Narayan Singh, sons and heirs of Babu Jug Deo Narayan Singh, deceased, residents and part proprietors of Mouzah Saikhopur, appertaining to Mahal Karnauti, Perganra Saraisa, District Muzafferpur, for 1318. Debit side: Rs. 1,220-12-6 due up to 8th *Jeth* 1318 F. S (signature with stamp affixed) signed Damodar Prasad Singh and Palak Deo Narayan Singh accounting up to 8th *Jeth* 1318 *Fasli*, a sum of Rs. 1,220-12-6 has fallen due from us to the Kothi which is right and correct, by the pen of Damodar Prasad Singh dated 16th *Bhado* 1318, F. S". The acknowledgments given by the other branches of the family represented by Gobind Prasad Singh, and Lachmi Prasad Singh, respectively, were in similar terms. These two suits were brought by the plaintiffs against Damodar Prasad Singh and Gobind Prasad Singh and a sum of Rs. 2,093-10-0 was claimed in each. The suits were dismissed by both the Courts below on the ground that the claims were barred by time.

The first question arising in these appeals is, whether the acknowledgment recited above is "promise to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits," within the meaning of section 25 (3) of the Indian Contract Act. The English Law makes no distinction in this respect between an acknowledgment or promise which is sufficient to extend time in the case of a debt which is not yet barred, and an acknowledgment or promise which is sufficient to create a new contract where the debt had already become barred by lapse of time. "The renewal of liability may be made before or after the debt is barred by the Statute. And it is material to the construction of the acknowledgment or promise whether the debt is barred or not at the time of making it: in the former case, the debtor is in a position to couple any promise he makes with a condition; in the latter, he has no right to impose terms, and must be presumed to have no such intention, for the action is then brought upon his origi-

RAM BAHADUR SINGH v. DAMODAR PERSHAD SINGH.

nal liability." (Leake on Contracts, 6th Edition page 724). The decision of the Judicial Committee in *Maniram Seth v Seth Rupchand* (1), which was a decision in a case falling under section 19 of the Limitation Act, a section in which the word used is "acknowledgment", does not directly apply to the construction of section 25 of the Indian Contract Act. In India, a distinction has always been made between the acknowledgment which is sufficient for the purposes of section 19 of the Limitation Act and the promise which is required by section 25 of the Indian Contract Act. An acknowledgment, no doubt, implies a promise to pay; but in order to create a new contract (and this is what section 25 of the Contract Act requires) it is necessary that the promise to pay should be expressed. Acknowledgments similar to those in the present cases have frequently been construed by the Indian Courts and have always been held to be insufficient to create a new contract: *Ramji v. Dharma* (2), *Ohowksi Himutlal Harivulubhdas v. Ohowksi Achrutlal Harivulubhdas* (3), *Ranchhod-das Nathubhai v. Jeychamt Khushalchand* (4), *Gobind Das v. Sariau Das* (5), *Dukhi Sahu v. Mahomed Eikhu* (6), *Debi Prosad v. Ram Ghulam Sahu* (7). It is, therefore, impossible to hold that the acknowledgment given in this case, so far as it is merely an acknowledgment of a time-barred debt, is sufficient evidence of a new contract to bring the case within section 25 of the Contract Act. But besides the acknowledgment of a time barred debt there is another element in the present case. Before the account was settled on the 8th of Jeth 1318 *Fasli*, all the members of the family were jointly liable for the entire debt of Rs. 3,662-5-3. On the day of settlement a new contract was entered into by which a several liability for one-third of the debt was assigned to each of the three branches of the family

in substitution for the previously existing joint liability for the total sum. This limitation of liability is in itself good consideration which will support a new contract apart altogether from the provisions of section 25 of the Contract Act, and, for the purposes of this new contract, the acknowledgment of indebtedness given in writing containing an implied promise to meet that indebtedness is, in my opinion, sufficient evidence of a contract on which the present suits can be based.

Two other points raised were of minor importance. It is contended that there is in this case an account stated within the meaning of Article 64 of Schedule I to the Limitation Act. Such an account stated, however, implies cross demands and it is the mutual surrender of these cross-demands that creates the new contract when an account is stated between the parties. In the absence of any cross demands, as in the present case, there is nothing to take the settlement of account out of the ordinary rule.

It was also contended that the correspondence between the parties is sufficient proof of a new contract, this is a matter of evidence and in second appeal this Court is not entitled to go into this question.

I would allow the appeals, set aside the judgments and decrees passed and made by the Courts below and give the plaintiffs a decree in each of the suits for the sums claimed against the defendants who signed the account of the 24th *Assin* 1316, that is to say, in Suit No. 232 of 1916, against both the defendants, and in Suit No. 231 of 1916 against defendant No. 1. The plaintiffs are entitled to their costs throughout.

DAS, J. — I agree.

*Appeal allowed.*

(1) 33 O. 1047; 4 C. L. J. 94 (P. O.); 8 Bom. L. R. 501; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. J. J. 800; 2 N. L. R. 180; 23 I. A. 165; 10 C. W. N. 874.

(2) 6 B. 653; 3 Ind. Dec. N. s. 911.

(3) 8 B. 194 F. B.; 4 Ind. Dec. N. s. 503.

(4) 8 B. 405; 4 Ind. Dec. (N. s.) 614.

(5) 30 A. 268; 5 A. L. J. 274; A. W. N. (1908) 129.

(6) 10 O. 284 (F. B.); 13 C. L. R. 445; 5 Ind. Dec. (N. s.) 190.

(7) 25 Ind. Cas. 89; 19 O. L. J. 263.



NIZAM DIN v. BHAGAT RAM.

LAHORE HIGH COURT,  
SECOND CIVIL APPEAL No. 1156 OF 1920.  
December 4, 1920.

*Present*:—Mr. Justice Martineau.

NIZAM DIN AND OTHERS—PLAINTIFFS—  
APPELLANTS

*versus*

BHAGAT RAM—DEFENDANT—  
RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Claim proceedings—Objections dismissed for default—Decree fully satisfied—Declaratory suit, whether maintainable.*

Two out of four representatives of a judgment-debtor filed objections to the sale of a house in execution of the decree. These objections were dismissed for default and the decree having been fully satisfied the file was consigned to the record-room. Subsequently, all the representatives of the judgment-debtor brought a suit for a declaration that the house belonged to them and was not liable to sale in execution of the decree:

*Held*, that section 47 of the Civil Procedure Code was no bar to the suit inasmuch as,—

- (a) the decree having been fully satisfied the execution Court had become *functus officio*.
- (b) the objections had been filed only by two out of the four plaintiffs.

Second appeal from the decree of the District Judge, Ferozepore, dated the 1st March 1920, affirming that of the Munsif, First Class, Ferozepore, dated the 13th November 1919.

Lala Gangi Ram, for the Appellants.

Lala Ram Chand Manchanda, for the Respondent.

**JUDGMENT.**—The plaintiffs are the representatives of Imam Din, against whom the defendant had a decree. The defendant had a house attached and sold in execution of the decree. Two of the plaintiffs, namely, Nizam ud din and Nur Muhammad, filed objections, but on the 6th December 1917 those were dismissed for default, on the 7th January 1918 the sale was confirmed and on the 22nd January 1918 the file was sent to the record room, the decree having been fully satisfied. The plaintiffs instituted the present suit on the 25th February 1919 asking for a declaration that the house was theirs and was not liable to sale in execution of the decree. The Munsif dismissed the suit as barred both by section 47 of the Civil Procedure Code and by Article 11 of the First Schedule to the Limitation Act. The

District Judge agreed with the Munsif as to the suit being barred by section 47 of the Civil Procedure Code, and dismissed the appeal without going into the question of limitation. The plaintiffs have filed a second appeal in this Court.

It is contended on the appellants' behalf that as the respondent's decree had been fully satisfied the executing Court was *functus officio*, and, consequently, section 47 of the Civil Procedure Code is no bar to the suit. This contention is correct. It is urged for the respondent that the plaintiffs could have appealed against the order of the 6th December 1917 dismissing their objections and, not having done so, cannot bring a regular suit. But the objections were dismissed only for default, and there could have been no appeal from the order of dismissal so far as the merits of the objections were concerned. There was no determination of the question arising between the parties under section 47 of the Civil Procedure Code. Moreover, it was only two of the plaintiffs who had filed objections. The dismissal of those objections could in no case affect the rights of the other two plaintiffs, Allabditia and Ramzan, and when the decree had been fully satisfied their only remedy was to file a suit.

I hold, therefore, that section 47 is not a bar to the suit. It is not necessary for me to go into the question of limitation, as the District Judge has not yet decided it.

I accept the appeal, set aside the decree of the District Judge, and remand the case to him under Order XLI, rule 23, for fresh disposal of the appeal before him. Court-fee on the appeal in this Court to be refunded. Other costs will be costs in the case.

*Appeal accepted*

DEIKO NANDAN PRASAD v. NARSINGH RAUT.

## PATNA HIGH COURT.

PRIVY COUNCIL APPEALS NOS. 6 TO 19 OF 1920.  
January 19, 1921.*Present:*— Sir Dawson Miller, Kt, Chief Justice, and Justice Sir B. K. Mullick, Kt.  
DEIKO NANDAN PRASAD AND OTHERS

—APPELLANTS

*versus*

NARSINGH RAUT AND OTHERS

—RESPONDENTS.

*Civil Procedure Code (Act V of 1909), O. XLV, r. 4—Consolidation of appeals—"Same judgment," meaning of—Suits decided by same judgment in Trial Court, but by different judgments in High Court, whether can be consolidated.*

The word "judgment" in rule 4 of Order XLV of the Civil Procedure Code, refers to the judgment appealed against, that is, the judgment of the High Court and not the judgment of the Trial Court. [p. 518, col. 1]

The proposition that, because certain suits were originally in the Court of first instance decided in one judgment, therefore, whatever may have happened to them subsequently and whether decided eventually in the High Court by the same judgment or by a number of judgments, there should, in such cases, be power to consolidate for the purpose of appeal to His Majesty in Council is to give a meaning to Order XLV, rule 4, which it was never intended to bear. The requirement of the rule is that the judgment which their Lordships of the Privy Council have to consider and from which an appeal is brought should be the same judgment in the consolidated appeals and not that they should have in the same case or in the same appeal to consider the effect of several separate judgments of the High Court. [p. 518, col. 1.]

Appeal from a decision of Coutts and Sultan Ahmad, JJ., affirming a decision of the District Judge, Patna.

Mr. G. D. Singh, for the Appellants.

Mr. K. Hasnain, for the Respondents.

ORDER.—This is an application for leave to appeal to His Majesty in Council in 14 appeals which were decided by this Court. These cases in which the appeals arose were tried together with a number of other cases amounting to 49 in all before the Subordinate Judge of Patna. In one of those cases the present appellants, or those whom they now represent, were the plaintiffs and in the other cases there were a number of plaintiffs and the present appellants were the defendants or some of the defendants in each of those suits. With regard to the case in which the appellants were the plaintiffs that alone of the suits amounted to a sum of over Rs. 10,000. All the suits were tried together and were

disposed of by the same judgment before the learned Subordinate Judge. The plaintiffs' case failed. That of all the other parties who were plaintiffs in the other suits succeeded. The result was that in the plaintiffs' suit an appeal came direct to this Court and that appeal affirmed the decision of the Court below. In the other suits, in some of which there was also an appeal, these appeals went to the District Judge and from his decision affirming that of the Court below an appeal was presented in certain of the cases to this Court. The High Court affirmed the decision of the District Judge. The result was that the present appellants failed both in the suit in which they were plaintiffs and in the suits in which they were defendants each of these suits being claims for certain portions of Diara lands. In the suit in which the present applicants were plaintiffs and which amounted to over Rs. 10,000 they have applied for leave to appeal to His Majesty in Council. There is no question about the valuation in that suit. In the other 14 cases in which they were defendants they have also applied for leave to appeal to His Majesty in Council. None of these suits amounts in value to Rs. 10,000 or anything near it, and the value as found in the lower Court of the whole of these 14 cases amounts to only Rs. 7,290. For the purposes of pecuniary valuation we are asked to exercise our powers under Order XLV, rule 4 and to consolidate the 14 suits in which the petitioners were defendants with the other suit in which they were plaintiffs and, if this can be done, there can be no question that the pecuniary valuation of the consolidated appeal will be sufficient to justify us in granting a certificate. Unfortunately, however, for the petitioners the appeal in which they were plaintiffs was not decided by the same judgment as the appeals in which they were defendants and which they now seek to have consolidated with the other appeal. They contend, however, that as these cases were decided in the first Court by the same judgment that, therefore, they come under the provisions of Order XLV, rule 4. That rule provides that, for purposes of pecuniary valuation, suits involving substantially the same question for determina-

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tion and decided by the same judgment may be consolidated, but suits decided by separate judgments shall not be consolidated notwithstanding that they involve substantially the same question for determination. Reading that rule I do not think that there can be any question but that the word "judgment" there used refers to the judgment appealed against, that is, the judgment which is being considered throughout Order XLV, and to suggest that, because the suits were originally in the Court of first instance decided in one judgment, therefore, whatever may have happened to them subsequently and whether decided eventually in the High Court by the same judgment or by a number of judgments, there should, in such cases, be power to consolidate for the purpose of appeal to His Majesty in Council is, in my opinion, to give a meaning to Order XLV, rule 4, which it was never intended to bear. The important thing is that the judgment which their Lordships have to consider and from which an appeal is brought should be the same judgment in the consolidated appeals and not that they should have in the same case or in the same appeal to consider the effect of several separate judgments of the High Court.

It is next contended that, in spite of rule 4, we still have inherent powers to consolidate but where the consolidation is merely for the purposes of pecuniary valuation the rule expressly lays down that suits decided by separate judgment shall not be consolidated. I know of no case, nor has any been brought our notice, where suits decided by separate judgments have been consolidated, nor can it I think be said that such cases come within the provisions of the rule. Therefore, in my opinion, this application for consolidation must be rejected.

The next matter which arises is this: Although in the plaint and in the memorandum of appeal to this Court and to the lower Appellate Court the suits were valued at a sum below Rs. 10,000, nevertheless, the appellants contend that they can shew, if an enquiry is granted under Order XLV, rule 5, that the real value of the property in these 14 appeals when ascertained will amount to a sum of over Rs. 10,000 and they have put in a petition

which has been verified stating that the value of the property is something like Rs. 150 per *bigha*, and, taken at this valuation, will amount to Rs. 16,000 or Rs. 17,000. Were we satisfied that there was any substance in this petition we should be justified in sending the case down to the Judge of the Trial Court to ascertain what the real value is notwithstanding the fact that the petitioners themselves have placed the value in their memorandum of appeal at a much lower figure than Rs. 10,000, but it turns out that this very question of the valuation of the property was one which was gone into as one of the issues in the case and was determined by a preliminary enquiry before the other issues in the case were gone into, and both the parties gave evidence as to the value of the property with the result that a decision was come to and the total value of the property in these 14 cases was assessed by the lower Court at a sum of Rs. 7,290. There has been no appeal on that matter and the parties have taken that valuation as accurate for the purposes of this case and Court-fees have been paid thereon. It seems to us that it would be useless in such a case to send the matter down to the lower Court to re-value the property when the property has already been valued after an enquiry by a competent tribunal and in the presence of the parties and, although it may not be necessary to decide whether what has happened amounts to *res judicata*, still we are not satisfied that the petitioners have shown sufficient grounds to induce the Court to allow the matter of valuation to be reopened. In these circumstances, we think, that the petition in these appeals upon both the grounds mentioned should be rejected. The respondents are entitled to the costs of these applications. We think that they are only entitled to one set of costs and we assess the hearing fee at 5 gold *n ohurs*.

*Petition rejected.*



KEHR SINGH v. ASA SINGH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1303 of 1920.

January 17, 1921.

Present:—Mr. Justice Chevis.

KEHR SINGH—DEFENDANT—APPELLANT  
versusASA SINGH AND ANOTHER—PLAINTIFFS—  
RESPONDENTS*Contract Act (IX of 1872), s. 64 - Minor, alienation by - Alienation set aside - Minor, whether bound to restore benefit - Acquiescence, delay in suing, whether proof of.*

Where an alienation is set aside at the instance of the alienor on the ground that he was a minor at the date of the alienation, he is not bound, except in cases of fraud, to restore to the alienee the benefit which he might have received as consideration for the alienation.

*Sardara v. Kaura Ram*, 43 Ind. Cas. 29; 7 P. W. R. 1918; 152 P. L. R. 1917; 36 P. R. 1918, dissented from.

*Balak Ram v. Dadu*, 7 Ind. Cas. 101; 7 P. R. 190; 112 P. W. R. 1910; 8 P. L. R. 140, distinguished.

*Mohori Bibee v. Dharmodas Ghose* 30 C. 539 (P. C.); 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114; 1 Sar. P. C. J. 74, *Vaikuntaram Pillai v. Athimoolam Chuttar*, 23 Ind. Cas. 799; 26 M. L. J. 612; 28 M. 101, relied on.

More delay in suing cannot be regarded as proof of acquiescence.

Second appeal from the decree of the District Judge, Amritsar, dated the 8th March 1920, reversing that of the Munsif First Class, Amritsar, dated the 5th August 1919.

Mr. Lal Chand Mehra, for the Appellant.

Mr. Dev Raj Sawhney, for the Respondents.

**JUDGMENT.**—The history of this case is as follows:—By deed, dated the 17th July 1905, land belonging to Sundar Singh and his two younger brothers, Asa Singh and Teja Singh, was mortgaged to the defendant, Sundar Singh executing the deed himself and his mother executing the deed on behalf of her two younger sons, Asa Singh and Teja Singh. The land was mortgaged for Rs. 300. Asa Singh and Teja Singh brought a suit, and by a decree, dated the 3rd November 1915, recovered their shares of the land. Kehr Singh then brought a suit against Sundar Singh urging that the whole of the mortgage debt, namely, Rs. 300, should be regarded as a lien on Sundar Singh's one third share in the land. This suit was dismissed and an appeal to the District Judge was also dismissed. In this suit Sundar Singh pleaded that he was a minor when the mortgage deed was executed and it was found that he was at the time only 14 or 15

years of age. Sundar Singh now sues Kehr Singh for recovery of his one-third of the land and has obtained a decree, against which Kehr Singh has lodged a second appeal. Sundar Singh, meanwhile, has died and is now represented by his brothers.

The first ground of appeal is that the appeal to the lower Appellate Court was barred by time. This ground, however, has not been argued before me, so I need say nothing about it.

The next point argued is, that the plaintiff was not a minor at the time when the mortgage-deed was executed but the decision in the former suit renders this question *res judicata*. Then, it is urged that if the plaintiff was a minor at the time when the mortgage-deed was executed, he misrepresented his age and thereby deceived the defendant. I can only say that I agree with the District Judge that if, as has been held, the plaintiff was only 14 or 15 years of age at the time of the mortgage, the defendant must have been aware of his minority.

Then, it is urged that since the alienation was effected in July 1905 and this suit was not brought till August 1917, the suit is time barred. There is, however, a finding of the District Judge that the defendant never got possession until 1906 and this is a finding of fact. This suit, therefore, brought in 1917, must be regarded as within limitation.

Then, it is urged that the plaintiff is estopped by reason of acquiescence, but no acquiescence has been pointed out beyond delay in suing and this alone cannot be regarded as proof of acquiescence.

Lastly, it is urged that the mortgagee is entitled to a refund of the mortgage money and reliance is placed on a judgment of a single Judge of this Court reported as 7 P. W. R. 198 [*Sardara v. Kaura Ram* (1)]. This judgment, no doubt, lays down that where a minor comes into Court to challenge an alienation and recover his land, he must, before recovery, restore to the alienee all the benefit which he has derived from the alienation, on the equitable ground that he who seeks equity must do equity. In the

(1) 44 Ind. Cas. 219; 7 P. W. R. 1918; 152 P. L. R. 1917; 36 P. R. 1918.

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first place, I remark that the *Punjab Weekly Reporter* is not an authorised publication; and, in the next, I refer to the Privy Council ruling, *Mohori Bibee v. Dharmodas Ghose* (2). There it is held that section 64 of the Contract Act relates only to a contract between competent parties and is not applicable to a case where one of the parties to a contract is a minor who is incompetent to enter into a contract. As regards equity, the same ruling approves of the dictum of Lord Justice Romer in the case of *Thurstan v. Nottingham Permanent Benefit Building Society* (3), which runs as follows:—"The short answer is that a Court of equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void." Counsel for the appellant refers me to *Balak Ram v. Dadu* (4). That, however, is a case where the vendee was deceived by the plaintiff as to his age and so section 41 of the Specific Relief Act was applied. In the present case, however, the finding is that the mortgagee was not really deceived. And in *Vaikuntarama Pillai v. Athimoolam Oheltiar* (5) it is pointed out that the only ground, on which equity interferes to make a person of full age return money which he obtained during minority, is fraud. Had the defendant been deceived as to the plaintiff's age and acted *bona fide*, that no doubt would have amounted to fraud and the plaintiff would have to return the money, but as it is found that the defendant was not really deceived, he cannot get back his money.

The appeal fails and is dismissed with costs.

*Appeal dismissed.*

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 118 OF 1917.

January 15, 1921.

Present:—Mr. Justice Scott-Smith and  
Mr. Justice Leslie-Jones.

LEHNUN—PLAINTIFF—APPELLANT

versus

GUPTU AND ANOTHER—DEFENDANTS

—RESPONDENTS.

*Custom—Alienation—Ancestral and self-acquired properties not distinguishable—Rule applicable.*

Where it is found that some of the property in suit is ancestral but that the whole of it is not, and it is impossible to distinguish which portion is ancestral, the whole of the property in suit must be held to be self-acquired. [p. 521, col. 1.]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 9th October 1916, reversing that of the Munsif First Class, Kangra, dated the 19th November 1915.

Mr. Mukand Lal Puri, for Bakshi Tek Chand, for the Appellant.

Lala Mehr Chand Mahajan, for the Respondents.

**JUDGMENT.**—This appeal relates to a suit by one Lehnun for a declaration against a sale of land by Photo, the plaintiff and the vendor being the grandsons of one Sepahi. The Court of first instance decreed the suit which was, however, dismissed on appeal by the District Judge who held that the property in suit was not shown to be ancestral.

This was, of course, a finding of fact, but the argument of the District Judge was not very clear and it was alleged in the grounds of appeal that he had overlooked an important entry in the Record of Rights of the Settlement of 1868.

We have now examined that and the other documents on the record for ourselves. It appears that the village of Jasaur was founded by Nikku, (the father of Sepahi) who acquired an area of 6 *ghumaos* only. The village is in the Kangra District and that, apparently, was the area which he broke up. He was succeeded by two sons, Sepahi and Gigu, whose shares in his acquisition would, therefore, be three *ghumaos* each. The same Settlement Record shows that Gigu had in 1868 already acquired another 2 *ghumaos* and the holdings of the

(2) 30 C. 539 (P. C.); 5 Bom. L. R. 421; 7 C. W. N. 441; 10 L. A. 114; 8 Sar. P. C. J. 374.

(3) (1902) 1 Ch. 1; 71 L. J. Ch. 83; 50 W. R. 179; 86 L. T. 35; 18 T. L. R. 135.

(4) 7 Ind. Cas. 1030; 76 P. R. 1910; 112 P. W. R. 1910; 98 P. L. R. 190.

(5) 28 Ind. Cas. 799; 26 M. L. J. 612; 33 M. 1071.

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descendants of Sepahi have since been very greatly increased.

The area now in suit is 14 *kanals*, 13 *marlas*. The vendor obtained it as the heir of *Musammatt Nagru*, the widow of his first cousin, *Jangi*, whose mortgage he redeemed. If *Jangi* had been in possession only of land derived from Sepahi his total area should not have exceeded three-quarters of a *ghumaon*, but in the Settlement Record of 1891-92 he was shown as holding over 2 *ghumaos*. Similarly, *Photo*, whose holding in that year should also have been three-quarters of a *ghumaon*, was in possession of more than 3 *ghumaos*; and *Gurditta*, the great grandson of *Gigu*, who should have held only 5 *ghumaos*, even if *Gigu's* own acquisition is included, was holding over 10½ *ghumaos*.

It is no doubt a fact that some of the property in suit was ancestral but it is equally certain that all of it is not, and it is impossible to determine which of it is. We are of the opinion, therefore, that the District Judge was right in holding that the principle laid down in *Atar Singh v. Thakur Singh* (1) was applicable to the circumstances of this case and that the suit was properly dismissed.

The appeal, therefore, fails and is dismissed with costs.

*Appeal dismissed.*

(1) 6 Ind. Cas. 721; 42 P. R. 1910; 12 C. W. N. 1049; 35 C. 1039; 35 L. A. 206; 8 C. L. J. 359; 18 M. L. J. 379; 128 P. W. R. 1908; 4 M. L. T. 207; 10 Bom. L. R. 790 (P. C.).

### PATNA HIGH COURT.

APPEALS FROM ORIGINAL DECREES

Nos. 186, 187 AND 188 OF 1918.

February 1, 1921.

Present:—Mr. Justice Das and Mr. Justice Ross.

Maharaja SIR RAMESHWAR SINGH  
BAHADUR—OPPOSITE PARTY—APPELLANT  
*versus*

BASUDEVA SINGH AND ANOTHER,  
CLAIMANTS, AND THE SECRETARY OF STATE  
FOR INDIA—OPPOSITE PARTY—RESPONDENTS.

Landlord and tenant—Trees, property in—"Timber,"  
meaning of—Bamboo trees, whether timber,

In the absence of a custom to the contrary, the property in trees or in that which is likely to become timber, is in the landlord, and the property in bushes in the tenant, [p. 521, col. 2.]

By the term "timber" is meant properly such trees only as are fit to be used in building and repairing houses. Bamboo trees fall, therefore, under the category of timber. [p. 521, col. 2.]

Appeal from a decision of the District Judge, Darbhanga, dated the 22nd June 1918.

Messrs. *Purnendu Narayan Sinha* and *Murari Prasad*, for the Appellant.

Mr. *Nirsu Narain Sinha*, for the Respondents.

### JUDGMENT.

Ross, J.—These appeals raise a question between landlord and tenants as to the right to the compensation for trees on land acquired by the Government under the Land Acquisition Act. The Collector awarded half the value of the trees to the tenant and half to the landlord. The District Judge held that the tenant was entitled to the whole. The landlord appeals. The trees are 10 *sisoo* trees, 1 *barhar*, 1 *mango* and 29 *bamboos*.

The law is well known. "The property in trees or in that which is likely to become timber, is in the landlord, and the property in bushes in the tenant" (*Woodfall on Landlord and Tenant*, 19th Edition, page 736). The District Judge seems to hold that, because the landlord set up a custom by which he is entitled to only half of the value of the trees and failed to prove it, the tenant is entitled to the whole although he also has failed to prove such a custom. This decision is wrong. If no custom is proved, the case must be governed by the general law modified by any admission which the landlord makes in favour of the tenant. The result is that the landlord is entitled to half the compensation for timber and the tenant to half.

A question is then raised as to *bamboos*. The tenants claim the entire compensation for *bamboos* on the ground that they are not timber. "By the term 'timber' is meant properly such trees only as are fit to be used in building and repairing houses. Many descriptions of trees which are not generally considered as timber are so in some places by custom of the country, being there used for the purposes of building"



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(*Ibid* page, 735). Applying this test it seems to me that whatever the botanical classification of bamboos may be, they are timber inasmuch as they are used, by the custom of the country, in the building and repairing of houses; and must, therefore, fall under the present rule.

It was faintly suggested that the respondents, as tenants at fixed rates, are entitled to the whole compensation. It is unnecessary in this case to determine what the rights of tenants at fixed rates are because there is no evidence that the respondents have that status.

Finally, it was urged that the tenants are entitled to compensation by reason of their loss of the fruits of the trees. This is not a matter between the parties to these appeals.

The result is that the appeals are decreed with costs and the decree of the District Judge is modified by awarding the landlord half of the compensation for the trees (including bamboos).

DAS, J.—I agree.

*Appeals accepted.*

#### LAHORE HIGH COURT.

MISCELLANEOUS CIVIL CASE NO. 345 OF 1920.

January 21, 1921.

*Present.*—Mr. Justice Scott-Smith

and Mr. Justice Broadway.

MEHR CHAND AND OTHERS—

PETITIONERS

*versus*

LABHU RAM AND OTHERS—

RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 102, O XXI, s. 23—Remand, order of, whether final order—Appeal to Privy Council, whether permissible.*

An order of remand is ordinarily not capable of being the subject of an appeal to His Majesty in Council, being interlocutory and not final within the meaning of section 103 of the Civil Procedure Code. It can only be regarded as a final order and capable of appeal, if it has the effect of finally deciding some cardinal point in the suit. [p. 523, col. 2.]

An order of remand which merely decides that a suit is maintainable in the form in which it is brought, is not a final order. [p. 523, col. 1.]

Petition, under section 110, Civil Procedure Code, for leave to appeal to His Majesty in Council against the judgment, passed on 19th January 1920, by Broadway and Martineau, JJ., in Civil Appeal No. 1007 of 1915, reported as 55 Ind. Cas. 32.

The Hon'ble Pandit Sheo Narain, R. B., for Mehr Chand, and Lala Balwant Rai, for the other Petitioners.

Lala Moti Sagar, R. S., for Labhu Ram, Respondent.

ORDER.—This is an application under section 110, Civil Procedure Code, for leave to appeal to His Majesty in Council. The suit was instituted by Lala Labhu Ram asking for a declaration to the effect that he was the sole owner of the property in suit free from incumbrances and was in possession thereof as such owner. The present petitioner, Lala Ram Saran Das, objected that the suit was not maintainable as framed. He alleged that he himself was in possession of the whole property and contended that Lala Labhu Ram should bring a suit for possession and not for a mere declaration. The Trial Court decided that Lala Ram Saran Das's contention should prevail and dismissed the suit.

Against this order of dismissal Lala Labhu Ram preferred an appeal to this Court which was decided on the 19th of January 1920. It was held that, inasmuch as Lala Labhu Ram had been in possession of some portion of the property and was a co sharer with one Nathu in those portions of the property which were in Nathu's actual possession, the suit as framed was competent. The case was accordingly remanded to the Trial Court for decision on the merits and of the other issues arising on the pleadings.

Lala Ram Saran Das now asks for leave to appeal to His Majesty in Council against this order of remand. On behalf of Lala Labhu Ram Mr. Moti Sagar contended that, inasmuch as the order sought to be appealed against was not a final order within the meaning of section 109 (a), leave should not be granted. He also contended that the case was not one such as contemplated by section 109 (c).

Mr. Sheo Narain, for Lala Ram Saran Das, while admitting that an order of remand by itself was not a final order

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such as is contemplated by section 109 (a), contended that, inasmuch as it has been held by this Court that Lala Labha Ram was in possession of a part of the property, the case was one in which a certificate should be granted. He also contended that the case fell within the purview of section 109 (c). He drew our attention to *Saiyid Muzhar Hossein v. Musammât Bodha Bibi* (1), *Dirgpal Singh v. Pahladi Lal* (2) and *Hyder Mehdi v. Badshah Khanam* (3).

The decision in *Saiyid Muzhar Hossein v. Musammât Bodha Bibi* (1) does not appear to assist Mr. Sheo Narain, for there it was held that, although the order sought to be appealed against purported to be made under section 562, Civil Procedure Code, that section was not applicable and that section 565 appeared to be more appropriate. In that case—the Appellate Court had reversed once for all, the decision of the first Court upon an issue as to the making and validity of the Will which issue governed the whole case. In the present case the decision on the question of the competency of the suit as framed by no means disposes of the whole suit.

In *Dirgpal Singh v. Pahladi Lal* (2) leave to appeal was granted under section 109 (c), it being distinctly held that the order, as an order of remand, was not a final order entitling an appeal to His Majesty in Council. That case, too, is clearly distinguishable.

In the case reported as *Hyder Mehdi v. Badshah Khanam* (3) it was held that a decision on a plea of limitation should be regarded as a final order within the meaning, of section 109, Civil Procedure Code, inasmuch as that decision went to the foundation of the case.

In our opinion an order of remand is not ordinarily capable of being the subject of an appeal to His Majesty in Council, being interlocutory and not final within the meaning of the section. It could only be regarded as a final order and capable of appeal if it had the effect of finally deciding some cardinal point in the suit.

(1) 17 A. 112; 5 M. L. J. 20; 22 I. A. 1; 6 Sar. P. C. J. 180; 8 Ind. Dec. (N. S.) 397 (P. C.).

(2) 54 Ind. Cas. 28; 42 A. 176; 18 A. L. J. 137; U. P. L. R. A. 99.

(3) 49 Ind. Cas. 520; 21 O. C. 336; 6 O. L. J. 70.

In this view we are supported by *Rai Radha Kishan v. Collector of Jaunpur* (4), as well as by the authorities cited by Mr. Sheo Narain.

The order in the present case decides nothing which can be regarded as a cardinal point in the suit. As an order of remand pure and simple, it is of an interlocutory nature and, therefore, not liable to appeal. So far as the applicability of clause (c) of section 109, Civil Procedure Code, is concerned, we are unable to see any ground for granting a certificate, and we, therefore, dismiss this petition with costs.

*Petition dismissed.*

(4) 23 A. 270 23 I. A. 29; 5 C. W. N. 153; 3 Bom. L. R. 78; 11 M. L. J. 55 (P. C.).

## PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 57 OF 1920.

February 4, 1921.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Adami.

MATHURA PRASAD SINGH

AND ANOTHER—APPELLANTS

versus

RAM PRASAD TEWARY AND OTHERS—

RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 110—Value of subject-matter of suit. Let us—Amount due at date of decree. Principal decreed taken together in calculation of amount.*

The amount or value of the subject-matter of the suit must, within the meaning of section 10 of the Civil Procedure Code, be taken to be the amount or value which the plaintiff either obtained or, had he been successful, would have obtained in his suit at the date when the decree was passed [p. 524, col. 1.]

Privy Council appeal against the decision of Mr. Justice Das and Mr. Justice Adami, dated the 21st March 1920, reversing a decision of the Subordinate Judge, Second Court, Siray, dated the 7th September 1917.

Messrs. *Parveshwar Dyal* and *Harnarayan Prasad*, for the Appellants.

Mr. *Balwant Nath Mitter*, for the Respondents.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council

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presented on behalf of the defendant. The plaintiff sued upon a mortgage-bond dated the 24th July 1902 claiming principal and interest at Rs. 1-8-0 per cent. per month. At the date when the plaint was filed the total amount of principal and interest came to Rs. 8,622. That was on the 29th July 1915. Judgment was delivered on the 7th September 1917 and, had the plaintiff succeeded in the suit, the amount then found due at the date of the decree would have been over Rs. 10,000. The claim, however, failed, whereupon the plaintiff appealed to the High Court and his appeal was successful and the High Court awarded him a sum of over Rs. 10,000 for principal and interest up to the date of the decree of the High Court. The only question is whether, in the circumstances stated, the case falls within section 110 of the Civil Procedure Code. It is contended on behalf of the plaintiff-respondent that the amount or value of the subject-matter of the suit in the Court of first instance was not Rs. 10,000 or upwards. I am unable to accept this view. I think that the proper construction to be placed upon that section, in so far as it relates to the amount or value of the subject-matter of the suit, must be taken to be the amount or value which the plaintiff either obtained or, had he been successful, would have obtained in his suit at the date when the decree was passed. That principle was adopted by this Court in the case of *Mahabir Prasad Singh v. Anup Narain Singh* (1). I see no reason to depart from the principle there laid down which followed the practice in the Calcutta High Court, and would order that the usual certificate issue in this case.

*Order accordingly.*

(1) 46 Ind. Cas. 187; 3 P. L. J. 377; (1918) Pat. 249; 5 P. L. W. 327.

## LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 3506 OF 1916.

January 18, 1921.

*Present:*—Mr. Justice Scott-Smith  
and Mr. Justice Leslie-Jones.

SHAMBHU NATH, MINOR, THROUGH  
Musammat SOMITRAN DEVI—PLAINTIFF—  
APPELLANT

*versus*

DWARKA DAS, FOR HIMSELF AND AS  
REPRESENTATIVE OF KANSHI RAM,  
DECEASED, AND ANOTHER—DEFENDANTS  
—RESPONDENTS.

*Hindu Law—Joint family—Compromise of doubtful claim by father, whether binding on sons.*

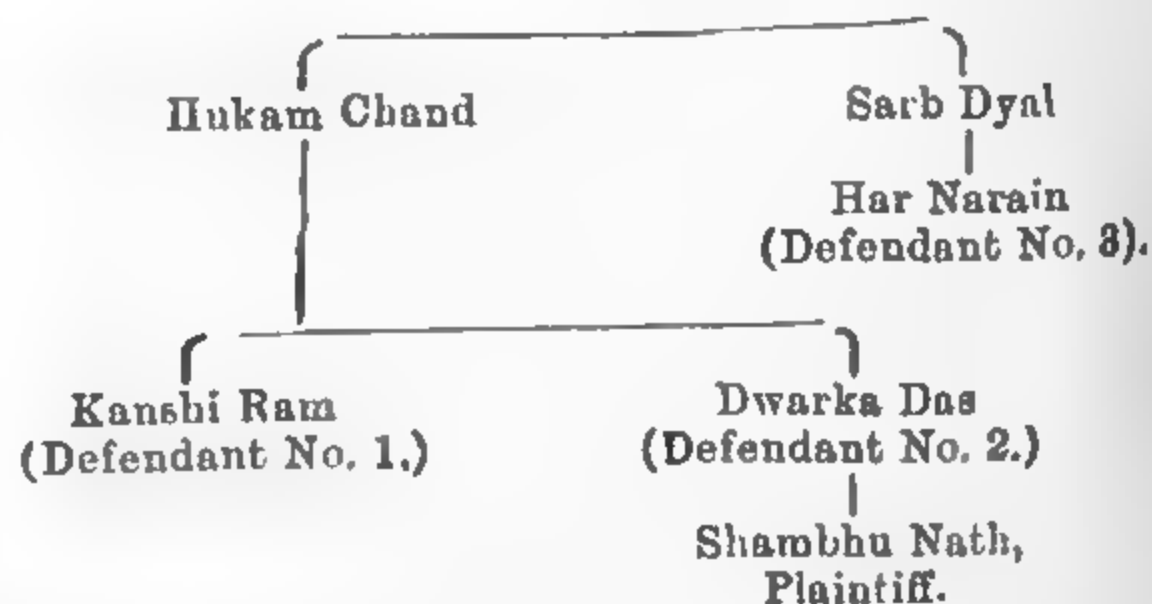
The minor sons of a Hindu father are bound by a *bona fide* compromise of a doubtful claim entered into by their father as manager of the joint family. [p. 525, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, Lyallpur, dated the 27th November 1916.

Mr. Oertel, for the Appellant.

Messrs. M. L. Puri and Bakhshi Tek Chand,  
for the Respondents.

JUDGMENT.—The pedigree table of the parties is as follows:—



The facts are fully given in the judgment of the lower Court and need not be repeated at length. The plaintiffs sued for a declaration to the effect that the deed of compromise of the 28th July 1913 entered into between the defendants in the case of *Har Narain v. Kanshi Ram and Dwarka Das* was an alienation of the land of a joint Hindu family without consideration and necessity and was null and void as against him. The lower Court has found that the plaintiff was born in March 1914, some eight months after the compromise was entered into, and that the compromise is binding on the plaintiff as it was entered into *bona fide*



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for the benefit of the joint family. It, therefore, dismissed the plaintiff's suit.

We do not propose in this judgment to deal with all the arguments which have been addressed to us, because we consider that the plaintiff's case has rightly been dismissed on the ground that the minor was bound by the agreement entered into in good faith by Kanshi Ram and Dwarka Das for the benefit of the joint family. With reference to the dispute between Har Narain on one side and Kanshi Ram and Dwarka Das on the other, in the case compromised on the 28th of July 1913 as regards Hukam Chand's property which he had willed away in favour of Har Narain, the Court below has found that Hukam Chand did execute a Will in favour of Har Narain, but that he subsequently executed another Will in favour of Kanshi Ram and Dwarka Das which, however, he revoked, thereby reviving the original Will in favour of Har Narain. It also found that the second Will in favour of Kanshi Ram and Dwarka Das had not been revived by a post-card said to have been written by Hukam Chand on the 5th of January 1912. Now, we do not see any necessity for deciding whether Har Narain's suit, which he brought on the 29th of August 1912, would have succeeded on the merits or not. It is clear that there was a good deal to be said on both sides, and when the compromise was entered into in July 1913 we have no doubt that Kanshi Ram and Dwarka Das entered into it in the *bona fide* belief that they were acting for the benefit of the family.

In the case reported as *Venkatagiri Nayani Varu v. Subbaroyalu Nayani* (1) it was held that the minor sons of a Hindu father are bound by a *bona fide* compromise of a doubtful claim entered into by their father as manager of the joint family. The case reported as *Bosherhar Nath v. Devi Pershad* (2), cited by the lower Court, is also in point. Following these authorities, we hold that the plaintiff is bound by the compromise and we accordingly dismiss the appeal with costs.

*Appeal dismissed.*

(1) 24 Ind. Cas. 491.  
(2) 19 Ind. Cas. 411; 50 P. R. 1913; 101 P. W. R. 913; 185 P. L. R. 1913.

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 418 B of 1917.

August 9, 1918.

*Present* :—Mr. Mittra, A. J. C.

JAGANNATH—PLAINTIFF—APPELLANT

*versus*

RAGHUNATH—DEFENDANT—RESPONDENT.

*Mortgage, renewal of, effect of, on original mortgage.*

The execution of a fresh mortgage, in renewal of an original mortgage, has not the effect of extinguishing that mortgage, but the money due under it is a part of the consideration for the second mortgage, and the presumption is that the rights of the parties under the first mortgage continue under the second mortgage. [p. 525, col. 2.]

Appeal against the judgment of the District Judge, Amraoti, in Civil Appeal No. 242 of 1916, decided on the 20th August 1917.

Mr. M. V. Joshi, for the Appellant.

Messrs. V. Bose and G. L. Subhedar, for the Respondent.

**JUDGMENT.**—This appeal has occupied considerable time in argument, but the result may be stated briefly.

The lower Appellate Court has not gone into the merits of the case generally but has dismissed the plaintiff's suit solely on the ground that the plaintiff cannot fall back on his prior mortgage of 1903. I am unable to follow the reasoning by which the lower Courts have held that the parties to the mortgage of 1907 did not intend to keep alive the mortgage of 1903. The case cited by the Court of first instance is a case in which the first mortgage was paid off not by the original mortgagor but by some body else. The learned Counsel for the respondent has not been able to show me any case in which, where a mortgagor has executed a fresh mortgage in renewal of the original mortgage, it has been held that the intention of the parties was to extinguish the original mortgage. It is a fact that a fresh mortgage gives the mortgagee better remedies than he had under the first mortgage, but the money due under the first mortgage was a part of the consideration for the second mortgage, and the presumption appears to be not that the parties intended to do away with the first mortgage but, on the contrary, intended that the rights under the first mortgage should continue under the second mortgage. Mere renewal of a mort-

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gage cannot operate to extinguish it.

The lower Appellate Court has also refused to allow the amendments of the plaint asked for in the 6th and 7th grounds of appeal to the lower Appellate Court. This request was to amend the plaint so as to make an alternative prayer for possession irrespective of whether there was any redemption necessary or not. It appears to me that this request for amendment was perfectly unnecessary. The plaintiff in his plaint based his right to possession of the lands in suit on the fact that he had foreclosed the original mortgagor. He also claimed to redeem any subsisting mortgage that there might be. A right to redemption does not in every case cover a right to possession, and in this case the prayer of the plaintiff must be taken to be for possession subject to the liability to redeem the defendant, if the defendant has any claim to be redeemed.

It appears to me that the plaintiff's claim has been dismissed on purely artificial grounds and that the rights of the parties have not been gone into or ascertained by the lower Appellate Court. With reference to these remarks, the appeal is remanded for further trial. A refund certificate will issue. Other costs will be costs in the suit. It is desirable, in order to avoid its possibility of a further remand, that the lower Appellate Court should go fully into the case, and not dispose of it only on some preliminary point.

*Appeal remanded.*

### LAHORE HIGH COURT.

SECOND CIVIL APPEAL No 2471 OF 1916.

January 14, 1921.

*Present*:—Mr. Justice Scott Smith and  
Mr. Justice Leslie-Jones.

BAHADURI AND OTHERS—PLAINTIFFS—  
APPELLANTS

*versus*

QADU AND OTHERS—DEFENDANTS—

RESPONDENTS.

*Question*—Alienation—Harrals of Shahpur District,  
*restriction on powers of.*

Among Harrals of the Shahpur District male proprietors have an unrestricted power of alienation.

Second appeal from the decree of the District Judge, Shahpur, at Sargodha, dated the 23rd May 1916, affirming that of the Senior Subordinate Judge, Shahpur, at Sargodha, dated the 17th March 1916.

Mr. Des Raj Sawhny, for Dr. Nand Lal, for the Appellants.

Mr. Devi Doyal, for the Respondents.

**JUDGMENT.**—This is a case in which Kado, a sonless Haral of the village of Gallapur in the Shahpur District, sold some land to a son of one of his brothers. The said son was the husband of the vendor's daughter. The alienation has been contested by the sons of another brother of the alienor, and two brothers of the alienee are *pro forma* defendants.

The suit has been dismissed by both the Courts below on the ground that the alienor had an unrestricted right of alienation, but the District Judge granted a certificate on which the present second appeal was admitted.

Counsel for the appellants relies largely on certain judgments delivered by Mr. Ellis as District Judge of Shahpur in 1914. From these it would appear that, in his view, a distinction should be drawn between Rajput and other Mohammedan tribes as regards their right of alienation, that of the Rajputs being restricted and that of the other tribes being unrestricted. Counsel for the appellants is, however, unable to tell us where the authority for this distinction is to be found, and it is not derivable from Wilson's Code of Tribal Custom in the Shahpur District which was published in 1896 and was not revised at the last Settlement, because it was recognised that the compilation had been very carefully prepared.

Harrals may be taken to be a Rajput tribe and they are so described in Ibbetson's Census Report and in Rose's Glossary of Punjab Tribes, though in Jhang there is a tradition which makes them a branch of the Ahir tribe and in Montgomery they are classed as Jats. They are, nevertheless, included by Wilson among those tribes which in his preface he describes as the "Miscellaneous Musalman Tribes" of the district, viz., all the Musalman tribes except Awans, Gondals, Ranjhas and Khokhars.

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Among them, moreover, are other tribes such as Janjuhas and Tiwanas, whose Rajput origin is not questioned.

According to the Code of Tribal Custom, a proprietor of any of the Miscellaneous Musalman tribes can make a gift of immoveable property even to a non relative. This is a very strong piece of evidence, *vide Beg v. Allah Ditta* (1), in support of a custom of unrestricted alienation and there are a number of other facts which point in the same direction. The village is *bhaya-chara* and was founded by persons belonging to no less than five different tribes. Since that time, persons belonging to numerous other tribes have acquired land in the village, the composition of which is now very heterogenous and, though there have been numerous previous alienations, none of them have ever been contested.

The appeal fails and is dismissed with costs.

*Appeal dismissed.*

(1) 88 Ind. Cas. 854; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 65; 19 Bom. L. R. 389; 16 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 176; 44 I. A. 89 (P. C.).

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 866 OF 1920.

December 16, 1920.

Present :—Mr. Justice Scott-Smith.

ATTAR SINGH—PLAINTIFF—

APPELLANT

versus

GHULAM MUHAMMAD AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 54—Attachment—Formalities, failure to comply with, effect of—Appeal, second—Intent to defraud or defeat creditors, whether question of fact.

The omission to affix a copy of an attachment order on a conspicuous part of the Court-house or to post it in the office of the Collector or to affix on some conspicuous part of the land concerned, is a fatal defect which invalidates an attachment of land. [P. 527, col. 4; p. 534, col. 1.]

A finding that a transfer was not intended to defraud or delay the creditors of the transferor is a finding of fact. [p. 528, col. 1.]

Second appeal from the decree of the District Judge, Jhelum, dated the 13th February 1920, reversing that of the Subordinate Judge, Second Class, Jhelum, dated the 7th April 1919.

Dr. Nand Lal, for the Appellant.

Mr. H. D. Bhalla, for Mr. Obbard, for the Respondents.

JUDGMENT.—In the suit out of which the present appeal arises Attar Singh, plaintiff-appellant, sued for a declaration to the effect that 31 *kanals* of land sold by Musammat Mahtab Bibi to Ghulam Muhammad and Ghulam Mahay-ud-din on the 20th November 1916 was liable to attachment in execution of his decree dated the 23rd December 1915. A prohibitory order for attachment of 16 *kanals* out of the land sold issued from the executing Court and there is evidence to show that it was served on Musammat Mahtab Bibi on the 15th May 1916. The learned District Judge has, however, held that there was no valid attachment under Order XXI, rule 54, Civil Procedure Code, and also that it is not established that the transfer to Ghulam Muhammad and Ghulam Mahay-ud-din was made with intent to defraud the plaintiff or to defeat or delay his claims within the meaning of section 53 of the Transfer of Property Act. The plaintiff has now filed a second appeal in this Court.

The report of the process-server on the prohibitory order issued to Musammat Mahtab Bibi is to the effect that she refused to affix her thumb-impression upon the order and that, therefore, a copy of it was affixed on the door of her house. There is no report showing that the formalities mentioned in rule 54 (2) of Order XXI, Civil Procedure Code, were complied with, and the District Judge found, as a fact, that there was no publication of the order by beat of drum, nor was there any copy affixed on the land or the Court house, or sent to the office of the Collector. This is a question of fact which cannot be controverted in second appeal. The learned District Judge has referred to *Nur Ahmal v. Prof. Ali* (1) and *Ibra Singh v. Junda* (2) in which it was held that the omission to affix a copy of the attachment order

(1) 2 A. 53; 1 Ind. Dec. (N. S.) 583.

(2) 5 P. R. 1397.



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on a conspicuous part of the Court-house, or to post it in the office of the Collector or to affix it on some conspicuous part of the land attached was a fatal defect which invalidates an attachment of land. Dr. Nand Lal, on behalf of the plaintiff-appellant, admits that he has no authority to the contrary. I, therefore, agree with the learned District Judge that there was no valid attachment of the property prior to the sale to Ghulam Muhammad and Ghulam Muhy-ud-din.

The finding of the learned District Judge that there was no intention to defraud, defeat or delay the plaintiff's claim is a finding of fact. Dr. Nand Lal contends that the District Judge omitted to consider an important piece of evidence, viz., that Ghulam Muhammad, one of the vendees, attested the service of notice on Musammam Mahtab Bibi. This fact is not specifically referred to in the judgment of the learned District Judge though it is referred to in the judgment of the Trial Court, but I see no reason to suppose that he did not read that judgment and did not consider the evidence. It is unnecessary for an Appellate Court to refer to each and every piece of evidence on the record nor do Counsel when arguing a case before the Court always refer to the whole of the evidence. I see no reason to suppose that the District Judge has overlooked any of the evidence and I, therefore, cannot consider that his finding on this question is vitiated.

The appeal fails and is dismissed with costs.

*Appeal dismissed.*

### PATNA HIGH COURT.

CIVIL REVISION No. 164 of 1919.

February 11, 1920.

*Present:*—Mr. Justice Das and

Mr. Justice Adami.

Raja SATYA NIRANJAN CHAKRAVERTY AND OTHERS—APPELLANTS

*versus*

DWARKA NATH SADHU AND OTHERS  
RESPONDENTS.

*Procedure*—Issues, trial of, piece-meal—*Interlocutory order*—Revision—High Court, power of, to interfere.

As the trial of a case piecemeal is a serious evil to the parties and might involve heavy costs in second appeal or any other hearing, the High Court will interfere with an interlocutory order directing

the trial of certain of the issues in a case before proceeding to the trial of the others.

Petition for revision against the order of the Sub Judge, Jamtare, District Santhal Pargannas.

FACTS.—The plaintiffs sued to obtain a decree declaratory of their title to the sub-soil of certain land and for a declaration that the defendants had no right to the minerals therein and for an injunction. The defendants denied the plaintiffs' title and further pleaded that the suit was barred by limitation. The Court framed 16 issues, both on facts and law. The plaintiffs produced evidence in respect of the issues the onus of which was upon them, and reserved their evidence on the remaining issues; the defendants then produced their evidence on the conclusion of which they asked the Court to try certain issues first and to postpone the determination of the remainder, to this course the plaintiffs objected. The Court overruled the objection and, on the ground that the issues which the defendants wanted to be tried first, were issues of law, fixed a date for the hearing of arguments on both sides, allowing the plaintiffs an opportunity of adducing rebutting evidence on these issues. Against this order the plaintiffs moved the High Court under section 115 of the Civil Procedure Code and section 107 of the Government of India Act, 1915, for an order directing the Court to try all the issues together according to law.

Messrs. Lalmohan Ganguly, Purnendu Narain Sinha, and Netaji Chandra Ghosh, for the Appellants.

Messrs. Nares Chandra Sinha and Sisir Kumar Mitra, for the Respondents.

### JUDGMENT.

Das, J.—I am of opinion that the order of the learned Subordinate Judge proposing to decide Issues Nos. 2, 3 and 12 first is not a proper order and ought to be set aside.

A question of this nature came up before the Calcutta High Court in the case of *Yatindra Nath Choudhury v. Hari Charan Choudhury* (1). It was pointed out by his Lordship Mr. Justice Mookerji that it was desirable that the Subordinate Courts should decide all the issues in a case, otherwise there was a serious evil to the parties litigants as it might involve heavy costs in second appeals or any other hearing. We set

(1) 26 Ind. Cas. 954; 20 C. L. J. 426.

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aside the order complained against and direct the Subordinate Judge to try all the issues in the case. We make no order as to costs.

ADAMI, J.—I agree.

*Order set aside.*

### LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL  
No. 1337 OF 1921.

January 6, 1921.

Present:—Mr. Justice LeRoussignol.

BUKN-UD-DIN AND OTHERS—DEFENDANTS  
—APPELLANTS

*versus*

ALTAF AHMAD AND ANOTHER—PLAINTIFFS  
—RESPONDENTS.

*Limitation Act (IX of 1908), s. 23—Nuisance, whether continuing wrong.*

The causing of a nuisance is a continuous wrong independent of contract and a fresh period of limitation begins to run at every moment during which the wrong continues.

Miscellaneous second appeal from the order of the District Judge, Delhi, dated the 24th March 1920, reversing that of the Munsif, First Class, Delhi, dated the 20th August 1919.

Sheikh Umar Bakhsh, for the Appellants.

Mr. C. H. Oertel, for the Respondents.

JUDGMENT.—The learned District Judge has remanded this case under Order XLI, rule 23, and the first ground of complaint is that this was illegal, as he did not accept the appeal on a preliminary point.

The remand should, of course, have been under Order XLI, rule 25, but the dispute can here, I think, be decided on the merits.

The plaintiffs asked for an injunction against defendants on the ground that for the past four years they had discharged latrine water and faecal matter through a hole in their wall and that their action constituted a public nuisance, from which the plaintiffs, their next door neighbours suffered special damage.

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The District Judge has found that the drain in question does constitute a serious nuisance, which prejudices the public generally and most especially the plaintiffs, because they, by the accident of their domicile, are continuously exposed to the ill-effects of the nuisance.

But the District Judge has remanded the case in order to afford defendants an opportunity of proving that by prescription they have acquired a right to commit this nuisance without let or hindrance. The defendants appeal and urge that the suit should have been dismissed on the findings and the plaintiffs in cross-objections urge that the suit should have been decreed. In my opinion the cross-objections should succeed. Here we have no question of easement, the right to use the drain is not in dispute, but the right to use it in such a way as to cause a nuisance is challenged.

Now, the causing of a nuisance is a continuous wrong independent of contract and a fresh period of limitation begins to run at every moment during which the wrong continues. (Section 23, Limitation Act). Consequently, the plaintiffs are not debarred from the relief claimed, even if the defendants have been poisoning the circumambient for the past 100 years.

I, therefore, decree the relief prayed by plaintiffs with costs throughout. This appeal is dismissed and the cross-objections are accepted.

*Appeal dismissed.*

### PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 807  
OF 1919.

January 21, 1921.

Present:—Mr. Justice Das.

GHANSHYAM CHAUDHURY AND OTHERS—  
PLAINTIFFS—APPELLANTS

*versus*

BASDEB JHA AND OTHERS—DEFENDANTS—  
RESPONDENTS.

*Bengal Tenancy Act (VIII B. C. of 1885), s. 158 (b)  
—Civil Procedure Code (Act V of 1908), O. XXI, r. 90  
—Limitation Act (IX of 1908), Sch. I, Arts. 120, 163  
—Execution of decree—Sale—Suit to set aside sale  
—Limitation.*

## GHANSHYAM CHAUDURY v. BASDEV JHA.

An execution sale which is bad on the ground of irregularity and fraud and is liable to be set aside under Order XXI, rule 90 of the Civil Procedure Code is voidable and not void, and an application to set aside such a sale must be made within thirty days of the sale. [p. 530, col. 2.]

On the other hand, an execution sale which takes place in contravention of the provisions of section 158 (b) of the Bengal Tenancy Act is void, and a suit for a declaration that such a sale is illegal and inoperative is governed by Article 120 of Schedule I to the Limitation Act. [p. 530, col. 2.]

Appeal from a decision of the District Judge, Durrhanga, dated the 5th August 1919, reversing a decision of the Officiating Munsif, Samastipur, First Court, dated the 28th March 1919.

Mr. P. N. Sinha, for Messrs. *Fakhruddin*, and *Shiveshwar Dayal*, for the Appellants.

Mr. *Baikuntha Nath Mitter*, for the Respondents.

**JUDGMENT.**—This was a suit by the appellants for setting aside an *ex parte* rent-decree obtained by some of the respondents against them, and the sale held in Execution Case No. 228 of 1917 in pursuance of the rent-decree. The plaintiffs alleged in the 16th paragraph of the plaint: "That no notice under section 158 (b) of the Bengal Tenancy Act having been issued on the said execution case, the sale is illegal and inoperative." In the 14th paragraph of the plaint, the plaintiffs stated as follows:—"That although the plaintiffs are all along in possession of the disputed property, yet the auction-sale, fraudulent delivery of possession and the resistance on the part of defendants first party are calculated to prejudice the plaintiffs' interest."

The Court of first instance dealt elaborately with all the evidence that was adduced in the case and came to the conclusion that the decree was a good decree, but that the sale held in execution of the decree was void inasmuch as the Court before proceeding to sell the holding failed to give notice of the application for execution to the other co-sharers. According to the Court of first instance there was a clear contravention of the provision of section 158 (b) of the Bengal Tenancy Act and the sale was accordingly void.

There was an appeal to the lower Appellate Court. Before that Court it was not disputed that the Court did not give notice of the application for execution to the other co-sharers as it was bound to give under

section 158 (b) of the Bengal Tenancy Act. It was also conceded that the decree was a good decree. The only question which the lower Appellate Court had to decide was, whether the Munsif was right in declaring that the sale held in pursuance of the rent decree was void and inoperative in law. The learned Judge took the view that the suit, in the circumstances of the case, must be regarded as an application under Order XXI, rule 90, and as the suit regarded as an application was not brought within 30 days, he allowed the appeal and dismissed the plaintiffs' suit.

In my opinion the view taken by the learned Judge is wholly wrong and cannot be supported. Order XXI, rule 90, applies where an application is made to set aside a sale on the ground of irregularity or fraud. The plaintiffs did allege that the sale ought to be set aside on the ground of irregularity or fraud, but that case entirely failed and the Court below was not in the slightest degree embarrassed by that portion of the case made by the plaintiffs. There was the other portion of the plaintiff's case, namely, that the sale was void and inoperative, inasmuch as the Court did not give notice of the application for execution to the other co-sharers. That portion of the suit could not possibly be regarded as coming within the scope of Order XXI, rule 90. Where the sale has to be set aside on the ground of irregularity or fraud, the sale is voidable; but where the sale has taken place in contravention of the provision of section 158 (b), the sale is not voidable but void. This distinction has not been recognized by the learned Judge in the Court below.

It has been argued before me by the learned Vakil appearing on behalf of the respondents that this is entirely a new case. He draws my attention to the argument advanced on behalf of the plaintiffs in the Court below that the case fell within Article 181 of the Limitation Act. It may be that the question was not properly argued in the Court below; but I have to see whether, on the allegations made in the plaint and on the issues framed by the Court of first instance, the lower Appellate Court was right in dismissing the plaintiffs' action. The plaintiffs undoubtedly alleged in the 16th paragraph of the plaint that the



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sale was illegal and inoperative inasmuch as the Court did not give notice of the application for execution to the other co-sharers. They further alleged that the steps taken by the purchasers of the property were calculated to prejudice their interest. Although the plaintiffs did not ask for a declaration that the sale was bad and inoperative in law, the Court was, on the allegations made in the plaint, entitled to pass a declaratory decree under the provisions of section 42 of the Specific Relief Act. There was every necessary allegation in the plaint to entitle the Court to pass a declaratory decree. The plaintiffs were undoubtedly entitled to a right as to the property if the case made in the plaint was true and the defendants were undoubtedly interested to deny the title of the plaintiffs to the property. Therefore, if the allegations made in the plaint were well founded, the Court was entitled to make a declaration that the sale was void and inoperative in law and was not binding on the plaintiffs. In my view, if the necessary allegations are there in the plaint and if those allegations are substantiated, the Court may give the appropriate relief although the plaintiffs have not asked for that relief. The question of appropriate relief is a question entirely for the Court, and it is wholly irrelevant that the plaintiffs have not asked for it in the plaint. In any case, the Court of first instance framed an issue on the allegations made in the 16th paragraph of the plaint and took evidence and decided that issue in favour of the plaintiffs. There is no question of prejudice at all, inasmuch as all the parties knew what the Court had to decide on that issue. The case went to the lower Appellate Court and it could not be urged that the defendants were taken by surprise. In my view, the lower Appellate Court erred in thinking that the case fell within the purview of Order XXI, rule 90 of the Code. In my view, the suit was a suit of a declaratory nature and must be regarded on the allegations made in the plaint as a suit under section 42 of the Specific Relief Act. That being so, 6 years' rule applies under Article 120 of the Limitation Act, and the plaintiffs' suit, was undoubtedly within time.

I must allow this appeal, set aside the judgment and decree of the lower

Appellate Court and restore the judgment and decree of the Court of first instance.

As the point which has been argued before me by Mr. Purnendu Narain Sinha on behalf of the appellants was not put forward before the lower Appellate Court, I must refuse to give them any costs of this appeal.

The plaintiffs are entitled to the costs incurred in the Court of first instance, but they must pay the costs to the defendants incurred in the lower Appellate Court

*Appeal allowed.*

### LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 117 of 1920.

January 26, 1921.

*Present:*—Mr. Justice Broadway and Mr. Justice Abdul Raouf.

KALA SINGH AND OTHERS—PLAINTIFFS—  
APPELLANTS

*versus*

KAHNA AND OTHERS—DEFENDANTS—  
RESPONDENTS.

*Common land—Co-owners—Exclusive user by one co-owner—Rights of other co-owners.*

When a joint owner of land, without obtaining the permission of his co-owners, builds upon such land, such buildings should not be demolished at the instance of such co-owners unless they prove that the action of their joint owner in building upon joint land has caused them a material and substantial injury such as cannot be remedied by partition of the joint land. [p. 533, col. 1.]

Letters Patent Appeal against the following judgment of Mr. Shadi Lal, Chief Justice, dated the 7th June 1920, in Civil Appeal No. 2220 of 1919 :—

"This appeal and the Cross-Appeal No. 2374 of 1919 arise out of one action, and may conveniently be disposed of by one judgment. The dispute between the parties relates to a plot of land about  $1\frac{1}{2}$  bighas in area situate within the *abadi* of the village of Danewala in the Ferozepore District. The defendants Nos. 1 to 14, who are occupancy tenants in the village and carpenters by profession, have occupied this plot of land, and the plaintiffs, who are proprietors of the village to the extent of  $\frac{1}{3}$ rd, seek to evict

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them and want a mandatory injunction directing them to demolish the buildings constructed thereon. The defendants Nos. 18 to 21 also own  $\frac{1}{3}$ rd of the village, and the learned District Judge finds upon the evidence adduced by the parties that these defendants 'did in fact settle defendants Nos. 1 to 14 on this land'. He, however, holds that the area of the land occupied is too large; and has consequently marked off two plots on the plan prepared by the local commissioner, shown them as A. B. C. D. and E. F. G. H. respectively, and allotted them to defendants Nos. 1 to 14 and directed them to vacate the remaining area in their possession. It is to be observed that these two smaller areas include 'all the *kothas* or sheds on the area in dispute' and amount to  $\frac{1}{3}$ rd of the total area occupied by them.

"Both the parties have appealed to this Court, and after hearing the learned Counsel in support of their respective contentions I am not prepared to dissent from the conclusion reached by the learned District Judge. It is to be observed that the decision was practically accepted by both the parties as a reasonable compromise; and that the only point on which the compromise failed, was that the plaintiffs insisted that the area taken out of the possession of defendants Nos. 1 to 14 should be considered as common land belonging to all the village proprietors except defendants Nos. 18 to 21. This contention, if acceded to, would lead to a partition of a portion of the common land, in support of which no authority has been cited. It sometimes happens that a co-sharer constructs a building on a portion of the common land or settles a non proprietor thereon, but that act does not justify a partial partition of the common property.

"So far as the appeal preferred by the plaintiffs is concerned, it must fail on the short ground that they have not shown that the area allotted by the District Judge to defendants Nos. 1 to 14 as the representatives of the consenting proprietors exceeds the share to be allotted to the latter when a partition takes place. Plaintiffs have failed to show that they have suffered such material and substantial injury as would not be remedied on a partition of the joint land, and, in the circumstances, I am not prepared to interfere with the discretion of the District Judge in refusing to grant a mandatory

injunction for the demolition of the buildings.

"Coming now to the appeal preferred by the occupancy tenants, I am of opinion that the learned Judge has done substantial justice. The area from which they are evicted, contains no *kothas* or sheds, and it is only fair that they should not occupy more than the share belonging to the consenting proprietors. The total area occupied by them is undoubtedly large, and considering that on account of its proximity to a tank it is required by other proprietors of the village, I consider that the representatives of  $\frac{1}{3}$ rd of the proprietary body should not be allowed to appropriate the whole of this area.

"For the aforesaid reasons I dismiss both the appeals and direct the parties to bear their own costs in this Court."

The Hon'ble Pandit *Sheo Narain*, R. B., and *Sardar Sewa Ram Singh*, for the Appellants.

*Sardar Kharak Singh*, for *Narain Singh*, Respondent.

JUDGMENT.—This is an appeal under section 10 of the Letters Patent from a judgment of the learned Chief Justice sitting singly. The suit, out of which the appeal arises related to a plot of land measuring about  $1\frac{1}{2}$  *bighas* forming part of a much larger area of common land belonging to the proprietors of the village *Danewala*. The plaintiffs own a  $\frac{1}{3}$ rd share in the village in which the common land is situate. Accordingly, they have a  $\frac{1}{3}$ rd share in the common land also. The defendants Nos. 18 to 21 also have a similar share in the village and in the common land. These defendants dealt with a portion of the land exclusively by settling the defendants Nos. 1 to 14 on it. The latter constructed certain buildings apparently without the consent of the other co-sharers, but without any interference on their part. Thereupon, the plaintiffs instituted a suit for a mandatory injunction praying for the demolition of the buildings and the restoration of the common land to its original condition. The Trial Court decreed the suit, granted a mandatory injunction and directed the defendants to remove the materials. The District Judge in appeal modified the decree of the first Court by dismissing the suit relating to a portion of the land in dispute

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and maintained the decree relating to a portion of it. He marked off on the plan two areas as A. B. C. D. and E. F. G. H. on which the buildings stood, and allowed the defendants Nos. 1 to 14 to remain in possession thereof and ordered them to give up the remaining portion as to which the decree of the first Court was maintained. Both the parties were dissatisfied with the decree of the District Judge and two appeals were preferred to this Court: one by the plaintiffs and other by defendants Nos. 1 to 14. Both of them have been dismissed by the learned Chief Justice and the plaintiffs have preferred this appeal under the Letters Patent. The following material findings of fact have been recorded by the learned District Judge, namely, (1) that the defendants Nos. 1 to 14 were settled on the land by the defendants Nos. 18 to 21; (2) that the plaintiffs had not shown that the building had caused such material and substantial injury as could not be remedied in a suit for partition of the joint land. The learned Chief Justice held that, on the facts found, he was not prepared to interfere with the discretion exercised by the learned District Judge in refusing to grant a mandatory injunction to the plaintiffs directing the demolition of the buildings. As a pure question of legal right the plaintiffs no doubt would be entitled to enforce their claim, but the relief claimed is an equitable relief and the Courts in equity are not bound to grant it in all circumstances. This rule of equity has been adopted and recognised in many reported cases in this country. In the case of *Paras Ram v. Sherjit* (1) Mr. Justice Mahmood of the Allahabad High Court laid down the following rule:—

"That when a joint owner of land without obtaining the permission of his co-owners builds upon such lands such buildings should not be demolished at the instance of such co-owners unless they prove that the action of their joint owner in building upon joint land has caused them a material and substantial injury such as cannot be remedied by partition of the joint land."

In the case of *Joy Ohunder Rukhit*

v. *Bipro Ohurn Rukhit* (2) a Division Bench of the Calcutta High Court held that even in cases where joint land had been dealt with in an exclusive manner by one joint owner in spite of the protest of his co-owners, before a Court will make an order directing that a portion of the joint property alleged to have been dealt with by one of the co-owners without the consent of the others, should be restored to its former condition, a plaintiff must show that he has sustained by the act he complains of, some injury which materially affects his position. In the present case the defendants Nos. 18 to 21, as observed before, have exclusively dealt with a portion of the joint land by settling thereon the defendants Nos. 1 to 14 as tenants. According to the finding of the learned District Judge, the area occupied by the building does not exceed the  $\frac{1}{3}$ rd share of the defendants Nos. 18 to 21 in the land, and the plaintiffs have not shown that they have suffered such material and substantial injury as cannot be remedied in a suit for partition of joint land. The rule of equity referred to above is also stated in explanation 3 under paragraph 225 of Rattigan's Customary Law, where, among other cases, *Paras Ram v. Sherjit* (1) is specifically mentioned.

In our opinion, the view taken by the learned Chief Justice is fully supported by authorities and this appeal must be dismissed. We accordingly dismiss it with costs.

*Appeal dismissed.*

(2) 14 C. 236; 7 Ind. Dec. (N. S.) 156.

(1) 9 A. 661; A. W. N. (1887) 253; 5 Ind. Dec. (N. S.) 678.



BAIJNATH PRASAD SINGH & TEJ BALI SINGH,  
PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.  
February 7, 1921.

Present :—Lord Lunnedin, Lord Phillimore,  
Mr. Ameer Ali and Sir Lawrence Jenkins.  
BAIJNATH PRASAD SINGH AND OTHERS  
—APPELLANTS

versus

TEJ BALI SINGH—RESPONDENT.

*Hindu Law—Mitakshara—Impartible estate, nature of—Succession to such estates, rule of.*

The fact that a Raj is impartible does not make it separate or self-acquired property. It may in fact be self-acquired or it may be family property of a joint undivided family. If the latter, succession will be regulated according to the rule which obtains in an undivided joint family, so far as the selection of the person entitled to succeed is concerned, i. e., he will be designated by survivorship, although then, according to the custom of impartibility, he will hold the Raj without the others sharing it. [p. 540, col. 1.]

Appeal from a decree of the Allahabad High Court (Richards, C. J., and Rafique, J.), dated May 30th, 1916, reported as 38 Ind. Cas. 849, affirming a decree of the Subordinate Judge, Mirzapur.

FACTS of the case, so far as left unstated in their Lordships' judgment will be found in the report of the earlier proceedings at 38 All. 590 ; 38 Ind. Cas. 849.

On this appeal.

Mr. De Gruyther, K. O. (with him Mr. Dube), for the Appellants, submitted that though the property in suit may originally have been an impartible Raj, yet as the effect of a re grant it became the self-acquired property of Ran Bahadur Shah and was no longer impartible. If, however, it were held to be impartible, the High Court's decision in favour of plaintiff was based on the view that there was co-parcenary in an impartible estate, and the Board had decided that there was not.

[LORD PHILLIMORE.—They say that if the property be joint and impartible, Tejbali as representing the eldest son is solely entitled.]

I say that unless it is both joint and impartible we succeed, and that its being impartible is inconsistent with its being joint.

In an impartible estate there is no co-parcenary and no taking by survivorship : and the rule of succession is that of the ordinary Hindu Law except as modified by custom.

The Board has held that there is no co-parcenary in an impartible estate :

*Gangadhara Rama Rao v. Rajah of Pittapur* [The Second Pittapur case] (1) and cases there cited. Since then the question of a claim by survivorship has been before the Board in the *Bettiah Raj* case [*Rajkumar Bishen Prakash v. Maharani Janaki Kuer*, judgment delivered on February 13th, 1920, unreported] and it was distinctly laid down that any person who claims to succeed to an impartible Raj by right of survivorship must fail. These two decisions of the Board lay down that the devolution of an impartible Raj cannot be determined by survivorship. The correct view is that, except in so far as varied by custom, the succession to an impartible Raj follows the rule of succession to partible property : the ordinary rule is that the eldest member and not the member of the eldest branch succeeds.

In the *Tipperah* case [*Neelkisto Deb Burmono v. Beerchunder Thakur*] (2) the Board laid down that there was no co-parcenary and no survivorship in an impartible Raj.

[SIR LAWRENCE JENKINS.—That was under the Dayabhaga, where you trace to the last male holder.]

The Board say the rules of survivorship cannot apply, so it must be the rule of inheritance, whatever that may be, whether Dayabhaga or Mitakshara.

The rule of inheritance to an impartible estate is laid down in *Parbati Kunwar v. Chandarpal Kunwar* (3). The ordinary law is that on the death of the holder of an impartible Raj the widow takes ; that on her death the decree excludes the line.

Respondent has alleged a custom of succession entitling him to succeed. There is no general rule of lineal primogeniture governing succession to impartible estates.

*Rajah Rup Singh v. Rani Baisni* (4).

There is no sufficient evidence of any such custom here. The Subordinate Judge has a finding, though far from a clear one, in

(1) 47 Ind. Cas. 354; 45 I. A. 148 at p. 153; 35 M. L. J. 392; 24 M. L. T. 276; 16 A. L. J. 833; 41 M. 778; 28 O. L. J. 428; 5 P. L. W. 267; 20 Bom. L. R. 1056; 23 C. W. N. 173; (1918) M. W. N. 922 (P. C.).

(2) 12 M. I. A. 523; 12 W. R. P. O. 21; 8 B. L. R. P. O. 13; 2 Sar. P. C. J. 523; 2 Suth. P. C. J. 243; 20 E. R. 436.

(3) 4 Ind. Cas. 25; 36 I. A. 125 at p. 136; 10 O. L. J. 216; 18 O. W. N. 1073; 6 A. L. J. 767; 11 Bom. L. R. 850; 12 O. C. 304; 31 A. 457; 19 M. L. J. 605 (P. C.).

(4) 11 I. A. 149; 7 A. 1; A. W. N. (1864) 246; 4 Sar. P. O. J. 533; 3 Ind. Dec. (N. S.) 902.

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was argued by Mayne, and it was never contended that *Sartaj Kuari's* case (18) did not go the length I have stated, but only that it did not apply to Madras.

In *Kachi Kaliyana v. Rengappa* [*The Udayarpalayan case*] (5) *Sartaj Kuari's* case (18) case was not cited to the Board, and it was decided on the assumption that the property was co-parcenary property.

In *Gangadhara Rama Rao v. Kajah of Pittapur* (1) a strong Board held that they were bound by previous decisions that there can be no co-parcenary in an impartible estate. How can a man take by survivorship when he is not a co-parcener?

In the *Bettiah Raj* case the precise point here was decided, viz., that in an impartible estate there cannot be succession by survivorship. The Judges were Viscount Cave, Lord Moulton and Mr. Ameer Ali.

When we have a series of decisions of the Board from *Sartaj Kuari* downwards, it would be lamentable that we should go behind the decisions to examine the reasons. At present the impartible Raj has all the incidents of separate property, and the rule of inheritance should apply: in the first place, any particular custom of the family: failing that, the ordinary law. Respondent here has not proved any particular custom of lineal primogeniture, and by the ordinary law of inheritance appellants have prior rights.

#### JUDGMENT.

LORD DUNEDIN.—The question arises as to the succession to the Zemindary of Agori Barhar. The estate is of great value, and the question raised is one of wide importance.

The estate fell vacant by the death of Rani Kunwari, the widow of the last male holder, Raja Kesho Saran Shab. She died in 1913, having possessed the estate since the death of her husband in 1871, but it was conceded that her possession was not due to any title arising out of separation of self-acquisition.

This couple left no children, and to trace the succession you have to go up for five generations to find an ancestor common to Raja Kesho Saran Shab, the last male holder, and the two claimants who are adversaries in the appeal. This common ancestor, Raja Sudist Narain Shab, had three sons, from the eldest of whom Raja Kesho Saran was descended. There is no one left in this line.

The descendants of the second son are also extinct.

The plaintiff is the great-great-great-grandson of the third son. The defendants are his uncles, being younger brothers of his father. It will thus be seen that the plaintiff is the direct senior. A lineal descendant of the common ancestor, the person who, by the law of primogeniture as applied in England, would succeed. But the uncles are one degree nearer to the common ancestor than he is. The question is, which is entitled to succeed, the plaintiff or the uncles defendants jointly? The uncles on the death of the widow managed to seize the property, which accounts for their being defendants in the suit.

The family in question was an ancient family, holding sway as independent Rajahs. They were dispossessed by a neighbouring Rajah in the eighteenth century, but having helped the English, they were re-instated by Warren Hastings. Their Lordships are satisfied that the re-instatement, which was finally carried out at a subsequent period, restored the family possessions to what they had always been in ancient times, viz., an impartible Raj or Zemindary, and that the Zemindary now is ancestral property and not self-acquired. They do not think it necessary to add anything to what was said by the Subordinate Judge and by the Court of Appeal in arriving at these conclusions.

Now, if the property now in question were not an impartible Zemindary, the question would be easy of solution. It has admittedly to be determined in accordance with the Mitakshara Law. It would all depend on whether the property in question were held joint or not. And both the Courts below have held that this family still exists as a joint family, and that there has been nothing equivalent to partition—with which finding their Lordships agree. The whole point, therefore, turns on the fact that this is an impartible Zemindary, and it is necessary to examine the decisions which deal with them, and are very numerous. They will be taken in their chronological order.

The first case is the *Shilagunga* case (10) decided in 183, judgment delivered by

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ord Justice Turner. In that case the contest was between the representatives of a widow and those of nephews of the last holder, named Gowery Vallabha Taver. The Zemindary in question was admitted to be impartible. The claims in the case were stated by Lord Justice Turner as follows:—

"(1) Were Gowery Vallabha Taver and his brother Oja Taver (the father of the nephews) undivided in estate, or had a partition taken place between them?

"(2) If they were undivided, was the Zemindary the self-acquired and separate property of Gowery Vallabha Taver? and if so,

"(3) what is the course of succession according to the Hindu Law of the South of India, of such an acquisition where the family is in other respects an undivided family?"

They answered the first question by saying that the estate was undivided.

They answered the second question in the affirmative.

That being so, they held that the widow was entitled to succeed.

In the course of the judgment, the following quotation is to be noted (p. 528):—

"The Zemindary is admitted to be in the nature of a principality—impartible and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may...have been made, the rule of succession...is now admitted to be that of the general Hindu Law prevalent in that part of India (i. e., the Mitakshara), with such qualifications only as flow from the impartible character of the subject. Hence if the Zemindar, at the time of his death and his nephews were members of an undivided Hindu family, and the Zemindary, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the Zemindar at the time of his death was separate in estate from his brother's family, the Zemindary ought to have passed to one of his widows, and, failing his widows, to a daughter or descendant of a daughter preferably to his nephews."

It will be noted that the actual judgment went on the ground of its being self-acquired property, but the passages above quoted certainly lay down that, so long as a Zemindary was family property, although impartible, the selection of the next holder would be determined by taking the senior member judged by survivorship.

The *Tipperah* case (2). This was a contest between two claimants for the Raj of Tipperah. It was held that there was a custom of allowing each Rajah to appoint his successor, and one of the claimants, being held to be duly appointed, was preferred. But in discussing what would happen if that appointment was not made out, with a view to determining the conflicting claims of the full and the half blood, Lord Chelmsford says as follows (page 540, bottom). After saying that the presumption in any Hindu family is for joint property, he goes on:—

"Still, when a Raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law by judicial construction a fiction involving also a contradiction to call this separate ownership, though coming by inheritance, at once sole and joint ownership, and so to constitute a joint ownership without the common incidents of co-parcenership. The truth is the title to the Throne and the Royal Lands is as in this case one and the same title; survivorship cannot obtain in such a possession from its very nature, and there can be no community of interest; for claims to an estate in lands and to rights in others over it, as to maintenance, for instance, are distinct and inconsistent claims. As there can be no such survivorship, title by survivorship, where it varies from the ordinary title of heirship, cannot, in the absence of custom, furnish the rule to ascertain the heir to a property which is solely owned and enjoyed and which passes by inheritance to a sole heir."

He then goes on to cite the *Shivagunga* case (10) with approval as to what it says about the law of inheritance being religion, duty, and superior efficacy of sacrifice; but he seems not to have noticed that the pronouncement quoted above is in



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the teeth of what was said in the *Shivagunga* case (10), and being in general terms might be so interpreted. The fact is, though curiously it seems to have escaped notice on many occasions, that the *Tipperah* case (2) was under the Dayabhaga Law, not the Mitakshara. The Dayabhaga differs from the Mitakshara in several particulars, and there is no succession by survivorship.

*Raja Suraneni Venkata Gopala Narasimha Row Bahadur v. Rajah Suraneni Lakshmi Venkama Row* (13). The Zamindari in this case was held to be partible, so that the decision does not affect the question, but Sir J. Colville comments upon a misapprehension of the *Shivagunga* case (10):—

"The *Shivagunga* case (10) was this: The family was shown to be undivided, but the impartible Zamindari was shown conclusively to have been the separate acquisition of the person whose succession was the subject of dispute. The ruling of this Court was that in that case the Zamindari should follow the course of succession as to separate property, although the family was undivided; but if that Zamindari had been shown to have been an ancestral Zamindari, as in this case, the judgment of the Board would, no doubt, have been the other way. Their Lordships think it necessary to make this observation in order to avoid future misconception as to what was decided here in the *Shivagunga* case (10)."

That case, therefore, followed the diota in *Shivagunga* case (10) as against the diota in the *Tipperah* case (2).

*Stree Rajah Yanumula Venkayimh v. Stree Rajah Yanumula Boochia Vankontora* (11). In this case the decision does not touch the question, but again Sir J. Colville comments on the *Shivagunga* case (10) and repeats what he said in the former case that the judgment would have been the other way if the property had not been self-acquired. He adds, at p. 333:—

"It is, therefore, clear that the mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession of separate estate. And their Lordships apprehend that if they were to hold that it did so they would affect the titles to many estates held and enjoyed as impartible in different parts of India."

*Maharani Hiranath Koer v. Ram Narayan Singh* (14). In this case Sir R. Couch, O. J.,

in the Court of Appeal, points out, at p. 324, the conflict between the *Shivagunga* (10) and *Tipperah* cases (2) and, quoting the last-mentioned case of *Rajah Suraneni Venkata Gopala Narasimha Rao Bahadur v. Rajah Suraneni Lakshmi Venkama Row* (13) follows it and *Shivagunga* case (10) in preference to the *Tipperah* case (2).

*Sivagnana Tevar v. Periasami* (15). The Zamindari was held to be self acquired, and the decision is, therefore, not in point; but, speaking of an estate that was ancestral, Sir J. Colville says (p. 70, middle):—

"He would, therefore, necessarily be joint in that estate, so far as was consistent with its impartible character, with his two younger brothers, the latter taking such rights and interests in respect of maintenance and possible rights of succession as belong to the junior members of a joint Hindu family in the case of a Raj or other impartible estate descendible to a single heir."

*Doorga Persad Singh v. Doorga Konwari* (16). The decision here turned upon *res judicata*. But in the course of his judgment Sir Barnes Peacock said (p. 159, bottom):—

"The impartibility of the property does not destroy its nature as joint family property or render it the separate estate of the last holder, so as to destroy the right of another member of the joint family to succeed to it upon his death, in preference to those who would be his heirs if the property were separate."

And he bases this pronouncement upon the *Shivagunga* (10) and *Periasami* cases (15).

*Naraganti Achammegar v. Venkatachalapati* (17). This case decided that an impartible Palaiyagam, in the event of death, passes by survivorship. At page 266 the law is thus stated:—

"Where property is held in co-parcenary by a joint Hindu family, there are ordinarily three rights vested in co-parceners—the right of joint enjoyment, the right to call for partition, and the right of survivorship. Where impartible property is the subject of such ownership, the right of joint enjoyment, and the right of partition as the right of an undivided co-parcener, are, from the nature of the property, incapable of existence. But there being nothing in the nature of the property inconsistent with the right of survivorship, it may be presumed that right remains."

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There follows more to the same effect, and attention is called to the incompatibility of the *Shivagunga* (10) and *Tipperah* cases (2) and *Shivagunga* case (10) is followed.

This is the first decision precisely in point. It is also to be noted, because it is the case quoted with approval by Lord Macnaghten in 32 L. A. as will be subsequently mentioned.

*Raja Rup Singh v. Rani Baisni* (4). This was a case between a widow and the nearest male heir. This decision is exactly what it has been said above, the *Shivagunga* case (10) would have been if the property had not been self-acquired. Here it was ancestral and the male was preferred.

Sir Barnes Peacock, delivering a judgment by a Court of which Lord Blackburn was a member, approved (page 154) of Sir R. Couch's judgment in *Maharani Hiranath v. Ram Narayan Singh* (14) above cited.

Up to this point, with the single exception of the *Tipperah* case (2), which, as stated, was not under Mitakshara Law the law is all one way and seems to affirm these propositions:—

(1) The fact that a Raj is impartible does not make it separate or self-acquired property.

(2) A Raj, though impartible, may in fact be self-acquired or it may be family property of a joint undivided family.

(3) If it is the latter, succession will be regulated according to the rule which obtains in an undivided joint family, so far as the selection of the person entitled to succeed is concerned, i.e., the person will be designated by survivorship, although then, according to the custom of impartibility, he will hold the Raj without the others sharing it.

There now comes a case which introduces a different line of thought.

*Sartaj Kuari v. Deoraj Kuari* (17). In this case a deed of gift had been made of thirteen villages of the Rajah to his younger and, it may be supposed, favourite Rani. The suit was raised at the instance of the older Rani as guardian of her son, to set aside the deed. The Zamindari was impartible, and the case, therefore, raised the point as to whether the holder of an impartible

Raj could alienate when there are no purposes of necessity.

The High Court of the North-Western Provinces, affirming the judgment of the Subordinate Judge, held that he could not.

They cited the cases above quoted and drew the deduction that, inasmuch as the right of single enjoyment was not incompatible with a restriction on alienation, and as such restriction was part of the general law of the joint family, that result followed. In particular, they said:—

"It must be conceded that the complete rights of ordinary co-parcenership in the other members of the family, to the extent of joint enjoyment and the capacity to demand partition, are merged in, or perhaps, to use a more correct term, subordinated to the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership."

The Board reversed, the judgment being delivered by Sir R. Couch. The point of the judgment is that the title to prevent alienation rests upon the present co-ownership of the person who wishes to restrain.

"The property in the paternal or ancestral estate acquired by birth under the Mitakshara Law is, in their Lordships' opinion, so connected with the right to a partition that it does not exist where there is no right to it.....By the custom or usage, the eldest son succeeds to the whole estate on the death of the father, as he would if the property were held in severalty. It is difficult to reconcile this mode of succession with the rights of a joint family, and to hold that there is a joint ownership which is a restraint upon alienation. It is not so difficult where the holder of the estate has no son, and it is necessary to decide who is to succeed."

It will now be best to abandon, for the moment, the chronological order of all cases and to trace the developments directly attributable to this judgment.

*Rama Krishna Rao v. Court of Wards* [The First *Tiltpur* case] (21). This case decided two points:—

(1) That the case of *Sartaj Kuari v. Deoraj Kuari* (17) which was a case of

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direct *inter vivos* gift, covered by analogy the case of alienation by Will.

(2) That the law as laid down in *Sartaj Kuari v. Deoraj Kuari* (18) which was a case from the North-Western Provinces, also applied in Madras, notwithstanding the older Madras decisions, Madras being under the Mitakshara Law.

No general remarks are made which need be quoted. The Zamindari in question was the Zamindari of Pittapur.

*Gangadhara Rama Rao v. Rajah of Pittapur* [The Second Pittapur case] (1). This was a suit for maintenance. It was sued by the son of the adopted son of the Rajah, who had left the whole Zamindari by Will to a son born after the adoption of the plaintiff's father. The plaintiff denied that the defendant was in truth a son, but said he was a supposititious child.

Accordingly, on his own theory, he was preferring a claim for maintenance against property in the hands of a third party. The Board held that such a claim could only be based on the ground of co-parcenary and that as by the *Sartaj Kuari's* case (18) co-parcenary was decided not to exist in an impartible Raj, the claim, not being based on relationship, must fail.

The matter is tersely put by Sankaran Nair, J., in the Court of Appeal:—

"The plaintiff does not advance any claim based on relationship. He refuses to admit any relationship.....As there was no community of interest, the property is not burdened with his claim in the hands of a donee."

It is upon these two cases that the appellants in this case base their argument.

The appellants' Counsel argues that the selection of his clients by the rules of ordinary succession to self-acquired, or non-ancestral property is the logical and inevitable conclusion to be reached from the decision in the *Sartaj Kuari's* case (18) that in an impartible Raj no co-parcenary exists—a decision which he says was logically extended to settle the question of maintenance in The Second Pittapur case (1), and should be equally logically extended to succession.

Now, the first observation that must be made is that Sir R. Couch in *Sartaj Kuari's* case (18) did not intend that his judgment should have any such effect. This is quite clear from the latter part

of it. All the older cases, including his own judgment in the case in 9 Bengal Law Reports, had been quoted. How does he deal with the cases? He says:—

"The Judges of the High Court have quoted in support of their view passages from several judgments of this Committee. In all of them the question was as to the succession to the property on the death of the Rajah or Zamindar, and it was held that, for the purpose of determining who was entitled to succeed, the estate must be considered as the joint property of the family."

And he then goes on with the discussion, on the assumption that the cases have thereby been distinguished so that nothing now being done could overrule them.

The matter, however, does not rest here. For, after the decision in the *Sartaj Kuari's* case (18), other succession cases did arise which shall now be quoted chronologically—remembering that the date of the *Sartaj Kuari's* case (18) is 1888.

*Jogendro Bhupati v. Nityanand Man Sing* (22). This was a competition between a legitimate and an illegitimate son, but in the beginning of the judgment (*Sartaj Kuari's* case (18) having been cited *inter alias*), Sir R. Couch says (p. 131):—

"Now, it may be well first to dispose of a point arising out of the fact that this is an impartible Raj, which it is admitted to be. According to the decision in the *Shivagunga* case (10) which, as their Lordships understand, is not now disputed, the fact of the Raj being impartible does not affect the rule of succession. In considering who is to succeed on the death of the Rajah, the rules which govern the succession to a partible estate are to be looked at, and, therefore, the question in the case is, what would be the right of succession supposing instead of being an impartible estate it were a partible one?"

This passage is absolutely conclusive as to Sir R. Couch's view. The other parties to the judgment were Lord Watson and Sir Barnes Peacock.

(22) 17 I. A. 128 at p. 131; 18 C. 151 (P. C.); 5 Ind. P. C. J. 596; 9 Ind. Dec. (N. S.) 101.



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*Sri Raja Lakshmi Devi Garu v. Sri Raja Surya Narayana Dhatrazu Bahadur Garu* (23). The question was as to whether partition had in fact taken place. But Lord Davey said:—

"It will, however, be found that as between the appellant and the respondent the question whether the Zemindary is partible or not is of no importance. Even if impartible, it may still be part of the common family property and descendible as such...The real question, therefore, is whether it has ceased to be part of the joint property of the family of first Zemindar."

*Ram Nundun Singh v. Janki Koor* (9). This was a case as to the Bettiah Raj—the same Raj as was the subject of a recent decision to be afterwards referred to.

The actual decision does not touch the point, because it rests on a finding that the Raj was in the hands of an heir who had been reinstated by grant from the East India Company to a self-acquired property.

But a question incidentally arose as to what was the state of affairs in the old family before the forfeiture, and Lord Davey in dealing with this says:—

"It appears that the Raja Kishin Singh was joint in estate with his brother, and, therefore, was entitled to succeed him in family property by survivorship."

*Kuchi Kaliyana v. Rengappa* [*The Udayar-palayan case*] (5). The leading question was whether the estate was partible or impartible. It was decided to be impartible. Lord Macnaghten says:

"There were two other questions raised in the appeals which may be mentioned for the purpose of putting them aside. It was objected by the appellant in the first five appeals that, assuming the estate to be impartible, still he was entitled as the preferable heir....The first of these two questions is concluded by authority. It is settled in accordance with a ruling of this Board that when impartible property passes by survivorship from one line to another, it devolves, not on the co-parcener nearest in blood, but on the nearest co-parcener of the senior line—a position held by the principal respondent."

And then he quotes the case in 4 Madras L. R. It was said that he here made a mistake—the case in 4 M. L. R. not being a decision of the Board. But, although if the sentence be read in one way that may be so, he was even then right in fact, for in the case of *Muttuvaduganadha Tevar v. Periasami Tevar* (12), Lord Hobhouse, delivering judgment in the Privy Council, had said (p. 137) that their Lordships agreed "on both points" with the presiding Judge of the High Court. Now, one of the points was the question of deciding succession in an impartible estate, and as to that the presiding Judge has approved (p. 132) of the decision in *Narayanti Achammagaru v. Venkatachalapati* (17).

Lastly, *Parbati Kunwar v. Ohandarajal Kunwar* (3), where Lord Collins (p. 136) quotes with approval a judgment of the Appeal Court of Madras:—

"The first principle is that a rule of decision in regard to succession to impartible property is to be found in the Mitakshara Law applicable to partible property, subject to such modifications as naturally flow from the character of the property as an impartible estate. The second principle is, that the only modification which impartibility suggests in regard to the right of succession is the existence of a special rule for the selection of a single heir when there are several heirs of the same class who would be entitled to succeed to the property if it were partible under the general Hindu Law. . . . We have, first, to ascertain the class...and we have, next, to select the single heir, applying the special rule."

And he then went on to cite Sir R. Couch in the passage already cited in *Muttuvaduganadha Tevar v. Periasami Tevar* (12).

It will be apparent from this long series of authorities that there are, under the Mitakshara Law, only two possible lines of devolution and that the only test to be applied is, Was there community or was there separation? The argument of the appellants would involve there being two tests, (1) Was the property joint or separate? and (2) If it was joint, was it an impartible Raj? If this were right, there would have been no enquiry in the

(23) 24 I. A. 118; 20 M. 256 (P. C.); 7 Sar. P. C. J. 185; 7 Ind. Dec. (N. S.) 182.

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*Shivagunga* case (10) whether the Raj was self-acquired property or not. It would have been enough to take the admission that it was an impartible Raj. The appellants' argument, therefore, is entirely based on what was said in the case of *Sartaj Kuari v. Deoraj Kuari* (18) and the second *Pittapur* case (1) which followed it.

Now, if the whole subject were open, it would probably have been better if the words "co-parcenary" and "co-parceners" had not been used. It is one of the inevitable inconveniences of translating an eastern language into the technical law terms of a foreign system of the West. It is quite true that in Colebrooke's Translation of the *Mitakshara*, the term co-parcener appears, e. g., sections 4 (1) and 9 (1), but assuredly the thing called co-parcenary is not identical with co-parcenary as understood in English law. A very simple instance will show this. Take the ordinary case of a member of a joint family under the *Mitakshara* law, and what happens if he dies. His right accretes to the other members by survivorship, but if a co-parcener dies his or her right does not accrete to the other co-parceners, but goes to his or her own heirs. It is, therefore, necessary not to fasten the attention on the word "co-parcenary," but rather to enquire what actually was decided in the case of *Sartaj Kuari v. Deoraj Kuari* (18). Now what was decided was that in an impartible Raj there was no restriction on the power of alienation by the member of the family who was on the Gaddi and was in possession, in respect that there was no such right of co-ownership in the other members as to give them a title to prevent such alienation. The right of the other members that was being considered was a presently existing right. The chance which each member might have of a succession emerging in his favour was obviously outside the sphere of enquiry.

Turning next to The Second *Pittapur* case (1), it must be always remembered that the claim for maintenance as put forward was made, not against the head of the family of which the claimant was a member, but against the donee, who on the claimant's own allegation was a stranger to the family. It obviously could not, therefore, succeed unless it was of the nature of a real right. Now, it could only be of the nature of a

real right, no proceedings having taken place before the estate got into the hands of the donee, if the maker of the claim had before that event been a person who was in some way an actual co-owner of the estate and any observations which go to the question of maintenance apart from the question of real right may be treated as *obiter dicta*. The decision, therefore, was the logical outcome of the decision in the *Sartaj Kuari's* case (18), but again the question of succession was outside the scope of enquiry.

No doubt, it would have been possible to decide the case of *Sartaj Kuari v. Deoraj Kuari* (18) differently if the theory had been accepted that impartibility being a creature of custom though incompatible with the right of partition, yet left the general law of the inalienability by the head of the family for other than necessary causes without the consent of the other members as it was. This is recognised by Sir R. Couch when, in delivering the judgment of the Board, he says:—

"The question of how far the general law of the *Mitakshara* is superseded and whether the right of the son to control the father is beyond the custom is one of some difficulty."

Even, however, if their Lordships thought the decision in *Sartaj Kuari's* case (18) wrong—an opinion which they do not pronounce—the case had stood too long to be now touched. But the judgment expressly affirmed the general proposition which had been laid down in the *Tipperah* case (2):—

"When a custom is found to exist it supersedes the general law, which however, still regulates all beyond the custom."

This is the key note of the position. The question of how to select the head of the family in a joint family is part of the general law. That the custom of impartibility does not touch it is shown by the long list of authorities above cited and there is, in their Lordships' view, no necessary logical deduction from the decision in *Sartaj Kuari* (18) and The Second *Pittapur* cases (1) which forces them to an opposite conclusion.

It is true that in a very recent and unreported case as to the succession to the

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Bettish Raj a different result was indicated. One of their Lordships was a party to that judgment, and their Lordships have consulted the other members of the Board who decided that case. Their Lordships are satisfied that in that case the appellant who was wrong on the merits, practically invited a decision upon the off-hand view that the *Sartij Kuari* (18) and The *Second Pittapur* cases (1) concluded the question, and this view was accepted without argument and without citation of the authorities. In these circumstances, their Lordships, while not doubting the soundness of the decision, do not hold themselves bound by the reasons given.

Their Lordships are, therefore, of opinion that, this Zemindary, being the ancestral property of the joint family, though impartible, the successor falls to be designated according to the ordinary rule of the Mitakshara Law and that the respondent, being the person who in a joint family would, being the eldest of the senior branch, be the head of the family, is the person designated in this impartible Raj to occupy the Gaddi. The decision appealed against was right. They will humbly advise His Majesty that the appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors for the Appellant:—Mr. Douglas Grant.

Solicitors for the Respondent:—Messrs. Barrow Rogers and Nevill.

## **OUDH JUDICIAL COMMISSIONER'S COURT.**

SECOND CIVIL APPEAL No. 405 OF 1918.  
July 2, 1920.

Present :—Mr. Daniels, A. J. C., and Mr. Wazir Hasan, A. J. C.

Mahant DURGA BHARTHI—PLAINTIFF—  
APPELLANT

*versus*

NAGESHWAR NATH—DEFENDANT—  
RESPONDENT.

*Hindu Law—Temple—Alienation by Mahant—  
Alienation, duty of—Necessity, proof of—Burden of proof.*

A mortgage of trust property by the Mahant of a Hindu shrine effected after the creditor had satisfied himself as to the existence and nature of valid necessity for the loan, is enforceable against the property mortgaged. [p. 544, col. 2.]

The creditor is not bound to show that the money was actually applied for the purpose for which it was borrowed. [p. 544, col. 2.]

Appeal against the decree of the District Judge, Gonda, dated the 3rd July 1918, confirming that of the Subordinate Judge, Gonda, dated the 30th April 1918.

The Hon'ble Mr. Gokaran Nath Misra, for the Appellant.

Mr. Salig Ram, for the Respondent.

**JUDGMENT.**—The facts of this case are in fact the same as those in First Civil Appeal No. 4 of 1918 which was argued on the same date, and we may refer to the judgment in that case for a fuller statement of facts than is given here. The suit was one brought by the plaintiff appellant, Durga Bharti, a Mahant, belonging to a celibate order having its shrine at Parela in Basti District, to set aside an alienation made by Dasrath Bharti, deceased, and for a declaration that a mortgage-decree passed in favour of the defendants for sale of the suit property is not binding on him. On the death of the previous Mahant Sheo Dayal Bharti, there was a dispute between Durga Bharti and Dasrath Bharti as to the succession. This dispute resulted in a compromise by which each party was awarded a share in the property, but it was agreed that neither party should choose a disciple to succeed him during the lifetime of the other and that, on the death of one of them, the survivor should be entitled to the whole and should have the right to appoint a successor. It was also agreed that each party should be liable for his own debts and that the share in possession of the other party should not be liable for them. The plaintiff's suit was dismissed by the Court of first instance and a compromise was entered into in connection with an appeal filed by Durga Bharti in this Court and was made a part of this Court's decree. The mortgage now in suit was made by Dasrath Bharti during the pendency of the appeal, and it was made, as the Courts below have found, in order to obtain funds to defend his title in appeal. One of the defences put forward to the present suit was that the properties in dispute were not trust properties at all, but



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were private properties of Dasrath Bharthi, which he had power to alienate. This issue has been found in favour of the appellant, but his suit has been dismissed on the ground that the loan was taken for a purpose for which Dasrath Bharthi as trustee was entitled to encumber the trust properties. The sole issue in this appeal is, whether this finding is correct.

The lower Courts have found that there was a valid necessity for borrowing the money, namely, the defence of Dasrath Bharthi's title as *Mahant* which was challenged in the appeal, and that the lender advanced money after satisfying himself as to the existence of the necessity. These are findings of facts which cannot be challenged in second appeal except on some legal ground. The appellant's contention is that the defendant was bound to show either that the money was actually applied for the purpose for which it was borrowed or that the lender made enquiries from third parties as to the existence of the necessity. The law, however, does not require this. The cases relied on by the appellant all relate to alienations made either by a Hindu widow or by the manager of a Hindu joint family. Assuming that the same principles are applicable to the case of a trustee, it has been laid down in clear terms by the Privy Council that the lender is not bound to see to the application of the money. In the words of the Privy Council itself: "It must be shown either that there was legal necessity for the alienation, or at least that the grantee was led on reasonable grounds to believe that there was" [*Amarnath Sah v. Achan Kuar* (1)]. Here the creditor has established both the existence of a valid necessity, and that, before advancing the money, he satisfied himself by enquiry from the debtor as to the nature of the necessity which existed. He has, therefore, sufficiently complied with the law.

The appellant has, however, advanced a second line of argument on this issue. He admits that, if Dasrath Bharthi's title had been attacked by an outsider, its defence was a legitimate charge on the trust property. He urges that the question here merely was whether Durga Bharthi or Dasrath Bharthi should

be trustee and that this was merely a private matter between the two men by which a trust was in no way affected. This argument we cannot accept. The ousting of a legal trustee by a person wrongfully claiming to be such is clearly an injury to the trust. The trustee is not only entitled but bound to defend such an action and is entitled in case of necessity to be reimbursed out of the trust property for the expenses incurred in doing so. The mortgage only affected the part of the share which fell into the possession of Dasrath Bharthi, and which was liable in the terms of the compromise for all debts incurred by him. The decision of the lower Appellate Court is, therefore, correct and we maintain it.

\* \* \* \* \*

The appeal and the cross-objections are both dismissed with costs.

*Appeal dismissed.*

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 351 of 1919.

August 20, 1920.

Present:—Mr. Hallifax, A. J. C.

INDAL BAPU—JUDGMENT DEBTOR—  
APPELLANT

versus

MOHAMMAD ALLI—DECREE-HOLDER—  
RESPONDENT.

*Central Provinces Land Alienation Act (II of 1916), s. 16 (1), scope and meaning of.*

The plain meaning of section 16 of the Central Provinces Land Alienation Act is that a sale shall not be held in execution of a decree or order if that decree or order is passed or made after a certain date, but that it can be held if the decree or order is prior to that date, whether the application for execution is prior or subsequent to that date. [p. 546, col. 2.]

The word "made" used in the section qualifies the words "decree or order" and not the word "execution." [p. 546, col. 2.]

Appeal against the decree of the District Judge, Bhandara, dated the 16th April 1919, in Civil Appeal No. 12 of 1919.

Meers. D. T. Mangalmurti and S. O. Dutt Choudhry, for the Appellant.

(1) 14 A. 420; 19 I. A. 196; 6 Sar. P. C. J. 197; 7 Ind. Dec. (N. S.) 637.

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Messrs. G. L. Subhedar and M. B. Kinkhede, for the Respondent.

**JUDGMENT.**—In this appeal we are concerned with the following portions of Central Provinces Act, II of 1916, the Land Alienation Act:—

"1. (1) This Act may be called the Central Provinces Land Alienation Act, 1916.

"(2) It shall extend only to such areas of the Central Provinces as the Chief Commissioner may, from time to time, notify in this behalf in the Gazette.

"(3) It shall come into force on such day as the Chief Commissioner may, by notification, direct."

"16 (1) No land belonging to a member of an aboriginal tribe shall be sold in execution of any decree or order of any Civil or Revenue Court made after the commencement of this Act, nor shall a receiver be appointed to manage such land under section 51 of the Civil Procedure Code, 1908."

The Chief Commissioner directed by notification that the Act should come into force on the 15th of April 1917 and on the 20th of April 1918 he further directed that its provisions should extend to the Gondia and Sakoli Tahsils of the Bhandara District, and that Raj Gonds, Gonds and Pardhans in those areas should be deemed members of aboriginal tribes.

The appellant here is a Raj Gond and a landholder residing in the Gondia Tahsil. The respondent obtained a money-decree against him on the 21st of March 1918. Application for execution of this decree by attachment and sale of his village of Nawatola was made on the 26th of August 1918, and the attachment was made and the case transferred to the Collector. During the proceedings it was pleaded on behalf of the judgment debtor that his village was not liable to sale because the decree was obtained after the Land Alienation Act came into force, that is to say, after the 15th of April 1917, when it came into force generally in the Central Provinces. This obviously impossible contention was apparently much pressed in the Court of the Subordinate Judge and in appeal in that of the District Judge, but was rejected in both Courts after a great deal of discussion. Its *reductio ad absurdum* is simple, for, if it were sound, section 16 (1) of

the Act would apply to the whole of the Central Provinces, without any notification of its extension to specified areas; in flat defiance of section 1 (2) quoted above.

In second appeal this contention is abandoned and an entirely new position is taken up. This is, that section 16 (1) prohibits the sale of land on an application for execution made after the Act comes into force, that is, that the word "made" qualifies the word "execution" and not the words "decree or order". To speak of the making of an application for execution as making an execution is, perhaps, not absolutely impossible, but I have certainly never met any instance of it and the learned Pleader for the appellant was unable to quote one. On the other hand, a decree is commonly said to be made, and an order still more commonly. The very plain meaning of the words of the section is that a sale shall not be held in execution of a decree or order if that decree or order is passed or made after a certain date, but that it can be held if the decree or order is prior to that date whether the application for execution is prior or subsequent to that date.

The learned Pleader for the appellant cited the rulings in *Koilash Ohunder Roy v. Jodu Nath Roy* (1) and *Deb Narain Dutt v. Narendra Krishna* (2) as supporting his contention by analogy. They refer respectively to section 148 (n) and section 170 of the Bengal Tenancy Act of 1885. The former took away the right to execute a decree for arrears of rent from an assignee of the decree which section 232 (now Order XXI, rule 16) of the Civil Procedure Code gave him. The section similarly repealed in regard to decrees for rent sections 271 to 283 (both inclusive), which are now Order XXI, rule 58 of the Civil Procedure Code, which gave a third party a right to have his claim to the tenancy investigated in the execution proceedings. In the former case, the assignment of the decree and, in the latter, the decree had been made before the Tenancy Act of 1885 came into force, but in both cases it was held that the provisions of the Act applied. In both cases the Court "applied the settled rule of construction ordinarily acted

(1) 14 C. 380; 7 Ind. Dec. (N. S.) 252.

(2) 16 C. 267 (F. B.); 8 Ind. Dec. (N. S.) 176.

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upon in the absence of any statutory rule inconsistent with it, and that rule is, that retrospective effect is not ordinarily given to an enactment so as to affect substantive rights, but that provisions affecting mere procedure are applied to pending proceedings." And, as was pointed out in *Ramakrishna Chetty v. Subraya Iyer* (3), vested rights which cannot be retrospectively affected by enactments are not confined to substantive rights but extend equally to remedial rights or rights of action. J. C., said in *Kala Tihari v. Narayan* (4): "As a general rule mere alterations in forms of procedure are retrospective in effect and apply to pending proceedings but where a change in procedure is complicated with a change of existing rights the rule could not, I think, be held to apply."

The appeal fails and is dismissed with costs.

*Appeal dismissed.*

(3) 18 Ind. Cas. 64; 38 M. 101; 24 M. L. J. 54; (1913) M. W. N. 803.

(4) 13 C. P. L. R. 143 at p. 144.

## CALCUTTA HIGH COURT.

### APPLICATION FOR REVIEW.

March 28, 1916.

*Present*:—Sir Lancelot Sanderson, Kt., Chief Justice, Justice Sir John Woodroffe, Kt., and Justice Sir Autosh Mookerjee, Kt.

NAGENDRA NATH SEN AND ANOTHER—  
PLAINTIFFS—APPELLANTS

*versus*

J. VAS, Esqr., I. C. S., DISTRICT  
MAGISTRATE AND CHAIRMAN,  
DISTRICT BOARD, KHULNA, AND OTHERS  
—DEFENDANT—RESPONDENTS.

*Election—Evidence, whether can be allowed to vary recorded voting paper showing election to be void—Number of votes recorded exceeding maximum, effect of.*

No evidence should be allowed to vary the recorded voting paper which, on the face of it, shows an election to be invalid and void.

The principle that when the number of votes recorded exceeds the maximum that can be given an election must be invalid and void, is a perfectly sound one, and one that cannot be controverted in the case of any elective body, especially when

there are no rules providing for any such contingencies.

Application of review from the following decision of Mr. Justice Holmwood and Mr. Justice Mullick, dated the 21st December 1915, in Appeal from Appellate Decree No. 127 of 1915, against the decision of the District Judge, Khulna, dated the 20th August 1915, reversing that of the Subordinate Judge, Khulna, dated the 12th July 1915.

Babus Jadu Nath Kanailal and Sasisekhor Bose, for the Appellants.

Mr. Bagram, Counsel and Babu Ram Charan Mitter, for the Magistrate and Commissioner.

Babus Mohendra Nath Roy and Dwijendra Nath Mookerjee, for the Respondents.

JUDGMENT.—We are of opinion that the learned Judge in the Court of Appeal below was perfectly justified in holding on the facts which we cannot go behind that the election was invalid and null and void, and that the Commissioner was justified in taking the action he did. We do not think that any evidence should have been allowed to vary the recorded voting paper which, on the face of it, shows the election to be invalid and void.

The principle that when the number of votes recorded exceeds the maximum that can be given the election must be invalid and void seems to us a perfectly sound one, and one that cannot be controverted in the case of any elective body, especially where there are no rules, as in this particular case, providing for any such contingencies. That being so, the appeal must be dismissed with separate costs to the two sets of respondents who have appeared. We assess the hearing fee at two gold mohurs for each set.

[An application was made to the Court for review of the foregoing judgment, and the Judges who had passed the judgment having ceased to be attached to the Court, the application came before Sir Lancelot Sanderson, Kt., C. J., and Justice Sir John Woodroffe, Kt., and Justice Sir Autosh Mookerjee, Kt., on 28th March 1916.]

JUDGMENT.—In this case we think that no rule ought to be granted, and that this application ought to be rejected. We think that the judgment of the Court below was right.

*Application rejected.*



SITLA BAKHSH SINGH v. SITAL SINGH.

PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

January 24, 1921.

*Present* :— Lord Buckmaster, Lord Phillimore, Mr. Ameer Ali and Sir Lawrence Jenkins.

Thakur SITLA BAKHSH SINGH—  
APPELLANT

*versus*

Thakur SITAL SINGH AND OTHERS—  
RESPONDENTS.

*Oudh Estates Act (I of 1869), ss. 8, 14, 15, 22—*  
"Person who would have succeeded according to the provisions of the Act," meaning of—Bequest to anyone but the immediate next heir, effect of—Limitations in cl. 11 of s. 22, effect of.

Under the Oudh Estates Act of 1869, a bequest to anyone other than the immediate next heir breaks the line of succession, ousts the special limitations provided by the Statute, and makes the property subject to the ordinary law of succession. [p. 551, col. 1.]

When section 22 of the Act applies, clause 11 provides special limitations, and does not simply remit the succession to the unqualified ordinary law of the religion and tribe of the last *taluqdar*: and in cases coming under List No. 3 (specified in section 8) the rule of primogeniture will still operate. [p. 551, col. 2.]

Consolidated appeals from a decree of the Court of the Judicial Commissioner of Oudh, dated September 15, 1916, reported as 40 Ind. Cas. 469, varying a decree of the Subordinate Judge, Bara Banki.

**FACTS.**—The question for determination in this appeal was, whether the succession to the estate concerned was governed by the rule of primogeniture or by the ordinary provisions of Hindu Law.

The facts are sufficiently stated in their Lordships' judgment. The Trial Judge held that succession was governed by the rule of lineal primogeniture and that the present appellant was entitled to the whole estate: but the Judicial Commissioners (Kanhaiya Lal and Kendall) modified this by finding that the ordinary Hindu Law applied, and that respondent, as equidistant reversioner with appellant, was entitled to one-half of the estate.

Mr. De Gruyther, K. C., (with him Mr. Hyam, for Mr. Dube), for the Appellant, submitted that the rule of primogeniture was still applicable. He narrated the history of the Act and referred to Sykes' Compendium of Oudh Taluqdari Law, pages 385, 386, 391. The

actual *sanad* was not forthcoming, but both parties were agreed that it was in the form printed at page 386 of Sykes. He contended that Dilraj Kunwar did not take under the Will, but under the Act; that the bequest to her was contingent on another which lapsed and that there was an intestacy, and that she only had a woman's estate of inheritance. If, however, it were held that she took under the bequest by Sher Bahadur Singh, he submitted that section 14 of the Act applied as she was a person who would have succeeded under the Act.

Mr. Dunne, K. C., for the Respondents.—This is an entirely new case, never before raised. She comes under section 15. In the Judicial Commissioner's Court it was admitted she was not a person who would have succeeded to the estate under the Act.

Any admission to that effect was an admission by a Pleader on a matter of law, and is not binding.

The Amending Act of 1910 operates retrospectively. Section 14 of that Act remodels section 22 of the old Act. Whoever succeeds now comes under the new Act. A bequest to a person in the line of succession does not take the case out of the Act. Dilraj Kunwar was such a person, vide sub-sections (9) and (10) of section 14 of the Amending Act.

If Dilraj Kunwar be held to take an absolute estate under the Will, the succession is regulated by clause 11 of section 22: it is to be according to the ordinary law to which persons of the religion and tribe of the *taluqdar* are subject. The meaning of the phrase "ordinary law" was discussed by the Board in *Brij Indar Bahadur Singh v. Ramee Janki Koer* (1). Another case relating to the same *talug* is *Jagdish Bahadur v. Sheo Pertab Singh* (2), which lays down that the estate may descend as an impartible estate even though the ordinary law applies. The ordinary law here includes the rule of primogeniture. Counsel referred to the following additional cases :—

(1) 5 I. A. 1 at p. 14; 1 O. L. R. 318 (P. C.); 3 Sar. P. O. J. 768; Bald. 148; Rafique & Jackson's P. O. No. 48; 3 Suth. P. C. J. 474.

(2) 28 I. A. 100; 5 C. W. N. 602 (P. C.); 23 A. 869; 11 M. L. J. 178; 3 Bom. L. R. 288; 8 Sar. P. O. J. 19.

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*Achal Ram v. Udai Partab Addiya Datt Singh* (3), *Diwan Ran Bijai Bahadur Singh v. Rai Jagatpal Singh* (4), *Bhai Narindar Bahadur Singh v. Achal Ram* (5), *Thakurain Balraj Kunwar v. Rai Jagatpal Singh* (6), *Debi Bakhsh Singh v. Ohandrabhan Singh* (7), *Murtaza Husain Khan v. Mohammad Yasin Ali Khan* (8).

Mr. Dunne, K. O. (with him Mr. Amien Jackson), for the Respondents.—It is now alleged that Dilraj Kunwar came in on an intestacy under the "ordinary law" by virtue of section 22 (11). But she could not have come in if there were a law of lineal primogeniture at all. I contend that she came in under the Will, that section 15 of the Act applies, and that, therefore, the succession is the same as though she had bought and is governed by the ordinary Hindu Law. Their case in the Trial Court was that the mother came in under the Will; but was swept back into the Act by the Amending Act.

[LORD PHILLIMORE.—The succession opened out when she died in 1906—before the Amending Act was passed].

The cases to which reference has been made as to the construction of section 22 (11) are List No. 2 cases. Under that list you have a class with a custom of impartibility: but in List No. 3 this is not so: it depends upon the *sanad*.

The whole meaning of 5 Indian Appeals 1 [*Brij Indar Bahadur Singh v. Ranee Janki Koer* (1)] is that the *sanad* is superseded by the

(3) 11 I. A. 51; 10 O. 511 (P. C.); 8 Ind. Jur. 272; 4 Sar. P. O. J. 107; Rafique and Jackson's P. O. No. 77; 5 Ind. Dec. (N. S.) 342.

(4) 17 I. A. 173; 18 C. 111 (P. C.); 5 Sar. P. C. J. 590; Rafique and Jackson's P. O. No. 120; 9 Ind. Dec. (N. S.) 74.

(5) 20 I. A. 77; 20 C. 649 (P. C.); 6 Sar. P. C. J. 810; 17 Ind. Jur. 319; Rafique and Jackson's P. O. No. 128; 10 Ind. Dec. (N. S.) 438.

(6) 81 I. A. 132; 7 O. C. 243; 26 A. 333; 8 O. W. N. 699 (P. C.); 1 A. L. J. 334; 11 Bom. L. R. 516; 8 Sar. P. O. J. 639.

(7) 7 Ind. Cas. 724; 37 I. A. 168; 14 C. W. N. 1010; 12 C. L. J. 303; 8 M. L. T. 273; 7 A. L. J. 1122; 12 Bom. L. R. 1015; 13 O. C. 316; 20 M. L. J. 917; 32 A. 599; (1910) M. W. N. 643 (P. C.).

(8) 36 Ind. Cas. 299; 35 A. 552; 20 M. L. T. 262; 14 A. L. J. 1033; 18 Bom. L. R. 884; 31 M. L. J. 604; (1916) 2 M. W. N. 555; 25 O. L. J. 1; 19 O. C. 290; 1 P. L. W. 122; 43 I. A. 269; 21 O. W. N. 410; 4 O. L. J. 8; 4 L. W. 538 (P. C.).

Act. If the law to be applied is the ordinary law *plus* the *sanad*, I say Dilraj Kunwar fell under section 15 of the Act: if it is the ordinary law without the *sanad*, we both take under the Mitakshara.

Mr. De Gruyther, K. O., replied.—My case is that the mother falls within section 14 of the Act and the succession to her is governed by section 22 (11). The object of Government throughout has been to prevent partition, and the *sanads* and Acts should be construed favourably to that object. The estate is impartible and, as between the rival claimants, we are entitled to succeed.

## JUDGMENT.

LORD PHILLIMORE.—This appeal turns upon the construction of the Oudh Estates Act, 1 of 1869, an Act the construction of which has been frequently before this Board. It arises in the following circumstances:—

One Sher Bahadur Singh was the holder of a *taluka* entered in the 1st and 3rd Lists enumerated in section 8 of that Act. He died on the 10th June 1899 having made a Will, dated the 1st December 1895. The Will contained a bequest of the *taluka* in favour of his wife, who, however, died in his lifetime, then of his mother, Dilraj Kunwar and then of his daughter.

There might be points of difficulty as to the construction and efficacy of the bequests, but their Lordships agree with the Courts in India that, in the events which actually happened, Dilraj Kunwar obtained an absolute estate under the terms of her son's Will. She entered into possession and died on the 12th July 1906. Thereupon, the present disputes arose.

The appellant claimed to be the proper successor under the rule of lineal primogeniture, as sixth in descent from the common ancestor. His original opponent, Kirat Singh, asserted that the appellant was seventh in descent, while he was sixth, and also disputed the seniority of the appellant's line.

Both parties set forth their claims in suits against Sher Bahadur Singh's daughter, whom they treated as a trespasser. It was determined early in the proceedings that the daughter had no title, and that the dispute really was between the appellant and Kirat Singh; that Kirat Singh was wrong in his contention that the appellant was seventh in descent; that both parties were in the same

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degree; and that the appellant was in the senior line, and would be entitled if the rule of male lineal primogeniture applied.

During the course of the litigation, Kirat Singh died, and thereupon his brothers, Sital Singh and Debi Singh, appeared as respondents. The Subordinate Judge decided in favour of the appellant against Sital Singh and Debi Singh in their capacity of representatives of their dead brother.

Sital Singh and Debi Singh appealed to the Court of the Judicial Commissioner, and put forward a case in their own right, contending that the estate had, by virtue of section 15 of the Oudh Estates Act, been taken out of the line of succession established by the Act, and that, consequently, the ordinary rule of inheritance according to the Mitakshara Law applied, and that they as equal in degree with the appellant were entitled to share with him in the inheritance. The Court of the Judicial Commissioner allowed this amended claim to be preferred, and decided in favour of the two brothers of Kirat Singh that the estate passed according to the ordinary Mitakshara Law, and that, therefore, the appellant was only entitled to half the property, the other half going to the two brothers. Debi Singh has sold his share to his brother, who is the contesting respondent in this appeal.

If, therefore, the rule of male lineal primogeniture applies, the appellant is entitled to the whole property. On the other hand, if the inheritance is to follow the rule of the Mitakshara, the contesting respondent in his own right and that of his brothers is, as the Court of the Judicial Commissioner decided, entitled to share with the appellant, each taking half.

The material provisions of the Oudh Estates Act are the following: Section 8 provides for the formation of six lists, of which the first three are important for the consideration of this case. They are as follows:—

First—A list of all persons who are to be considered *talugdars* within the meaning of this Act.

Second.—A list of the *talugdars* whose estates, according to the custom of the family of and before the thirteenth day of February, 1856, ordinarily devolved upon a single heir.

Third.—A list of the *talugdars*, not included in the second of such lists, to whom

*sanads* or grants have been or may be given or made by the British Government up to the date fixed for the closing of such lists, declaring that the succession to the estates comprised in such *sanads* or grants shall thereafter be regulated by the rule of primogeniture.

This *taluga* comes into the first and third lists, while most of the decisions to which reference has been made in the argument have regard to *talugas* coming into the first and second lists.

Section 22 provides for the succession to all intestate *talugdars* whose names shall be inserted in the second or third lists. There are ten clauses providing for descent to named heirs, and then comes the eleventh clause, which is as follows:—

“Or in default of any such descendant, then to such persons as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of such *talugdar* or grantee, heir or legatee are subject.”

Every *talugdar* is, however, competent to dispose of his property under certain conditions, either by deed or Will; and if any such deed or bequest breaks the line of succession the *taluga* ceases to be regulated by the special provisions of the Act and becomes subject to the ordinary laws of inheritance. If, however, the transfer or bequest is to the next heir in succession, such transfer or bequest does not break the limitations. Under the Amending Act, Act III of 1910, it is not necessary, in order to save the limitations, that the transfer or bequest should be to the immediate next heir; but this Act having been passed since the succession in dispute opened, has no bearing upon the present case, notwithstanding that in certain respects it is made retrospective. The sections in the original Act which provide for the alternative contingency are in terms as follows:—

“XIV. If . . . any *talugdar* or grantee, or his heir or legatee, shall hereafter transfer or bequeath the whole or any portion of his estate . . . to a person who would have succeeded according to the provisions of this Act to the estate or a portion thereof if the transferor or testator had died without having made the transfer or intestate, the transferee or legatee and his heirs and legatees shall have the same rights and powers in regard



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to the property to which he or they may have become entitled under or by virtue of such transfer or bequest, and shall hold the same subject to the same conditions and to the same rules of succession as the transferor or testator.

"XV. If . . . any *taluqdar* or grantee, or his heir or legatee shall hereafter transfer or bequeath to any person not being a *taluqdar* or grantee the whole or any portion of his estate, and such person would not have succeeded according to the provisions of this Act to the estate, or to a portion thereof, if the transferor or testator had died without having made the transfer and intestate, the transfer of and succession to the property so transferred or bequeathed shall be regulated by the rules which would have governed the transfer of and succession to such property if the transferee or legatee had bought the same from a person not being a *taluqdar* or grantee."

The appellant says that he is the successor to the whole *taluqa*, because the principle of male lineal primogeniture applies, even though recourse is had, as it must be in this case, to clause 11 of section 22, and because, according to his contention, the bequest to Dilraj Kunwar was not one which falls under section 15 and breaks the limitations, but a bequest to the next heir under section 14.

The respondent has two grounds of defence. *First*, he says, that when clause 11 is reached special limitations disappear, and the succession under this clause is according to the ordinary law and no longer according to the law of primogeniture. *Secondly*, he says, that if clause 11 still provides special limitations, then Dilraj Kunwar was not next heir to her son, and the bequest to her was not a bequest to the next heir, but broke the line of succession, and, therefore, made the property thenceforward subject to the ordinary law of succession, that is, according to the Mitakshara.

Their Lordships will proceed to consider together both grounds of defence adopted by the respondent. If clause 11 should be treated as providing special limitations, then, though the descent is to be according to the ordinary law of the religion and tribe, yet this ordinary law operates only so far as it is not inconsistent with the overriding consideration that the succession is to be govern-

ed by the rule of primogeniture, which implies also impartibility.

The cases upon the construction of the Oudh Estates Act which have been brought to their Lordships' notice are the following:—

*Brij Indar Bahadur Singh v. Ranee Janki Koer* (1), decided in 1877, is a case where the *taluqa* was entered in the second list, but where there had been a *sanad* of earlier date than the Act of 1869 granted to a widow lady, by which the estate was to descend to the nearest male heir according to the rule of primogeniture. Their Lordships held that the *taluqa* having been placed in List No. 2, which merely requires that the property should devolve upon a single heir, and the original grantee being a woman, the Act superseded the *sanad*; and the estate descended to her daughter as heir according to the Mitakshara Law, no special custom being proved.

Similarly, in *Achal Ram v. Udai Partab Addiya Dat Singh* (3) decided in 1883, also a case of a *taluqa* in the second list, their Lordships held that the estate did not descend according to the rules of primogeniture, and that the plaintiff, who did not prove that he was nearer in degree than some other relations, had not made out his title.

*Diwan Ram Bijai Bahadur Singh v. Rai Jagatpal Singh* (4) decided in 1890, is a third case of a *taluqa* in List No. 2, and one in which, nearer heirs having failed, the descent was regulated by clause 11 of section 22. The principle of impartibility gave the estate to the elder brother, unless he was excluded by the general Hindu Law as being insane, which, in the event, their Lordships found he was not.

In this case the decision that the estate remained impartible though the succession was under clause 11 seems to show that clause 11 does provide special limitations, and does not simply remit the succession to the unqualified ordinary law of the religion and tribe.

*Bhai Narindar Bahadur Singh v. Achal Ram* (5), decided in 1893, is a case relating to the same *taluqa* as that which came under consideration in *Achal Ram v. Udai Partab Addiya Dat Singh* (3). The purport of the decision now being cited is that when the case comes under List No. 2, there being no

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rule of primogeniture, degree prevails over line in the ascertainment of the heir, but where the degree is equal the line prevails. The case follows the previous decisions, but has been specially relied upon, because of certain observations made in the course of the judgment. They are as follows:—

"Counsel has suggested that in a case of distribution ordered by the 11th sub-section of the 22nd section of the Act of 1839, the family custom is not to be taken into account. Their Lordships consider that the effect of the 11th sub-section is simply to refer the parties to the law which would govern the descent of the property when the special provisions of the Act are exhausted. That law clearly takes in the family custom, and that law will in this case carry the estate to the one single heir, and that single heir must be pronounced to be Jubraj in preference to the plaintiff."

The expressions in this passage are not precisely the same as those used in other judgments of the Board. But the result and also the mode of reasoning are the same. The passage should not be taken by itself, but in conjunction with an earlier passage in the judgment: "the effect of that (being placed in List No. 2) is that the estate is labelled as one which according to the custom of the family descends to a single heir, but not necessarily by the rule of lineal primogeniture." When, therefore, their Lordships say that the law takes in the family custom, they mean that the law takes in the limitations provided in List No. 2. With this explanation there is no difficulty about the case. It falls into line with the others, and confirms the view that the limitations under sub-section or clause 11 are still limitations under the Act, and not mere returns to the ordinary law.

*Jagdish Bahadur v. Sheo Pertab Singh* (2), decided in 1901, relates to the same *taluka* as in *Brij Indar Bahadur Singh v. Ranes Janki Koer* (1). The Board decided that if the descent to a *taluka* is to be traced under clause 11 to a person entitled under the ordinary law of the religion and tribe, it is still subject to the provisions of the Act and descends as an impartible estate; and, after considering an alleged custom under which the later born son of a senior wife was supposed to have a prior claim over an earlier son of a junior wife, and

finding that as a custom this was not proved, the Board proceeded to enquire what was the ordinary Hindu Law on the subject, and held that, according to the ordinary Hindu Law, the elder born, without reference to the position of his mother, succeeded.

*Thakurain Balraj Kunwar v. Bai Jagatpal Singh* (6), decided in 1904, again a case under List No. 2, is a decision upon the construction of section 14. It was held in this case that it was not enough to keep the estate within the settlement that the legatee was a possible heir in the line of succession, but he must be the person or one of the persons to whom the estate would have immediately descended in accordance with section 22.

This decision is said to have led to the passing of the Amending Act of 1910. The particular succession was regulated by clause 6 of section 22, and, this being so, the case has no special bearing on the present one.

Incidentally, in this case it was decided that a legatee who succeeded before the passing of the Act was not a legatee within the meaning of that word in the Act of 1839.

The family was the same family as that concerned in the case in *Brij Indar Bahadur Singh v. Ranes Janki Koer* (1), but it was a separate *taluka*, or rather a separate part of the *taluka*, that came in question.

*Thakur Sheo Singh v. Rani Raghubans Kunwar* (9), decided in 1905, came afterwards again before this Board on a further question as to the determination of what property formed part of the *taluka* and what property of the predecessor from whom the succession was traced, was separate property [*Rajindra Bahadur Singh v. Raghubans Kunwar* (10)]. On the occasion reported in 32 I. A., it was held again that a legatee of a *taluka* who succeeded before the passing of the Act of 1839 was not a legatee within its meaning, and that the succession to him was not covered by section 22, but by the particular *sanad*, and that, this being the case, the *sanad* and not the Act was to govern, and

(9) 32 I. A. 203 at p. 214; 27 A. 634; 15 M. L. J. 352; 8 O. C. 317; 9 C. W. N. 1009; 2 C. L. J. 194 (P. C.).

(10) 48 Ind. Cas. 212; 45 I. A. 134; 21 O. C. 106; 24 M. L. T. 282; 5 O. L. J. 401; 8 L. W. 570; 40 A. 470; (1918) M. W. N. 831; 28 C. L. J. 456; 23 C. W. N. 101; 10 Bom. L. R. 1075 (P. C.).

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the particular *sanad* in that case requiring that the estate should descend to the nearest male heir according to the rule of primogeniture, having in fact equivalent limitations to those expressed in List No. 3 of the Act, the brother of the last holder must be preferred to his widow. This seems to their Lordships a strong authority in favour of the respondents in the present case, the limitations being in fact the same, though by virtue of a different instrument, in the one case the *sanad*, in the other the Act. The limitations to the nearest male heir according to the rule of primogeniture, exclude the widow, and, equally, if not a *fortiori*, would exclude the mother. It would follow that the bequest in the present case to Dilraj Kunwar was a bequest to a person cut of the line of succession, and brought the case within section 15 of the Act, rendering the estate in future descendable according to the ordinary Hindu Law, unless a particular custom of the religion or tribe should be proved.

*Debi Baksh Singh v. Ohandrabhan Singh* (7), decided in 1910, was a case of *taluka* which fell under List No. 5, which is as follows:—

"A list of the grantees to whom *sanads* or grants may have been or may be given or made by the British Government up to the date fixed for the closing of such list, declaring that the succession to the estates comprised in such *sanads* or grants shall thereafter be regulated by the rule of primogeniture."

It will be observed that the limitations are the same as those under List No. 3. The decision, therefore, should bear closely upon the present case. The plaintiff was in the senior line, but of a degree more distant from the common ancestor than the defendant. As the succession was to a remote predecessor, it fell under clause 11. The Board insisted upon the rule of impartibility. The contention of the appellant in support of his claim to succeed under the ordinary law as nearest in degree rested mainly upon a citation of a passage in the judgment in *Brij Indar Bahadur Singh v. Ranee Janki Zoor* (1), in which it was supposed that their Lordships had rejected all reference to the *sanad*. But in that case there was an inconsistency between the *sanad*, which was granted before the Act, and which made the descent to the nearest male heir

according to the rule of primogeniture and the provisions of the Act, which entered the particular estate in List No. 2, and made it merely descendable upon a single heir. In the case now under consideration, as in all the other cases, the limitations in the *sanad* and the limitations in the Statute were the same. It matters not which is looked at. Accordingly, their Lordships held that clause 11 gives a rule of descent which is still within the Statute, and, therefore, a descent in the particular case according to the rule of primogeniture giving a preference to the line over the degree in the ordinary way.

*Murtaza Husain Khan v. Mohammad Yasin Ali Khan* (8), decided in 1916, concerned a *taluka* held by a Muhammadan family, all the other cases which have been cited having been Hindu *talukas*. There was no contention as to the descent of the *taluka*, which it was admitted between the parties devolved according to the rule of primogeniture. The question in dispute was as to the separate and private property of the last holder of the *taluka*. According to ordinary Muhammadan Law, this property would have been divisible between the two sons, but the elder son said that by the family custom it devolved upon him, because it followed the descent of the *taluka*. Now, it happened that the *taluka* was entered in List No. 2, in which the descent is to a single heir, but there is no rule as to primogeniture. Still, if there is a descent to a single heir, as the *taluka* is impartible, the elder will inherit as if there were the rule of primogeniture. It was suggested that the *taluka* was entered in List No. 2 by mistake, and that it should have been entered in List No. 3; but their Lordships could not accept that contention. They held, however, that if it was in List No. 2 there was a presumption that it was in that list because there had been an earlier family custom which would apply to all property whether belonging to the *taluka* or separate from it. It is to be observed that if there was a custom that the property should descend to a single heir, it would have the same effect in the particular case as if there was a custom that it should descend according to the rule of primogeniture. This being so, their Lordships held that the entry in the list, whether



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List No. 2 or List No. 3, was good evidence that there was a family custom which would make the property, in the particular case, devolve upon the elder son.

Their Lordships believe that they have now gone through all the decisions of the Board, which were cited in argument, and the result is, that, while there are several decisions on cases coming under List No. 2 to the effect that it is enough to provide a single heir, and that when the succession is regulated by section 11 this single heir is the nearest in the succession, and may be male or female, there is no decision to this effect when the case comes under List No. 3, where the rule is that of primogeniture. But there are two decisions—that in *Thakurain Balraj Kunwar v. Rvi Jugalpal Singh* (6) where the succession was regulated by the *sanad*; and that in *Debi Bakhsh Singh v. Chandrabhan Singh* (7) which came under List No. 5—which show that the rule of male lineal primogeniture applies after the special successions provided by clauses 1—10 are exhausted, and where clause 11 is invoked.

Therefore, the second ground of defence adopted by the respondent succeeds. It would appear to follow from the cases cited, from 17, 28 and 37 I. A., and from the reasoning which has been adopted in this judgment, that the first ground of defence would not have succeeded; but it is enough that, treating clause 11 as regulating the succession, Dilraj Kunwar was not, as mother of the previous holder, the proper successor according to the Act; and that the Will bequeathing the property to her, took the property out of the limitations of the Act, and rendered it under section 15 subject to the ordinary Hindu Law, according to which the appellant and respondent as representing two lines of agnates would divide the property.

There was a further suggestion that as Dilraj Kunwar, if she succeeded by inheritance, would only have succeeded to a Hindu woman's estate, which is a limited one without power of bequest, and with only certain powers of transfer *inter vivos*, while the effect of the Will had been to give her an absolute estate, the Will would have broken the line even if she had been the next heir. But it is unnecessary to consider this point. Upon the whole, their Lordships will humbly

advise His Majesty that this appeal fails, and should be dismissed with costs.

*Appeal dismissed.*

Solicitors for the Appellant.—Messrs. Barrow, Rogers and Nevill.

Solicitors for the Respondents.—Messrs. James Gray and Son.

### MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 317 OF 1919.

March 15, 1920.

Present:—Mr. Justice Sadasiva Aiyar  
and Mr. Justice Spencer.

VENKATA REDDI, MINOR, AND OTHERS—  
PLAINTIFFS NOS. 4, 5, 1 AND 3—  
APPELLANTS

*versus*

MUTHU PAMBULU NAICK AND OTHERS  
—DEFENDANTS NOS. 1 TO 3 AND PLAINTIFF  
NO. 2—RESPONDENTS.

*Evidence Act (I of 1872), s. 63—Transfer of Property Act (IV of 1882), s. 59—Mortgage—Creation of charge—Proof of attestation—Civil Procedure Code (Act V of 1908), O. VIII, r. 5—Discretion of Court, when to be exercised.*

In order to prove the creation of a valid charge by a mortgage-deed which, under section 59 of the Transfer of Property Act, requires to be attested by two witnesses, the evidence of one of the attesting witnesses is, under section 68 of the Evidence Act, sufficient to prove the execution of the mortgage and the document may be accepted by the Court as *prima facie* sufficiently proved to be a valid mortgage, but this *prima facie* proof may be rebutted by proof on the other side that the other witness or witnesses who has or have apparently attested the document did not really see its execution. [p. 557, col. 2.]

The discretion under rule 5, Order VIII of the Civil Procedure Code, should usually be exercised by the Court of first instance in those cases where it suspects on *prima facie* grounds that an admission was made collusively or in order to evade a rule of public policy. Where an allegation of fact in a plaint is not denied specifically or by necessary implication it must be deemed to have been admitted, and in such a case an Appellate Court would be using its discretion wrongly in requiring proof of that allegation. [p. 557, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Ramnad at Madura, in Appeal Suit No. 40 of 1918 (Appeal Suit No. 335 of 1918 on the file of the District Court, Ramnad),

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preferred against the decree of the Court of the District Munsif, Sattur, in Original Suit No. 254 of 1916.

FACTS appear from the judgment.

Messrs. N. R. K. Tatachari and P. R. Srinivasan, for the Appellants.—The lower Appellate Court erred in allowing a new point to be raised for the first time, about the validity of the mortgage-document as creating a charge on property. The point was not raised either expressly or by implication in the written statement of the defendants. The validity of the document must be deemed to have been admitted. No doubt the Court has a discretion to require proof even when there has been an admission under Order VIII, rule 5, Civil Procedure Code. That discretion would properly be exercised by the Court of first instance. Here, any way, the lower Appellate Court did not give an opportunity to the plaintiffs to tender such proof.

Then, the only controlling sections with regard to mode of proof of a mortgage are sections 68 and 69 of the Evidence Act. Under section 69 proof by one attester is held sufficient. There is no requirement that the attesting witness who is tendered to prove the document should also prove that the other attestors to the document saw the executant sign.

Mr. K. V. Sesha Aiyangar, for the Respondents.—Section 59 of the Transfer of Property Act, which was enacted ten years after the Evidence Act, lays down that a mortgage-document should be attested by at least two witnesses. Though the section does not deal with the *quantum* or mode of proof the language of the section implies that, to enforce the charge created by it, the two attestors should be called to prove execution or at any rate one attester should prove attestation by the other.

See *Valla Nagiah v. Divakara Mudaliar* (1), *Muniappa Chettiar v. Vellachamy Mannadi* (2), *Shamu Patter v. Abdul Kadir Rowthan* (3), *Ganga Pershad Singh v. Ishri Pershad*

*Singh* (4), *Arumugham Chetty v. Muthu Koundan* (5).

### JUDGMENT.

SADASIVA AIYAR, J.—The plaintiffs Nos. 1, 4 and 5 are the appellants mentioned in the memorandum of second appeal preferred to this Court. As it appeared that the third plaintiff's name was left out by an oversight of the appellants' learned Vakil, we allowed the memorandum of second appeal to be amended by adding the third plaintiff's name also as an appellant.

The suit was brought upon a hypothecation-bond executed by the first defendant in August 1912. Four items of property were hypothecated, out of which Item No. 2 was afterwards sold by the first defendant to the second defendant. The second defendant then hypothecated it to the third defendant. Defendants Nos. 2 and 3 remained *ex parte* both in the Court of first instance and in the lower Appellate Court. The first defendant in his written statement described the plaint bond as "the suit mortgage-debt-bond." The plaintiffs in their plaint claimed a charge on the properties and sued for sale on the basis of that charge. If the first defendant had intended to plead that the document did not create a charge owing to its alleged invalidity as a mortgage, he ought to have raised that plea expressly in his written statement. Under Order VIII, rule 5, Civil Procedure Code "every allegation of fact in the plaint if not denied specifically or by necessary implication or stated to be not admitted in the pleadings of the defendant, shall be taken to be admitted except as against a person who is under a disability." The allegation of fact in the plaint that the mortgage-bond gave the plaintiffs a right to bring the properties to sale as creating a charge on the property not having been denied specifically or by necessary implication must be deemed to have been admitted by the first defendant. The lower Appellate Court, therefore, used its discretion wrongly in requiring proof or rather in

(1) 41 Ind. Cas. 595; 6 L. W. 147; (1917) M. W. N. 583.

(2) 49 Ind. Cas. 278; (1918) M. W. N. 853; 25 M. L. T. 19; 9 L. W. 5.

(3) 16 Ind. Cas. 250; 35 M. 607; 39 I. A. 218; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; 1912) M. W. N. 935; 10 A. L. J. 253; 14 Bom. L. R. 1034; 16 C. L. J. 596 (P. C.).

(4) 45 I. A. 94; 4 P. L. W. 349; 16 A. L. J. 404; 34 M. L. J. 545; 27 C. L. J. 548; 22 C. W. N. 67; 20 Bom. L. R. 587; 23 M. L. T. 388; (1918) M. W. N. 382; 8 L. W. 176; 45 C. 748 (P. C.).

(5) 52 Ind. Cas. 525; (1919) M. W. N. 409; 9 L. W. 565; 37 M. L. J. 166; 26 M. L. T. 93; 42 M. 711.

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taking the validity of the document as a mortgage as not proved on the evidence on record even as against the first defendant. Of course, under the proviso to Order VIII, rule 5, "the Court may, in its discretion, require any facts so admitted to be proved otherwise than by such admission." But that discretion should usually be exercised by the Court of first instance and would be exercised properly in cases where the Court of first instance suspects, on *prima facie* grounds that the admission was made collusively or in order to evade a rule of public policy. However, I shall, for the purposes of the decision of this case, even assume that the first defendant did not admit the validity of the document as a mortgage.

As regards defendants Nos. 2 and 3 they were *ex parte* (as I have said) in both the Courts below and had not appealed against the decree of the Court of first instance directing Item No. 2 also (that property in which alone they were interested) to be sold for the mortgage-amount and I think that the lower Appellate Court again used its discretion (under Order XLI, rule 33) in a wrong manner in interfering with the District Munsif's decree so far as it affected the *ex parte* defendants Nos. 2 and 3 on a mere technical ground. However, I shall again assume that its discretion in this matter also was not exercised improperly. Even then it seems to me that the lower Appellate Court should have given the plaintiffs an opportunity to fill up the alleged gaps in the evidence which were not at all considered material by the first Court and should, in the language of the proviso to Order VIII, rule 5, have "required evidence" of the facts which it considered not proved before finding them against the present appellants. But it is unnecessary to deal with this point also further.

The only remaining short question is, whether the mortgage-deed has been proved to create a valid charge (having regard to section 59 of the Transfer of Property Act) on the evidence actually adduced in this case and not disbelieved by the lower Appellate Court. Section 59 requires that a mortgage securing a principal amount which is Rs. 100 or upwards should be created by a registered instrument signed by the mortgagor and attested by at least two witnesses. It has been

now settled that an "attested" document means a document whose execution by the executant has been actually seen by the apparent attester. See *Shamu Patil v. Abdul Kadir Rowthan* (3).

The next point for consideration is, "how is a document which purported to be attested by two witnesses to be proved, in order that it may be accepted by the Court to be a valid mortgage-document, such a document being required by law to be attested by two witnesses?" For this purpose, we have to look into the Evidence Act, where sections 63 and 69 contain provision as to the mode of proof of "a document which is required by law to be attested," a mortgage-document for Rs. 100 or upwards being such a document. Section 68 says: "If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence." I think the implication from the language of the section is that, if one attesting witness has been called (if there be an attesting witness alive, etc.) then the document can be accepted by the Court (of course, if it believes his evidence) as evidencing a mortgage-transaction as the necessary evidence insisted upon by section 68, Evidence Act, of a document required by law to be attested has been given. In other words, the document can, on that evidence, be treated by the Court as having created the charge on immoveable property which it purports to create. Section 68 requires only that one attesting witness (if alive) should be called for the purpose of proving execution subject, of course, to the condition that that witness is subject to the process of the Court and capable of giving evidence. The lower Appellate Court, however, held that either two attesting witnesses should be called when two are alive and that, even assuming that one only need be called, he should, at least, be made to prove that another (or the other) attesting witness besides himself also saw the execution. Hence, it held that the plaint document was not properly proved as a mortgage document as one only of the attesting witnesses was called and



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he merely proved its execution by the first defendant and the attestation by himself (that witness) and he was not asked about any other attester having seen the execution. (I might add here that the lower Appellate Court in its very technical handling of the case even refused to allow an application for review filed by the plaintiffs).

Mr. Sesha Aiyangar for the respondent third defendant (the first defendant who contested the suit in the two lower Courts remaining *ex parte* here and the 3rd defendant who was *ex parte* in the Courts below now taking advantage of the lower Appellate Court's decision to appear before us in order to support it) contends that, though section 59 of the Transfer of Property Act does not deal with the *quantum* or mode of proof, we must assume that it not only requires that a mortgage-document (for 100 rupees or more) should be attested by two witnesses, but that the mortgagee suing on it should call two witnesses, if alive, to prove the document or should make the one witness (called) to prove its attestation by another also. No doubt there are English and American Statutes which contain such strict provisions about the mode of proof also (by calling, at least two witnesses) of documents required to be attested by two or more witnesses. I do not see, however, why we should make section 59 stricter than it is and add the words to the section (after the words "two witnesses") such as "two of whom at least shall, if alive, be called to prove the instrument or one of whom at least, shall be called to prove that the instrument was not only attested by himself but attested by another attester." The fact that the Evidence Act is 10 years older than the Transfer of Property Act has no relevancy in the consideration of this question. I might add that section 69 of the Evidence Act says that, if no such attesting witness can be found, proof that the attestation of one attesting witness at least is in the hand-writing of that witness and that the signature of the person executing the document is in the hand-writing of that person is proof which might be accepted as sufficient by the Court. If section 59 of the Transfer of Property Act is interpreted as we are invited to interpret it, as adding another requisite (even in the circumstances con-

templated by section 69 of the Evidence Act, that is, even where no attesting witness is alive or could be found), namely, direct proof that two attesting witnesses saw the execution, it would be practically impossible in most such cases to adduce evidence of third persons about attestation by two witnesses and many old mortgage transactions could never be proved at all as such. Documents, say about 28 years old, where it is not at all unlikely that the two attestors and the mortgagee have died (life not being too long in this country), cannot be proved at all to be valid documents unless some third persons who did not attest but merely happened to be present at the execution and attestation (a very unlikely contingency) happened to be alive, remembered what happened long ago of a transaction at which they were casually present and could, therefore, be called to prove the attestation by two attestors. If the argument is pushed to its logical limit then even section 90 of the Evidence Act which says that a document purporting to be 30 years old can be presumed to have been validly executed and attested, must be deemed to have been overruled by the provisions of section 59 of the later Transfer of Property Act. No doubt, where the provisions of section 68, Evidence Act, have been complied with by calling the attesting witness to prove the execution by the mortgagor, and the attestation by himself (the witness) and the document may, therefore, be accepted by the Court as *prima facie* sufficiently proved to be a valid mortgage, that *prima facie* proof can be rebutted by proof, on the other side, that the other witness or witnesses who has or have also apparently attested the document did not really see its execution and that the document, therefore, did not comply with the requirements of section 59 of Act IV of 1882.

The cases in *Vadla Nagiah v. Divakara Mudaliar* (1), *Muniappa Chettiar v. Vellachamy Mannadi* (2), *Shamu Patler v. Abdul Kadir Routhen* (3), *Ganga Pershad Singh v. Ishri Pershad Singh* (4) and *Arumugham Chetty v. Muthu Koundan* (5) are all cases in which it had been definitely proved, as found by the lower Courts, that the apparent attestors of the documents in question were not attestors in the legal sense and had not seen the execution, and hence it was held in

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those cases that the documents were invalid as mortgages. Those cases did not consider whether the document had been *prima facie* proved to be a valid mortgage, that is, whether the requisition as to proof contained in the Evidence Act as regards such a document had been complied with and in fact no occasion arose in those cases for the consideration of that point on the facts found in those cases.

The question now in dispute was directly considered in *Shib Dayal v. Sheo Ghulam* (6), which decision was pronounced after the Privy Council decision in *Shamu Patter v. Abdul Kadir Rowthen* (3). That case in *Shib Dayal v. Sheo Ghulam* (6) followed two earlier decisions of that Court *Ram Dei v. Munna Lal* (7) and *Uttam Singh v. Rukam Singh* (8). In *Ram Dei v. Munna Lal* (7) the question in dispute has been carefully considered. I am unable to accept the contention of Mr. Sesha Aiyangar that the learned Judges who decided those three cases overlooked the distinction between the proof of a document and the validity of a document. On the other hand, I think they did have that distinction clearly in their minds and held that, whereas section 59 of Act IV of 1882 did require that there should be two attesting witnesses at least for the validity of the document of the nature mentioned in that section, the requirements of the Evidence Act as to proof of such a document could be sufficiently met by compliance with the directions in sections 68 and 69 of the Evidence Act. I think also that section 114 of the Evidence Act [relied on in some other connection by the learned Judges who decided *Jogendra Nath Mukhopadhyaya v. Nitai Ohurn Bundo-padhyaya* (9)] supplies the clue to the intention of the Legislature in enacting sections 68 69 of the Evidence Act which consider proof up to a certain point as legally sufficient. As I said already, such *prima facie* evidence of validity (believed by the Court to be true) could be rebutted by other evidence (of course, when believed by the Court).

In the present case, the evidence of P. W. No. 4 believed by the Courts sufficiently satisfied the requirements of section 68 of the

Evidence Act (the document being on its face, attested by at least two attesters and thus satisfying the requirement of section 59 of the Transfer of Property Act). Following, therefore, *Shib Dayal v. Sheo Ghulam* (6) I would hold that the document has been proved to be a valid mortgage.

In the result, the decree of the lower Appellate Court will be modified and the usual mortgage-decree shall be passed in favour of the plaintiffs for the sum mentioned in the lower Appellate Court's decree with interest as provided for therein, Items Nos. 1, 3 and 4 being directed to be sold first and Item No. 2 last. The plaintiffs shall have their costs of the second appeal from defendants Nos. 1 and 3 and their costs incurred in the Courts below will be paid by the first defendant. The costs shall also be a charge upon the mortgaged property. Time for redemption is six months from this date.

SPENCER, J.—In this case the validity of the suit document, a mortgaged-deed, was not the subject of any issue in the Court of first instance, the only matter on which the plaintiffs and the first defendant joined issue being the question of discharge, upon which defence the District Munsif dismissed the suit.

On appeal, the Subordinate Judge, after reversing the first Court's finding on the question of discharge, gave the plaintiffs a personal decree against the first defendant alone and refused to give them a decree for sale of the mortgaged property on the ground that the attestation to the deed had not been properly proved. From the Subordinate Judge's order on the review petition his reasons for not granting a decree on the mortgage appear more fully than in his judgment. He says therein that, though the first defendant admitted execution, he did not ask for an issue to be framed as to the validity of the mortgage-deed but as against the other defendants who remained *ex parte*, it was incumbent on the plaintiffs to prove the document in the manner prescribed by section 68 of the Evidence Act and he had not done so.

In my opinion, the requirements of section 68 of the Evidence Act were sufficiently complied with when P. W. No. 4, an attesting witness, was examined. If there

(6) 38 Ind. Cas. 694; 39 A. 241; 15 A. L. J. 164.

(7) 38 Ind. Cas. 175; 39 A. 109; 14 A. L. J. 1041.

(8) 38 Ind. Cas. 651; 39 A. 112; 15 A. L. J. 167.

(9) 7 C. W. N. 384.

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had then been any idea of suggesting that this witness did not know what was meant by "attesting" he should have been asked some questions in the cross-examination to further explain his statement in the chief examination. "I attested it." The document, Exhibit A, shows that two other witnesses signed it. But it is not known definitely whether they are alive and available for examination.

The features of this case resemble that decided in *Shib Dayal v. Sheo Gulam* (6). It was there stated: "with regard to the proof of the mortgage the plaintiff produced one of the attesting witnesses who proved that he saw the mortgagor sign the mortgage and that he signed his name as an attesting witness. On the face of it, the mortgage appears to have been attested by a number of other witnesses, but they were not called, nor did the witness who was called say that there was any other attesting witness present. He was not asked the question by either side. The question is whether, under these circumstances, there being no other evidence, the mortgage can be said to be proved." Their Lordships of the Allahabad High Court held that there had been a sufficient compliance with the law as stated in section 68 of the Evidence Act when one attesting witness was examined, as required by that section and the evidence for the plaintiff was not at all rebutted. *Ram Dei v. Munna Lal* (7) was a similar case. As to the amount of proof required, section 68 of the Evidence Act does not require that more than one attesting witness should be called to say that he attested it before the document can be used as evidence. I do not believe that it could have been the intention of the framers of the Transfer of Property Act which became law in 1882, to lay down anything in section 59 contrary to the provisions of the Evidence Act of 1872 on the subject of proof. If an Appellate Court, in the exercise of its discretion under the proviso to section 58 of the Evidence Act and to Order VIII, rule 5, of the Civil Procedure Code, requires clearer proof of attestation it is the duty of the Court itself to call for such proof and not to decide that the document has not been proved as a mortgage merely because the plaintiff did not examine all attesting wit-

nesses. See *Arumugham Chetty v. Muthu Koundan* (5) and *Muniappa Chettiar v. Vellochamy Mannadi* (2).

Mr. Sesha Aiyangar, for the respondent, relied on two other decisions which can clearly be distinguished. In *Param Hans v. Randhir Singh* (10) the second witness did not sign or make a mark and so the document was held to be not validly executed as there was nothing in the evidence to show that he authorised the scribe to write his name. In *Vadla Nagiah v. Diakara Mudaliar* (1) there was no admission or proof of the attestation nor did any presumption arise from the common course of business that the mortgage had been validly attested. Both these cases are, therefore, distinguishable from the present.

I concur in the decree proposed to be passed by my learned brother,

M. C. P.

*Appeals allowed; Decree modified.*

(10) 35 Ind. Cas. 743; 38 A. 461; 14 A. L. J. 673

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2840 of 1916.

January 14, 1921.

*Present*:—Mr. Justice Scott-Smith and  
Mr. Justice Leslie-Jones.

THE FIRM KISHORI LAL-BANARSI DAS  
—DEFENDANTS—APPELLANTS

*versus*

THE FIRM RAM LAL-TEK CHAND—  
PLAINTIFFS—RESPONDENTS.

*Stamp Act (II of 1899), s. 12 (3)—Cancellation of adhesive stamp—Drawing lines across stamp, whether sufficient.*

The drawing of lines across an adhesive stamp is as effectual a mode of cancellation as any other, provided that from what has been done the intention to cancel is clearly apparent. [p. 560, col. 17.]

Second appeal from the decree of the Additional District Judge, Amritsar at Gurdaspur, dated the 3rd of August 1916, modifying that of the Senior Subordinate Judge, Amritsar, dated the 13th April 1916.

Mr. Nand Lal, for the Appellants.

Mr. Manohar Lal, for the Respondents.

JUDGMENT.—This was a suit between two firms in which the plaintiffs sued for



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recovery on what was alleged to be a stamped balance and a few subsequent dealings. In the First Court the plaintiffs obtained a decree for almost the whole of their claim and this decree was affirmed on appeal by the District Judge. There was also an appeal by the plaintiffs as regards the sum disallowed, with the result that in the Court of the District Judge their whole claim was allowed. The present appeal is by the defendants.

The First Court held that the balance referred to was duly stamped and the stamp cancelled. This finding was contested on appeal but the point was not decided by the District Judge. We do not, however, propose to remand the case as the appeal is a very old one and we have no difficulty in agreeing with the finding of the Trial Court, on the evidence of Uttam Chand, P. W. No. 3, and Radha Kisben, P. W. No. 4, that the balance was stamped at the time of the execution. There was no reason why it should not have been stamped in the ordinary course of business, and Counsel for appellants is incorrect in saying that the statement of Dani Chand, P. W. No. 2, supports the contention of his clients. We prefer the evidence to which we have referred to that of Kishori Lal, defendant, and his relative, Girdhari Lal.

The cancellation was done by drawing lines across the stamp, and it appears to us that the drawing of these lines is a sufficient compliance with the provisions of section 12 (3) of the Stamp Act. Though the point was not actually decided in *Piran Ditta v. Mangal Singh* (1), this was the view taken by Rattigan, J., after consideration of *Virabhadrapa v. Bhimaji* (2). We for our part are unable to see why drawing of lines across a stamp should not be as effectual as any other mode of cancellation, provided that from what has been done the intention to cancel is clear, and certainly this is the method of cancellation, adopted by a large number even of literate people.

The other grounds of appeal are numerous but only a few of them have been referred to by Counsel. We may remark, however, that the matter decided by the lower Appellate Court on the appeal of the plaintiffs-respondents was a pure question of fact and cannot be disturbed on second appeal. It is not a

fact as alleged by Counsel that the Court of first instance did not examine all the witnesses for the defendants, as the record shows that they closed their case; and though Counsel has argued in a general way that certain letters written by the plaintiffs to the defendants are fatal to the case of the former, he has not explained why. He has taken exception to the fact that certain interrogatories were issued to one of the plaintiffs, but the record shows that this was done only after the said plaintiff had been in the witness-box and at the request of defendants themselves.

The appeal fails and is dismissed with costs.

*Appeal dismissed.*

#### OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 27 OF 1919,  
June 28, 1920.

*Present*:—Mr. Daniels, A. J. C., and  
Syed Wazir Hasan, A. J. C.

Musammal BIBI JAI KISHORI—  
DEFENDANT No. 3—APPELLANT

*versus*

THE HON'BLE SIR Raja MOHAMMAD ALI  
MOHAMMAD KHAN—PLAINTIFF,  
Pandit HAR SAHAI AND OTHERS—  
DEFENDANTS NOS. 1, 2 AND 4 TO 9—  
RESPONDENTS.

*Civil Procedure Code (Act V of 1908), Os. XXI, XXXIV—Mortgage, redemption, right of, extinction of—O. XXI, applicability of—"Sale," effect of—Ownership, when passes—Equity of redemption—Subrogation, doctrine of—One of several mortgagors redeeming mortgage, effect of—Charge, creation of.*

The provisions of Order XXXIV of the Code of Civil Procedure do not contemplate an order by the Court for the extinction of the right to redeem, where the suit by a mortgagee or by a mortgagor is not founded upon a mortgage by conditional sale. [p. 563, col. 2.]

The provisions of Order XXI of the Civil Procedure Code apply to sales ordered under Order XXXIV of that Code, and where such a sale is ordered, the mere 'sale' has not the effect of divesting a person whose property has been sold of the ownership of his property, because, in many cases, the sale is liable to be revoked. It is only when the sale becomes 'absolute' upon an order confirming it that it has the effect of divesting the person whose property is sold of his title to it and of vesting it in the pur-

[ (1) 108 P. R. 1908; 207 P. W. R. 1908.

(2) 28 B. 432; 6 Bom. L. R. 436.

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chaser. Where, therefore, the mortgagor makes the deposit under rule 83 of Order XXI, his equity of redemption subsists, and the deposit has the effect of redeeming the mortgaged property. [p. 563; col 2; p. 64, cols 1 & 2.]

The principle of the doctrine of subrogation is applicable to the case of the substitution of one creditor for another by operation of law, and where one of several mortgagors redeems the mortgaged property, though he is not a mortgagee, he has a charge on the share of each of the other co-mortgagors in the property. [p. 565, col. 2; p. 567, col. 1.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 24th February 1919.

Babus Aditya Frasad and Jiban Krishna Banerji, for the Appellant.

Syed Zakur Ahmad, for Respondent No. 1.

#### JUDGMENT.

WAZIR HASAN, A. J. C.—The properties mentioned in List A annexed to the plaint, *i. e.*—

1. 1-anna-7-pies share with *sir* lands in Mauza Hari;

2. 45 *bighas*, 14 *biswas* in Mauza Atwatman;

3. 54 *bighas*, 19 *biswas* also in Atwatman; were mortgaged by Ram Sahai, defendant No. 1, and Ram Nidh, defendant No. 2, to one Maulvi Fakhruddin by a deed, dated the 30th November 1903, and also by deeds, dated the 2nd December 1904 and the 3rd October 1905 executed by Ram Sahai alone. Ram Nidh seems to have disappeared from the scene after having taken part in the execution of the first deed of mortgage, dated the 30th November 1903. In execution of a decree for arrears of revenue which the plaintiff held against Ram Sahai the 45 *bighas* odd in Mauza Atwatman were put up for sale and purchased by the plaintiff on the 20th of August 1909 [see *Har Sahai v. Hon'ble Raja Ali Muhammad Khan* (1)].

On the 25th October 1909 Har Sahai, his son, Chab Nath, and his grand son, Mahadeo Prasad, executed a deed of mortgage in favour of Bibi Jai Kishori, defendant No. 3, in respect of all the three items of properties mentioned before and also some other properties (C-1). On the 1st of February 1914 Ram Sahai alone executed another deed of mortgage in favour of the same Bibi Jai Kishori in respect of the properties which stood already mortgaged to her as well as some other properties (C-2).

(1) 20 Ind. Cas. 266; 16 O. C. 178.

On the 30th July 1914 Ram Sahai executed a third deed of mortgage in favour of the same lady creating a further charge for the fresh loan on the same properties which were the subject-matter of the mortgage of the 1st February 1912 (C-3). It will be seen from the sequence of events which have been given above that the plaintiff's purchase of the 45 *bighas* odd land in Atwatman is prior to the incumbrances in favour of the appellant. But that fact is immaterial for the decision of the question of the liability of the other two items except in so far that it excludes the possibility of any 'notice' being fastened on the plaintiff.

On the 16th of July 1913 Maulvi Fakhruddin lodged his claim in the Court of the Subordinate Judge of Bara Banki to enforce payment of money charged upon the properties mentioned at the outset of this judgment under his three deeds of mortgage noted before. To this suit he impleaded, amongst others, the plaintiff and the defendant No. 3, Bibi Jai Kishori. Fakhruddin obtained the usual decree for sale on the 23rd of October 1913 for a sum of Rs. 11,745-12-0. The final decree was passed on the 10th June 1914 and eventually the properties were sold on the 20th of May 1915. The sale was held in several lots and different items of the properties were purchased by different individuals all of whom, we are told, were strangers. The plaintiff, then, on his depositing in Court Rs. 13,415-10-7 for payment to the decree-holder, Fakhruddin, and Rs. 710 for payment to the several purchasers, applied under Order XXI, rule 83, of the Code of Civil Procedure to have the sale of the 20th of May 1915 set aside. The order prayed for was passed on the 30th of August 1915. The facts which I have given in the above narrative are not disputed.

The present suit is brought by the plaintiff for recovery of Rs. 12,225-11-5 principal and Rs. 2,934 interest by sale of the 1-anna 7-pies share with *sir* lands in Mauza Hari and 54 *bighas* odd land in Mauza Atwatman. His case is that each of the three items of the properties was liable to contribute rateably to the debt secured by the mortgages in favour of Maulvi Fakhruddin, that the amount for

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which his property, *i. e.*, 45 *bighas* odd land, was liable comes to Rs. 1,950, that after deducting this sum from the total amount of money paid by him he is entitled to recover the balance by the sale of the other two items of properties just before mentioned.

The only serious defence to this claim of the plaintiff was lodged by the defendant No. 3. It is not necessary to set out in any detail the various pleas which she raised in the lower Court because the points urged in appeal on her behalf lie within a very narrow compass and these I shall notice at their proper places.

On the question of the plaintiff's right to sell these two properties free from any incumbrances in favour of the defendant No. 3, the learned Subordinate Judge of Bira Banki gave his finding in favour of the plaintiff. On the question of the amount of rateable contribution by each of the properties, he came to the following conclusions :—

	Rs.	a.	p.
1. By 1-anna 7-pies share in Hari	4,568	12	0
2. By 54 <i>bighas</i> odd land in village Atwatman ...	4,867	8	0
3. By 45 <i>bighas</i> odd land in village Atwatman ...	4,669	7	5

He, therefore, held that the plaintiff was entitled to Rs. 9,456.40 as principal and to Rs. 2,302.9.6 interest at the rate of 9 per cent. per annum. In the result, he granted a decree to the plaintiff in the following terms :—

"I pass a decree for Rs. 11,758.13.6 with proportionate costs in plaintiff's favour. Defendants will pay the decretal amount within six months of this date otherwise a 1-anna-7-pies share in village Hari and 54 *bighas*, 19 *biswas* land in village Atwatman as described in the schedule attached to the plaint shall be sold. Interest from the date of the suit till 24th August 1919 at 9 per cent. Order XX, rule 1, Civil Procedure Code." The only person aggrieved by this decree was the defendant No. 3 and consequently she is the sole appellant before us.

In support of the appeal the following points have been urged by the learned Pleader for the appellant :

(1) That section 95 of the Transfer of Property Act (Act IV 1882) has no application to this case,

(2) That even if it has, the statutory charge which the plaintiff may hold in virtue of the provisions of that section did not come into existence a minute earlier than the time of payment which the plaintiff made under Order XXI, rule 89, of the Code of Civil Procedure and that, consequently, the charge in favour of the plaintiff can be enforced only as subject to the several incumbrances in favour of the appellant.

The argument advanced under the first point is that the mortgages in favour of Fakhruddin had been extinguished by, and merged in, the final decree of the Court which he had obtained on the 10th of June 1914 and, consequently, the payment made under Order XXI, rule 89, had not the effect of redeeming any mortgage. The old section 89 of the Transfer of Property Act provided as follows :—

"If in any case under section 88 the defendant pays to the plaintiff or into Court on the day fixed as aforesaid the amount due under the mortgage, the costs, if any, awarded to him, and such subsequent costs as are mentioned in section 94, the defendant shall (if necessary) be put in possession of the mortgaged property; but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold and that the proceeds of the sale be dealt with as is mentioned in section 88; and thereupon the defendant's right to redeem and the security shall both be extinguished." Compare, in this connection, the recent decision of the Privy Council in *Matru Mal v. Musammot Durga Kunwar* (2). Section 89, however, has been repealed by the Code of Civil Procedure (Act V of 1908), section 156 and Schedule V, Order XXXIV of that Code now deals with "Suits relating to Mortgages of Immoveable Property." That Order provides neither for the extinction of the mortgagor's right to redeem nor of the security as a result of the passing of the

(2) 55 Ind. Cas. 969; 47 I. A. 71; 18 A. L. J. 396; 88 M. L. J. 469; 11 L. W. 529; (1920) M. W. N. 388; 2 U. P. L. R. P. C. 75; 22 Bom. L. R. 553; 32 C. L. J. 121; 42 A. 364; 27 M. L. T. 319 (P. C.).



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final decree either in a suit for sale by a mortgagee or in a suit for redemption by a mortgagor, where the mortgage is not by conditional sale.

Order XXXIV, rule 5, sub rule (2), is as follows:—

"Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in rule 4"; and Order XXXIV, rule 8, sub-rule (4), is that, "Where such payment is not so made, and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property, or a sufficient part thereof, be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same: Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time, postpone the day fixed for payment." On the other hand, in a suit for foreclosure by a mortgagee as well as in a suit for redemption by a mortgagor when the mortgage is not simple or usufructuary the final decree in case of non-payment has the effect of debarring the mortgagor from "all right to redeem" [*Vide* Order XXXIV, rule 3, sub-rule (2), and rule 8, sub rule (2)]. These provisions of the Code are in complete accord with the general rule that the mortgagor's equity of redemption "continues unless and until by judgment for foreclosure, or the operation of the Statute of Limitations, the character of creditor is changed for that of owner, or the interest of the mortgagor is destroyed by sale either under the process of the Court or of a power in the mortgage incident to the security." (Halsbury's Laws of England, Volume XXI, page 71, section 125).

It may further be observed that a mortgagor may lose his right to redeem also by the effect of *res judicata*. The general rule quoted above is recognised by the proviso to section 60 of the Transfer of Property Act (Act IV of 1882) which is as follows:—"Provided

that the right conferred by this section has not been extinguished by act of the parties or by order of a Court." (We are not here concerned with 'act of the parties'). I have seen above that the provisions of Order XXXIV of the Code do not contemplate an order by Court for the extinction of the right to redeem where the suit by a mortgagee or by a mortgagor is not founded upon a mortgage by conditional sale.

This naturally brings me to the question,—When does the mortgagor lose his equity of redemption? The same question may be put in another form. When and how is the mortgagor deprived of his ownership of the property? For an answer to this question we must turn to some other provisions of the law of procedure. The provisions are to be found in Order XXI of the Code of Civil Procedure (Act V of 1908). It is now generally agreed that these provisions would also apply to sales ordered under Order XXXIV of the Code [*See Janj Bahadur v. Kuer Kishen* (3) and *Sita Ram v. Bharath Prasad* (4)], nor was the point disputed at the Bar. The main rules of Order XXI with which I am concerned fall under the heading "Sales of Immoveable Property." A careful analysis of these rules will reveal that the mere 'sale' has not the effect of divesting a person whose property has been sold of the ownership of his property. The sale is liable to be revoked in many cases. It may be revoked in the same proceedings in which it is held; (1) when the purchaser makes a default in payment (rule 86); (2) on the ground of material irregularity or fraud in publishing or conducting it (rule 90); (3) on the ground that the judgment-debtor had no saleable interest in the property sold (rule 91) and also on an application to set aside the sale on deposit (rule 89). An improper sale will have no efficacy. In the case of *Pooley's Trustee v. Whetham* (5) Cotton, L. J., in delivering the judgment of the Court of Appeal, observed:—"The power of sale given to Mr. Kaye being, therefore, not objectionable,

(3) 1 O. C. 193.

(4) 8 O. C. 241.

(5) (1886) 33 Ch. D. 111 at p. 123; 55 L. J. Ch. 899; 55 L. T. 333; 34 W. R. 689.

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is there any objection to the sale? A passage was read to us from the judgment of the late Vice Chancellor Stuart in *Robertson v. Norris* (6) stating that the Court will consider the exercise of a power of sale improper, and will prevent it being effectual against the mortgagor if it is exercised, not for the purpose of getting money which is due on the mortgage to secure which the power of sale is given, but for some indirect purpose—a statement of the law from which I do not dissent."

So long, therefore, as the 'sale' is liable to be vacated no legal consequences can flow from it. It is only when it becomes 'absolute' upon an order confirming it that it has the effect of divesting the person whose property is sold of his title to it and of vesting it in the purchaser (*Vide* Order XXI, rules 92 and 94). Section 65 of the Code makes it perfectly clear, though the purchaser's title on a sale becoming absolute has been by that section given a retrospective effect from the date of the sale. This is in harmony with the rule applicable to a private transfer where the deed effecting it is required by law to be registered. No title passes in such a case without the registration of the deed, but as soon as registration is perfected the transfer of the title dates from the date of the deed (section 47 of the Registration Act—Act XvI of 1908). It would appear from what has been said before, that an order *absolute* in a suit arising out of a mortgage by conditional sale and an order confirming a sale and thus making it *absolute* in a suit on a simple or a usufructuary mortgage have the parallel effect of shutting out the equity of redemption in each case. I may here quote the following passage from the judgment of Lord Selborne, L. C., in the well-known case of *Heath v. Pugh* (7):—

"As to the equity of redemption, it is sufficient to quote Lord Hardwicke's words in the leading case of *Oasborne v. Scarfe* (8): 'An equity of redemption has always been considered as an estate in the land, for it may be devised, granted or entailed

with remainders, and such entail and remainders may be barred by fine and recovery and, therefore, cannot be considered as a mere right only; but such an estate whereof there may be a seisin. The person, therefore, entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets.'.....'The interest in the land must be somewhere and cannot be in abeyance, but it is not in the mortgagee, and, therefore, must remain in the mortgagor. A devises his estate and afterwards makes a mortgage in fee; though this is a total revocation in law, yet in this Court it is a revocation *pro tanto* only,' (and see *Blake v. Foster* (9)).

"This being the position of the title, as long as the mortgage is redeemable, the effect of an order of foreclosure absolute is to vest the ownership of, and the beneficial title to, the land, for the first time, in the person who previously was a mere incumbrancer. The equitable estate of the mortgagor is then forfeited and transferred to the mortgagee. It is transferred as effectually as if it had been conveyed or released. A foreclosure (said Lord Hardwicke) 'is considered as a new purchase of the land.' 'The mortgage being foreclosed' (said Sir Wm. Grant) 'the estate became absolutely his.' 'By the order made in the foreclosure suit' (said Sir Lancelot Shadwell) 'he became the absolute owner.' *Oasborne v. Scarfe* (8), *Silberschildt v. Schiott* (10), *Lee Gros v. Ockerell* (11)." I am of opinion, therefore, that a mortgagor does not lose his right to redeem unless and until the sale has become absolute. It follows that when the plaintiff made the deposit under Order XXI, rule 89, he had his equity of redemption subsisting and the said deposit had the effect of redeeming the mortgaged properties. I overrule the first point.

Under the second point, it is contended that the plaintiff cannot be treated as a representative of the mortgagee, Fakhr ud din and the rights possessed by the latter are not available to the former. In support of this argument the following cases were brought to our notice:—

*Vasudev Bhikaji v. Balaji Krishna* (12),

(9) (1813) 2 Ball & B. 402 at p. 403.

(10) (1814) 3 V & B. 45 at p. 49; 35 E. R. 396.

(11) (1832) 5 Sim 384 at p. 389; 58 E. R. 380.

(12) 26 B. 500; 4 Bom. R. R. 178.

(6) (1858) 1 Giff. 421; 65 E. R. 983; 4 Jur. (N. S.) 155; 14 R. R. 426.

(7) (1881) 6 Q. B. D. 345 at p. 360; 50 L. J. Q. B. 473; 44 L. T. 527; 29 W. R. 904.

(8) (1737) 1 Atk. 603 at p. 605; 2 Wh. & T. L. C., 7th Ed., 6; 26 E. R. 877.

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*Makhdam Khan v. Musammat Jadi* (13), *Raja Ali Mohammad Khan v. Court of Wards Bishunpur Estate* (14), *Basant Singh v. Rameshar Bakhsh Singh* (15), *Jag Mohan Singh v. Sita Ram Singh* (16), *Mohammad Mohsin v. Mohammad Abid* (17).

*Vasudev Bhikaji v. Balaji Krishna* (12)—In 1872 V and G mortgaged the land in suit. In 1882, a consent decree was passed against the mortgagors and in favour of the mortgagee.

Some time after this, but before 1885, the decretal amount was paid by V and he alone redeemed the property and obtained possession. In 1898 the heirs of G brought the suit out of which the appeal arose against the representatives of V claiming the half share of the land in question. One of the pleas in defence was that V and those claiming under him have been in adverse possession for more than twelve years since V redeemed the property. The plaintiff relied upon Article 148 of the Limitation Act (Act XV of 1877). The learned Chief Justice, Sir Lawrence Jenkins, held that "it is a condition of Article 148 that it should be one against a mortgagee," that a redeeming co-mortgagor has a "charge and is not a mortgagee" and that, consequently, "he would not be a mortgagee within the meaning of Article 148."

*Makhdam Khan v. Musammat Jadi* (13)—The facts of this case were similar to the facts of the Bombay case just mentioned and the point for decision was exactly the same. A Bench of this Court, consisting of Messrs. Scott and Ryves, followed the Bombay decision and held that Article 148 did not apply but that Article 144 did to a suit for possession brought by one mortgagor against his redeeming co-mortgagor. In the course of his judgment Mr. Scott observed as follows:—

"The redeeming co-mortgagor no doubt alone becomes entitled to actual possession, if the mortgage was with possession and under section 95 of the Transfer of Property Act he has a charge on the share of each of his co-mortgagors for the proportion of the expenses properly in-

curred in redeeming and obtaining possession. If, as contended by the appellant, a co-mortgagor who redeems the whole mortgage, has the same interest in the mortgaged property as the mortgagee, section 95 would be superfluous and unnecessary, as without it he would have the right of a mortgagee, which is superior to a charge on the property. I, therefore, am of opinion that by the Transfer of Property Act it was clearly intended that a co-mortgagor redeeming should have no right in the shares of the co-mortgagor other than a charge, and that he is not a mortgagee or representative of a mortgagee."

Before I proceed further I desire to record my complete agreement with the opinions expressed in the aforementioned two cases that, 'where one of several mortgagors redeems the mortgaged property, he has a charge on the share of each of the other co-mortgagors in the property,' (see section 95, Transfer of Property Act) and that such a redeeming mortgagor is not a mortgagee.

To the decision of the case, *Raja Ali Muhammad Khan v. Court of Wards, Bishunpur Estate* (14), I will refer later. The decision in *Basant Singh v. Rameshar Bakhsh Singh* (15) is not relevant at all to the question which I have to decide and, therefore, I need not pause to consider it.

The judgment of Mr. Louis Stuart in *Jag Mohan Singh v. Sita Ram Singh* (16) has no bearing whatsoever on the case before us and we do not understand why it was quoted at all. The point decided in that case was that section 95 of the Transfer of Property Act does not apply to the case of a redeeming mortgagor when the mortgage redeemed was a usufructuary mortgage and the redeeming mortgagor had not obtained possession. This view is in consonance with the decision of the Privy Council in *Ahmad Wali Khan v. Shamsul-Jahan Begum* (18) to which Mr. Stuart has made a reference in his judgment.

*Mohammad Mohsin v. Mohammad Abid* (17)—The point for decision in that case was one of limitation and the question was whether the suit brought by the appel-

(13) 9 O. C. 91.

(14) 9 O. C. 259 at p. 264.

(15) 20 Ind. Cas. 765; 16 O. C. 199.

(16) 39 Ind. Cas. 186; 20 O. C. 72.

(17) 52 Ind. Cas. 159; 22 O. C. 72.

(18) 28 A. 482; 10 C. W. N. 626 (P. C.); 3 A. L. J. 260; 3 C. L. J. 481; 1 M. L. T. 143; 8 Bom. L. R. 397; 16 M. L. J. 229; 33 I. A. 81; 8 Sar. P. O. J. 918.



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lant for redemption of a mortgage of December 21st, 1856, was governed by Article 148 or by Article 134 of the Indian Limitation Act (Act IX of 1908). The remark at page 75—"It is only when a puisne mortgagee redeems a prior mortgage that the question of subrogation arises," was made with reference to the particular facts of that case and does not seem to have been intended to define the exact limits of the application of the principle of subrogation. This interpretation is borne out by what follows immediately after: "A mortgagor who redeems a mortgage by himself cannot claim subrogation, nor can the person who succeeds to his interest." This sentence clinches the exact point which the facts of that case gave rise to. It is a well-established principle of equity that the rule of subrogation has no application to the case of a person who pays his own debts or discharges incumbrances created by himself.

The decision of their Lordships of the Privy Council in *Ahmad Wali Khan v. Shamsul-Jahan Begam* (18) was also quoted and it was argued that their Lordships of the Privy Council would have laid it down in that case if it were correct that a chargeholder under section 95 of the Transfer of Property Act (Act IV of 1882) acquires any of the rights of the mortgagee when he has redeemed. This is an argument which I am unable to entertain seriously. Obviously, the point which I have to determine did not arise in the case which their Lordships had had before them and it is impossible for me to conjecture what their decision would have been if it had arisen [See the case of *Secretary of State for India v. J. Momet* (19)].

The precise point, therefore, which we are called upon to decide in this case did not arise for decision and was not decided in any of the cases referred to. It is true, as I have said before, that the plaintiff cannot claim to be the representative of Fakhruddin, but it does not at all follow from this that he has no right of his own. What the plaintiff

exactly claims is 'priority' of his charge over the incumbrances upon which the appellant relies and that claim he sets up not in right of Fakhruddin and as his representative but in his own right. This brings me to the crucial point whether the plaintiff has such a right.

Neither the provisions of section 95 nor of section 82 of the Transfer of Property Act (Act IV of 1882) can be relied upon in support of the right of priority claimed by the respondent. No provision of any other legislative enactment was referred to at the Bar; nor am I aware of any. But the absence of any such statutory provision cannot and should not, in my opinion, debar me from dealing out that simple justice to the plaintiff to which he is manifestly entitled. The obstruction on the part of the appellant comes with little grace. These two pieces of property were saved by the act of the plaintiff, which, though primarily impelled by motive of self-protection, had the effect of averting the sale the confirmation of which would have carried away all, including the appellant's incumbrances. The payment made by the plaintiff has enabled the appellant to avail of her securities if she wished subject to the equitable claims of the former. However it may be, I think that I have power to do what the appellant is unwilling to concede. Precisely in circumstances of this case, the law, which is the fountain-head of our jurisdiction, gives us clear authority to 'act according to justice, equity and good conscience' [Vide section 3, clause (g), Oudh Laws Act (Act XVIII of 1876)] and I am of opinion that I would be so acting if I apply the principle of subrogation to this case. There are no elements in the plaintiff's claim which would arrest the application of that principle. The payment was not made by him as a volunteer; he was not primarily bound to discharge the obligation resting on these two items of properties, he was obliged to do so for protecting his own bit of property and he has paid not only a portion of the debt but the whole debt.

Now, what is this right of subrogation? This question may best be answered in the language of an eminent Indian lawyer Sir Rash Behary Ghose: "I now pass on

(19) 18 Ind. Cas. 22; 40 C. 391; 13 M. L. T. 53; 17 O. W. N. 169; (1913) M. W. N. 45; 15 Bom. L. R. 27; 11 A. L. J. 49; 17 C. L. J. 194; 6 Bur. L. T. 1; 24 M. L. J. 459; 7 L. B. R. 10; 40 I. A. 48 (P. C.).

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to the kind of subrogation of which I am mainly going to speak to you to-day, namely, the substitution of one creditor for another not by virtue of any actual assignment but by operation of law, a right which does not depend upon a mere legal fiction but upon the most obvious principle of justice and equity, and which is recognised in one form and another in almost every system of law." (Ghose's Tagore Law Lectures on Law of Mortgage, 4th Edition, Volume I, pages 331 and 332).

The principle of subrogation was applied, though not in express terms, by their Lordships of the Privy Council 'in the interests of justice, equity and good conscience,' in the leading case of *Gokuldass Gopaldass v. Rambux Sheochand* (20). Their Lordships, in considering the doctrine laid down in the case of *Toulmin v. Steere* (21), referred to and quoted from the judgment of Vice-Chancellor Hall in *Adams v. Angel* (22) and also from the judgment of Sir George Jessel, M. R., in the Court of Appeal in the same case, then they proceeded to notice some decisions passed in India and finally observed as follows:—

"The doctrine of *Toulmin v. Steere* (21) is not applicable to Indian transactions, except as the law of justice, equity, and good conscience. And if it rested on any broad intelligible principle of justice it might properly be so applied. But it rests on no such principle. If it did, it could not be excluded or defeated by declarations of intention or formal devices of conveyance, whereas it is so defeated every day. When an estate is burdened by a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course to have it assigned to a trustee for his benefit as against intermediate mortgagees to whom he is not personally liable.

"In India, the art of conveyancing has been and is of a very simple character. Their Lordships cannot find that a formal transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed. To apply to such a practice the doctrine of *Toulmin v. Steere* (21)

(20) 11 L. A. 126 (P. C.); 5 Sar. P. C. J. 543; 10 C. 1035.

(21) (1877) 3 Mer. 210; 36 E. R. 81; 17 R. R. 67.

(22) (1877) 5 Ch. D. 634; 46 L. J. Ch. 352; 36 L. T. 334.

seems to them likely, not to promote justice and equity, but to lead to confusion, to multiplication of documents, to useless technicalities, to expense and to litigation.

"The obvious question to ask in the interest of justice, equity and good conscience is, what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest. In the familiar instance of a tenant for life paying off a charge upon the inheritance, he is assumed, in the absence of evidence to the contrary, to have intended to keep the charge alive. It cannot signify whether the division of interests in the property is by way of life-estate and remainder, or by way of successive charges. In each case it may be for the advantage of the owner of a partial interest to keep on foot a charge upon the corpus which he has paid." I have seen before that both the appellant and the respondent were parties to the suit of the first mortgagee, *Fakhr-uddin*. Both had equal opportunities to save their respective interests. The appellant did not avail herself of that opportunity but the respondent did. I can conceive of no just or even a reasonable ground, and none has been suggested at the Bar, for giving the benefit of the payment made by the respondent obviously for the protection of his own interest to the appellant. If I allow the contention of the appellant, the result would be that the value of the charge which the respondent holds will be reduced to almost nothing [see *Stevens v. Mid-Hants Railway Co.* (23)].

In the case of *Blackburn Building Society v. Cunliffe Eooks & Co.* (24) Lord Selborne, L. C., in delivering the judgment of the Court of Appeal, after deciding the question of the power of borrowing on the part of the Society, observed as follows as regards the rights of Bankers:—"And there is an

(23) (1873) 8 Ch. 1064; 42 L. J. Ch. 694; 29 L. T. 318; 21 W. R. 858.

(24) 1883 22 Ch. D. 61; 52 L. J. Ch. 92; 48 L. T. 33; 31 W. R. 98.

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equitable principle consistent with the law of which I have spoken, sound in itself, and also sufficiently established by authority which may entitle them, nevertheless, to some benefit from their securities; and if the facts of the case give them the benefit of that equitable principle, it is consistent with justice and with authority to say that irregularity of either the form or the substance of their course of dealing shall not stand in the way of justice due to them." Again, at page 71: "Regarded in that light, it is consistent with the general principle of equity, that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts. I take that to be a principle sufficiently sound in equity; and if the result is that by the transaction which assumes the shape of an advance or loan nothing is really added to the liabilities of the Company, there has been no real transgression of the principle on which they are prohibited from borrowing. Well, applying that in the present case, we think that, as far as it can be made out that the moneys which were advanced by the Bankers simply went to pay the legitimate debts and liabilities of Society, the Bankers ought to have the benefit of their security." This decision was affirmed on appeal [*Cunliffe Brooks & Co., v. Blackburn and District Benefit Building Society* (25)]. Lord Blackburn, in delivering the judgment of the House of Lords, made the following observations:—"Any persons, whether the Bankers or any one else, might pay off the creditors and stand in the shoes of the creditor who is paid off....As I have already intimated, there could not, in my opinion, have been any objection made against the claim of a person who, whether at the request of the managers or without it, and whether a Banker or not, paid off one to whom the Society was liable, and either by express or implied bargain purchased the claim of the person who was paid off. He would not be entitled to claim as lender of the money; but he would be entitled to claim as assignee of the creditor whom he had paid off.

(25) (1884) 9 A. C. 857; 54 L. J. Ch. 376; 52 L. T. 226; 33 W. R. 307.

"The Court of Appeal, in the present case, held that though there was nothing that amounted to an assignment to the Bankers of the claims of those who were paid off by the money advanced, yet if it could be shown that such claims were in fact paid off thereby, there was an equity in substance to give them, the Bankers, the same benefit as if there had been such an assignment. This is an important decision. It seems to be justice; whether it is technical equity is a question which, I think, is not now before this House."

In the case of *Neath Building Society v. Luce* (26) Obity, J. said as follows:—

"The second question arises in working out the equity of the person who has lent to the Society sums in excess of their borrowing power. Such sums it is clear he cannot recover on the contract of loan, but it is also established that he has an equity of subrogation which is expressed by Lord Selborne in *Blackburn Building Society v. Cunliffe Brooks & Co.* (24) as a right to be re-paid such portion of the amount lent as went to pay the legitimate debts of the society. To this extent the lender is entitled to stand in the shoes of the creditors. But that case also contains a further illustration of this right of the lender. If the Society has made advances to members out of the amount lent, and obtains securities in respect of these advances, then the lender is entitled also to have the benefit of these securities."

I may also refer to the judgment of Romer, J., in the case of *Chetwynd v. Allen* (27) of Warrington, J., in *Butler v. Rice* (28) of Mockerjee, J., in *Gurdeo Singh v. Ohandrikha Singh* (29) and of Stanley, O. J., and Banerji, J., in *Har Prasad v. Raghunandan Prasad* (30) in support of the view which I am taking in this case.

The general rule, therefore, is that 'one who advances money to pay off a charge becomes in equity a transferee of the charge and intends to keep it alive.' This is well ex-

(26) (1890) 43 Ch. D. 159; 59 L. J. Ch. 8; 61 L. T. 611 at p. 615; 38 W. R. 122.

(27) (1899) 1 Ch. D. 853; 68 L. J. Ch. 160; 80 L. T. 110; 47 W. R. 200.

(28) (1910) 2 Ch. D. 277; 79 L. J. Ch. 652; 103 L. T. 94.

(29) 1 Ind. Cas. 917; 36 O. 193; 5 O. L. J. 611.

(30) 1 Ind. Cas. 825; 31 A. 166; 6 A. L. J. 67 and 832.



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pressed by Sir Rash Behary Ghose at page 348 of his book already referred to : —

"Strictly speaking, therefore, when one of several mortgagors redeems a mortgage, he is entitled to be treated as an assignee of the security which he may enforce in the usual way for the purpose of reimbursing himself. It is true section 95 of the Transfer of Property Act allows only a charge on the interests of the co-mortgagors. But whatever may be the true construction of this unskillfully drawn and clumsily worded section, I venture to think it does not impose any new burden, and the charge would have the same priority as the security which has been redeemed on the principle that the benefit of subrogation may be claimed by any person who redeems a mortgage on an estate in which he is only partially interested. Tenants for life, lessees, and purchasers of a part of the mortgaged estate, all come within this rule, and are entitled to enforce any security redeemed by them against other persons interested in the equity of redemption for their proportion of the mortgage-debt." The result is that the second point taken on behalf of the appellant also fails.

The learned Pleader for the plaintiff-respondent drew our attention to section 81 of the Transfer of Property Act (Act IV of 1882). That section in terms does not advance the case of the plaintiff any further than that all the three items of properties are liable to contribute rateably to the debt of Fakhraddin. It, however, seems to be settled law "that the owner of one of those properties who pays off the mortgage shall have a charge on another for any portion of the debt. [*Vide Ray Ali Mohammad Khan v. Court of Wards, Bishunpur Estate* (14)]. The rule is stated by Fisher in his *Law of Mortgage*, Sixth Edition, section 1347, in the following words:—"The effect of the equitable doctrines of contribution and marshalling is shortly as follows:—if several estates, whether of one or of several owners, be mortgaged for or subject equally (and not one as surety or collateral security for the other) to one debt; or if the owner of several estates, having mortgaged one of them, charges his real estate with or devises it in trust for payment of his debts and the estates descend or are devised to different persons (for the rule will not hold

where they come to the same person) and though one of them pass by a specific and the other by a residuary devise; the several estates shall contribute rateably to the debt; being valued for the purpose, after deducting from each estate any other incumbrance by which it is affected; and a vendor's lien being reckoned like any other incumbrance." But that each item of the property is burdened with a charge for the proportionate amount is not enough for the success of the plaintiff's claim. The real question is one of 'priority' as against the incumbrances existing in favour of the appellant. This question I have already answered in favour of the respondent. No other point was argued before us.

I would dismiss the appeal with costs.

DANIELS, A. J. C.—I agree that the appeal must be dismissed with costs. Where the sale to be set aside has taken place in execution of a mortgage decree a proceeding under Order XXI, rule 89, is essentially a proceeding by way of redemption. This is evident from the fact that the sale is set aside not on payment of sale price but of the decretal amount. The plaintiff's right to get the sale set aside arises in virtue of his having an interest in the equity of redemption of a portion of the mortgaged property, namely, 45 bighas of Atwatman which he purchased in execution of a simple money decree. This is, therefore, a case in which one of several mortgagors has redeemed the mortgaged property and obtained possession thereof and is, as the learned Subordinate Judge has rightly held, exactly covered by section 95 of the Transfer of Property Act.

The only other question is the point of time from which the plaintiff's charge is to be reckoned. This is not stated in section 95, but the true answer clearly is that it is the date from which he became a co-mortgagor, i.e., the date of his purchase. Once he has acquired a right to redeem he cannot be made liable for subsequent incumbrances to which he was not a party. The interpretation contended for by the appellant, namely, that his charge is subsequent to any incumbrances by the owners of other portions of property right up to the date when the sale was set aside, would lead to results, on the face of them, inequitable and absurd. Suppose A

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and *B* are owners of two properties mortgaged to *C*, and that *C* is about to take proceedings to enforce his mortgage. *A* is in a position to redeem *B* is not. *B* proceeds to incur further loans on the security of his property until the equity of redemption is worth nothing. Clearly *A*'s charge cannot be made subject to these later incumbrances. It would be useless giving charge on the property of the co-mortgagors if the latter are to have it in their power at any time to render the right valueless.

*Appeal dismissed.*

### LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1801 OF 1917.

January 19, 1921.

*Present:*—Sir Shadi Lal, Kt., Chief Justice,  
and Mr. Justice Wilberforce.

MUHAMMAD SHAFI AND OTHERS—

PLAINTIFFS—APPELLANTS

*versus*

ABDUL RAHIM—DEFENDANT—

RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 92—Collector, duty of—Failure of Collector to consider matters indicated in section—Sanction, validity of.*

Although it is desirable that a Collector, before granting sanction for a suit under section 92 of the Civil Procedure Code, should consider whether the trust is a public trust, whether there are *prima facie* grounds for holding that there has been a breach of such trust and whether the persons suing are persons who have an interest in the trust, yet his failure to consider these matters, does not in any way invalidate a sanction granted by him.

First appeal from the decree of the District Judge, Delhi, dated the 24th April 1917.

Mr. Aziz Ahmad, for the Appellants.

Lala Moti Sagar, R. S., for the Respondent.

**JUDGMENT.**—The plaintiffs in this case, who claim to be the *Mutwallis* of a mosque, sued for the removal of the *Imam*, actual possession of the mosque and other reliefs. They obtained sanction for the suit under section 92, Civil Procedure Code, from the Collector, but this sanction was held by the District Judge not to be a proper sanction in

law and the suit was, therefore, dismissed as not maintainable. Against this decision the plaintiffs have appealed.

The first point raised is that the Court-fee *viz.*, Rs. 10, is insufficient. The Court-fee payable is admittedly that paid in the first Court, and Mr. Moti Sagar for the respondent claims that the appeal should, therefore, be dismissed. He refers especially to *Lekh Ram v. Ram, i Das* (1) as an authority in his favour. In this case, however, the question of Court-fee came up before the admitting Judge and that Judge then expressed his doubt as to the Court-fee payable and ordered the question to come before the Division Bench hearing the case. In these circumstances, we consider that the appellants were to some extent justified in postponing the payment of Court-fee which they declared before the admitting Judge that they were ready to pay as directed. We have, therefore, directed that the full Court fee shall be put in by 4 P. M. to-day, and as Counsel undertook that this will be done, we proceeded to hear the appeal. The Court fee was duly paid.

As for the merits of the case, it is clear that the Collector in giving sanction in no way exercised his judgment as to whether the case was one in which he should grant sanction. His order was to the effect that it was his practice never to refuse permission unless there was a likelihood of the breach of the peace or of public trust funds being dissipated in useless litigation or unless the matter was so politically important that a decision by executive authority was preferable. From his order it is clear that he did not consider whether the persons suing were persons who had an interest in the trust or whether the trust was a public trust and whether there were *prima facie* grounds for holding that there had been a breach of such trust. The District Judge held that his omission to consider such points was a vital defect and that the sanction was not a valid one. He based his decision on *Sajedur Raja Chowdhury v. Gur Mohun Das* (2) and Mr. Moti Sagar for the respondent has argued his case on the same lines. Section 92 itself, however, requires no particular consideration of any of the above questions by the Collector

(1) 57 Ind. Cas. 215; 1 L. 234.

(2) 24 C. 418 at p. 426; 12 Ind. Dec. (N.S.) 946.

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and the remarks in *Saeedur Raja Chowdhuri v. Gour Mohan Das* (2) are entirely obiter. Mr. Moti Sagar has been able to refer us to no authority that the Collector is required in his order to show that he has considered the points referred to in the Calcutta judgment, and there is no other authority of any Indian Court in favour of this proposition. While, therefore, we agree with the remarks of the Calcutta High Court to this extent that it is desirable that a Collector before giving sanction should exercise his judgment on the lines indicated we do not consider that a failure to do so in any way invalidates the sanction granted.

We, therefore, accept the appeal and remand the case for decision on the merits. Costs will be costs in the cause and the Court fees paid in this appeal will be refunded.

*Appeal accepted.*

### BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUITS NOS. 910, 911, 912, 955, AND 956 OF 1920.

August 5, 1920.

Present:—Mr. Justice Setalvad.

THE BOMBAY MUNICIPALITY—  
PLAINTIFF

*versus*

M. DAMODAR BROS. AND OTHERS—  
DEFENDANTS.

*Land Acquisition Act (I of 1894), ss 16, 31, 47—City of Bombay Municipal Act (II of 1848), s 91—Acquisition of land by Government on behalf of Municipal Commissioner of Bombay—Land when vests in Commissioner—Monthly tenancy, whether determined—"Vest", meaning of—Procedure—Bombay Rent (War Restriction) Act (II of 1918), s. 9, applicability of, to land acquired under the Land Acquisition Act.*

The interest of a monthly tenant in property which is being acquired under the Land Acquisition Act comes to an end when the property vests in the Collector under section 16 of the Act. The effect of the acquisition and the resultant vesting is equally effective and complete in the case of acquisition undertaken by Government on the application of the Commissioner under section 91 of the City of Bombay Municipal Act. [p 573 col. 2.]

The vesting contemplated by section 91 of the City of Bombay Municipal Act is such as would result under the Land Acquisition Act. [p 573, col. 2.]

Section 91 of the City of Bombay Municipal Act *pro tanto* modifies the provisions in the Land Acquisition Act so as to vest the property in the Corporation on payment of compensation awarded, instead of in the Government and, therefore, no transfer from Government to the Corporation is needed. [p. 574, col. 1.]

The provisions of section 31 of the Land Acquisition Act do not apply in the case of acquisitions made by virtue of the provisions of section 91 of the City of Bombay Municipal Act and payment of the compensation amount by the Commissioner is enough. [p 574, col. 1.]

The Crown is not bound by the provisions of any Act unless directly or by necessary implication referred to therein, and for this purpose the Crown means not only the King but also Officers of State acting on behalf of the Crown in discharge of their executive duties. The provisions of the Bombay Rent Act, therefore, cannot affect the rights and powers of Government and their Officers under the Land Acquisition Act. [p 575, col. 1.]

The Bombay Rent Act was not intended to apply to premises acquired under the Land Acquisition Act for public purposes. The whole object of such an acquisition is to get the land immediately for useful public purposes and it would be defeating that object to lay down that the public body acquiring the land is not entitled to immediate possession. The general provisions of the Rent Act cannot be held by implication to repeal and override particular and special enactments like the Land Acquisition Act and the Municipal Act. [p. 574, col. 2.]

Sir Thomas Strangman, Advocate-General, for the Plaintiffs.

Mr. Mulla, for the Defendants in Suit Nos. 910 and 956.

Mr. Bahadurji, for the Defendants in Suit No. 911.

Mr. Coltman, for the Defendants in Suit No. 912.

Mr. M. Mehta, for the Defendants in Suit No. 955.

JUDGMENT.—In the year 1917 the Municipal Corporation of the City of Bombay adopted in its final form a scheme for the widening of Churchgate Street and Armenian Lane within the Fort of the City of Bombay, and for the development of that portion of the Fort which was under their consideration ever since 1914, and determined for that purpose to acquire certain properties abutting on those streets. Having failed to acquire the properties by private agreement with the owners thereof, it was considered necessary to have resort to the provisions of section 91 of the City of



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Bombay Municipal Act. The Municipal Commissioner, with the approval of the Standing Committee, moved the Government of Bombay to acquire these properties on behalf of the Corporation under the Land Acquisition Act. The Government of Bombay thereupon, on the 23rd of July 1917, notified the acquisition of five plots in Armenian Lane called plots I to V (Exhibit A). On the 1st of December 1917 the Governor-in-Council issued the necessary notification for the acquisition of seven plots situated in Churchgate Street, called the plots VI to XII in the said notification (Exhibit B). Exhibit H is the plan showing the nature of the scheme and the properties to be acquired. The plots marked I to V on the plan are covered by the notification Exhibit A, and the plots marked VI to XII on plan Exhibit H are comprised in notification Exhibit B. The properties involved in this litigation are properties V and VI on the plan Exhibit H. Property V is situated in Armenian Lane and property VI is situated at the junction of the Churchgate Street and Esplanade Road. Sir Mahomed Yusuf was the owner of both these properties and he had let the said properties to one Diveshwar Parshotam under the lease, dated 12th of December 1917 for a period of three years from the 1st of November 1917.

After the properties were notified for acquisition as stated above, the Collector proceeded to determine the compensation payable to Sir Mahomed Yusuf in respect of these properties. The persons claiming to share in the compensation to be awarded were, Sir Mahomed Yusuf, the Gresham Life Assurance Society, who claimed certain easements on the properties acquired, and Government, to whom certain annual payments were made for the land. The lessee, Diveshwar, had no claim to share in the compensation to be awarded, because by clause 16 of his lease, it was provided that in case the buildings were required by any public body or Government, the lease was to be null and void.

By the time the proceedings before the Collector terminated, but before his award was actually published, the Executive Engineer of the Municipality and Sir Mahomed Yusuf came to an agreement that was embodied in the correspondence Exhibit

D, whereby, in consideration of Sir Mahomed Yusuf agreeing to pay the portion of the compensation payable to the Gresham Life Assurance Society and to Government and his further agreeing not to claim from the Municipal Corporation the compensation payable to himself, the Municipality agreed to convey to Sir Mahomed Yusuf the residue of the land acquired from him after retaining the portion necessary for the purpose of widening the street and also in addition certain strip of land which the Municipality were to get under the arrangement with the Wadia Trust being the owners of property No. XI. Sir Mahomed Yusuf also agreed to pay the costs of any suit or suits that the Municipality might have to file for the purpose of ejecting the occupants of the said premises. The above arrangement was approved by the Municipal Corporation, but no conveyance has yet been given to Sir Mahomed Yusuf.

The Executive Engineer informed the Collector of the above arrangement and he thereupon, on the 24th of November 1919, published his award (which was ready in July but the publication of which was postponed because of the negotiations that were going on between the Municipality and Sir Mahomed Yusuf) whereby he fixed the amount of compensation at Rs. 19,84,948 and apportioned the same as follows:—

	Rs.
Sir Mahomed Yusuf	... 19,61,652
The Gresham Life Assurance Society	... 21,300
Government	... 1,996

By his letter of the same date, the Collector forwarded the award to the Municipal Commissioner and requested him to arrange to send his Surveyor, on the 4th of December 1919, to receive charge of the land from the Collector's Surveyor. On the 3rd of December 1919, the Executive Engineer forwarded to the Collector two cheques of Sir Mahomed Yusuf for the amounts payable respectively to the Gresham Life Assurance Society and to Government. The Collector paid those amounts to the parties concerned.

On the 9th of December 1919 the Collector's Surveyor and the manager of Sir Mahomed Yusuf signed Exhibit M, wherein

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it is recorded that they had respectively handed over and taken charge of plots Nos. V and VI. On the same day the Collector's Surveyor wrote a letter (Exhibit N-2) to Mr. Jamshedji Fitter, the Acquisition Officer of the Municipality, and sent along with it what is called a charge-receipt for these properties and the same was signed by Mr. Fitter and the Collector's Surveyor (Exhibit J), whereby it is recorded that they had respectively taken and handed over charge of the said plots.

The Municipality, by their letter of the 22nd of December 1919, required the occupants of these properties who were monthly tenants of the said Diveshwar to vacate the premises in their occupation by the 31st of December 1919. Some of the occupants have vacated the premises in their occupation and others have remained on the premises on the understanding with the Municipality that they would vacate on a fortnight's notice. The defendants disregarded the said notices and the Municipal Corporation has filed these suits for recovery of possession from the present defendants, and the second plaintiff Sir Mahomed Yusuf has been joined as co-plaintiff out of caution, as the plaint says, by reason of the agreement with him. The defendants in Suit No. 910, Messrs. M. Damodar Brothers are the occupants of premises comprised in No. V on Exhibit H, and the defendants in Suits Nos. 911, 912, 955 and 956 are occupants of premises comprised in No. VI. It was agreed that all these suits should be tried together as many of the points arising in these cases were common.

Several questions of law were raised and were argued at considerable length by Counsel appearing for the various parties. It is contended on behalf of the first plaintiff that, by virtue of the provisions of section 91 (2) of the City of Bombay Municipal Act, the properties vested absolutely in the Corporation who thereby acquired all existing interests in the property and that such vesting gets rid of everybody, that the provisions of the Rent Act do not apply in the case of the occupants of such premises and that, even if the Rent Act applies, there is satisfactory cause for the recovery of possession. It was contended for the defense, (1) that there was no

vesting of the premises in dispute in the Corporation, because the provisions of the City of Bombay Municipal Act and the Land Acquisition Act had not been complied with; (2) that when property vests in the Corporation under section 91 of the City of Bombay Municipal Act such vesting is not of such an absolute character as the vesting in Government under section 16 of the Land Acquisition Act; and (3) that, in any event, the Bombay Rent Act applied, and that, under the circumstances of the case, there was not sufficient cause for ejecting the defendants within the meaning of the proviso to section 9 of the Bombay Rent Act. The special circumstances regarding the different defendants were also gone into in support of the contention that if decrees were passed in favour of the Corporation the defendants should be given considerable time for giving possession in order to enable them to make other arrangements.

Under section 16 of the Land Acquisition Act, 1894, when the Collector has made the award he may take possession of the land which shall thereupon vest absolutely in the Government free from all incumbrances; and, under section 47, if the Collector is opposed or impeded in taking possession of the land, he can enforce the surrender himself, if he is a Magistrate, or, if not a Magistrate can apply to the Commissioner of Police to enforce such surrender. It is not denied that the interest of a monthly tenant comes to an end when the property vests in the Collector under section 16. The effect of the acquisition and the resultant vesting must, to my mind, be equally effective and complete in the case of acquisition undertaken by Government on the application of the Commissioner under section 91 of the City of Bombay Municipal Act. Reliance was placed on the fact that, while section 16 of the Land Acquisition Act and section 41 of the City of Bombay Improvement Trust Act spoke of vesting absolutely and free from all encumbrances, section 91 of the City of Bombay Municipal Act merely used the expression 'vest.' But I think that when the Municipal Act provides for acquisition by resorting to the Land Acquisition Act the vesting contemplated is such as would result under the latter Act. It was contended that under section 16

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of the Land Acquisition Act the properties could only vest in the Government and as the Government had not conveyed the properties to the Corporation, the latter had acquired no title to the properties and reference was made to the provisions of Part VII of the Land Acquisition Act which deals with acquisition of land for Companies and it was pointed out that section 41 contemplated the transfer of the acquired land by Government to the Company concerned. I think section 91 of the City of Bombay Municipal Act *pro tanto* modifies the provisions in the Land Acquisition Act so as to vest the property in the Corporation on payment of compensation awarded, instead of in the Government and, therefore, no transfer from Government to the Corporation is needed.

It was contended, further, that, inasmuch as the Collector had not tendered payment of the compensation awarded to Sir Mahomed Yusuf and had not paid it to him as required by section 31 of the Land Acquisition Act, the Collector was not entitled to take possession and hand it over to the Municipality. I do not think the provisions of section 31 apply in the case of acquisitions made by virtue of the provisions of section 91 of the City of Bombay Municipal Act and payment of the compensation amount by the Commissioner is enough.

It was next contended that in fact no possession was taken by the Collector and handed over to the Municipality and that Exhibits 2, M, N and J were merely paper transactions. I am unable to regard these as merely paper transactions. Moreover, in the case of acquisitions under section 91 of the City of Bombay Municipal Act I do not think the taking of possession by the Collector and his handing over the same to the Municipality is necessary. As I have pointed out above, the property vests directly in the Corporation without the intervention of Government or the Collector, and when the property is so vested in the Corporation, they are entitled to take possession, which they are seeking to do by these suits.

Then it is contended that, inasmuch as the compensation awarded to Sir Mahomed Yusuf has admittedly not been paid and

the arrangement arrived at with him had the effect to avoid such payment, even if it was not entered into for that very purpose, the provisions of section 91, clause (2), were not complied with and the property did not vest in the Corporation. When the Collector informed Sir Mahomed Yusuf of his award on the 24th of November, Sir Mahomed Yusuf replied to the Collector on the 23rd of December 1919 to the following effect:—

"I beg to state that my claim for compensation amounting to Rs. 19,61,652.0.0 as mentioned in the award has been satisfied by reason of the arrangement arrived at between the Municipal Corporation and me and which is embodied in my letter to the Municipal Executive Engineer, dated the 29th September 1919 and his letter to me, dated the 5th November 1919."

I think the money was to all intents and purposes paid to Sir Mahomed Yusuf, although the money did not actually change hands as the Municipality retained the same as the price of the land that they had agreed to convey to Sir Mahomed Yusuf. The Municipality could have given a cheque for the amount to Sir Mahomed Yusuf and he could have immediately returned it to them in fulfilment of his agreement. Such a formality was unnecessary. I, therefore, hold that the property, the subject-matter of these suits, vested absolutely in the Municipal Corporation and that such vesting put an end to all interests in the property.

Then, the question arises whether in such a case the provisions of the Bombay Rent Act apply. I think that the Bombay Rent Act was not intended to apply to premises acquired under the Land Acquisition Act for public purposes. The whole object of such an acquisition is to get the land immediately for useful public purposes and it would be defeating that object to lay down that the public body acquiring the land is not entitled to immediate possession. The general provisions of the Rent Act cannot be held by implication to repeal and override particular and special enactments like the Land Acquisition Act and the Municipal Act; *Dodds v. Shepherd* (1). As already

(1) (1876) 1 Ex. D. 75 at p. 78; 45 L. J. Ex. 457; 34 L. T. 358; 24 W. R. 322.



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pointed out, under section 47 of the Land Acquisition Act the Collector is empowered to summarily enforce surrender of possession without the intervention of any Court and the Rent Act cannot override that provision. Moreover, the Crown is not bound by the provisions of any Act unless directly or by necessary implication referred to therein and for this purpose the Crown means not only the King but also Officers of State acting on behalf of the Crown in discharge of their executive duties. The provisions of the Rent Act, therefore, cannot affect the rights and powers of Government and their Officers under the Land Acquisition Act.

But whatever that may be, assuming that the Rent Act applies, I have no doubt that the premises are required by the Corporation for a satisfactory cause. The evidence of Mr. Mackison, the Executive Engineer of the Municipality, shows that the whole scheme of the widening of the Churchgate Street and Armenian Lane hangs together and they cannot get on with the scheme till they get possession of the premises, the subject-matter of these suits. Plots Nos. I, II, III and IV are all cleared now and a good number of the tenants of plots Nos. V and VI have agreed to remain on the premises in their occupation on the understanding that they would vacate on forty-eight hours' notice and some of them to whom such notices have been served have already vacated. It is, therefore, absolutely necessary for the Municipality to get possession of the premises occupied by the defendants in these suits in order to enable them to carry out the whole scheme and to fulfil their obligations under the agreement with Sir Mahomed Yusuf. The plans submitted to the Municipality by Sir Mahomed Yusuf for the development of the areas that would go to him have been passed and the buildings according to these plans can only be constructed if the Municipality can obtain possession of the premises, the subject-matter of these suits.

There is no doubt that with regard to some of the defendants, it is considerable hardship that they are required to vacate the premises in their occupation. This is particularly the case with Messrs. M. Damodar Brothers, the defendants in Suit

No. 910, and Messrs. D. Macropolo and Co., the defendants in Suit No. 912. But where any scheme of large public utility, such as the Municipality have undertaken in this instance, is to be carried out, individual hardship of this character is unavoidable. Mr. Mackison deposed that when the scheme is fully carried out, the Churchgate Street and Armenian Lane will be considerably widened, to the great convenience of the congested public traffic in those streets and the development of this quarter will provide double the letting space for offices of what is available at present.

It is contended that the notice given by the Municipality on the 22nd of December to vacate by the 31st of December 1919 was not a sufficient notice and that, therefore, these suits must fail and that the Municipality can sue for possession only after giving a month's notice to vacate. The lease of Diveshwar, as already pointed out, terminated on the acquisition and on such determination the monthly tenancies of the under-lessees, the defendants, also came to an end. Thereafter they remained on the premises merely as tenants on sufferance and they were not entitled to a month's notice.

It is contended that the Municipality should at present take possession only of the portions actually required to be thrown into streets to be widened. Even if this were practicable, it would upset and virtually make it impossible to carry out the whole scheme which involves re-selling of the areas not actually thrown into the streets for the purpose of carrying out the scheme economically and beneficially in the public interests. Section 296 of the City of Bombay Municipal Act expressly empowers the Municipality to acquire in addition to the land actually required for widening any public street all such land and buildings outside the intended regular line of such street as it shall deem expedient and to sell such additional land.

Only a small portion of the premises occupied by Messrs. Javeri and Co. the defendants in Suit No. 911, is to be utilised in widening the Armenian Lane, but the rest of the area the Municipality have agreed to give to Mongini Brothers in consideration of their removing the portion

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of their premises within the set-back line in the Churchgate Street, except a little strip which they have arranged to give to Sir Cowasji Jehangir, the owner of plots Nos. VII and VIII, as part of the arrangement with him. There is really no hardship in the case of Messrs. Javeri and Co. They have hired other premises into which they have already removed part of their offices and stock. With regard to Messrs. Dharamai and Co., the defendants in Suit No. 955, and the Madras United Spinning and Weaving Mills Co. Limited, the defendants in Suit No. 956, there is no particular hardship. With regard to Messrs. M. Damodar Brothers and Messrs. D. Macropolo and Co, as well as with regard to the other defendants, it must be remembered that they had ample warning about their being required to vacate their premises. The notifications for the acquisition of the properties occupied by them were promulgated as early in 1917, and they must be perfectly aware that the acquisition was being proceeded with. A petition on behalf of various occupants, including some of the defendants in these suits, was addressed to the Municipal Corporation praying that the time for demolishing the buildings in Churchgate Street be extended (Exhibit K). On the 9th of September 1919, the Standing Committee resolved not to comply with the request of the applicants and, on the 3rd of November 1919, the Corporation declined to interfere, and the applicants were informed of this on the 7th of November 1919. The applicants presented a petition to Government and, on the 5th of February 1920, the Government refused to comply with the request of the applicants to delay the scheme (Exhibit L). Under the circumstances, I think that the Municipality must succeed and the defendants should be ordered to vacate the premises in their occupation and to hand over vacant possession thereof to the first plaintiff. In view of the fact, however, that there is monsoon at present, I direct that execution of the decrees be stayed till the 5th of October next. The defendants must pay to the first plaintiff compensation for use and occupation as prayed in the plaints in the respective suits from the 1st of January 1920 except in the case of the defendants

in Suits Nos. 910 and 956 of 1920 who must pay such compensation from the 1st of February 1920. The defendants must pay the costs of the first plaintiff. The second plaintiff has, I believe, not incurred any separate costs, but if he has, he must bear his own costs. It was really not necessary to have joined him as plaintiff.

*Appeal allowed.*

### LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 29 OF 1917.

January 27, 1921.

*Present:*—Mr. Justice Broadway and  
Mr. Justice Abdul Raouf.

NARAIN SINGH AND ANOTHER—PLAINTIFFS  
—APPELLANTS

*versus*

WARYAM SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

*Pre-emption, evasion of—Exchange, validity of.*

The law of pre-emption may be evaded by any legal means, and there is nothing illegal in a man becoming a proprietor in a village under an exchange where he apprehends that a sale effected in his favour would be pre-empted. [p. 578, col. 1.]

Second appeal from the decree of the District Judge, Ferozepore, dated the 18th December 1916, reversing that of the Subordinate Judge, 2nd Class, Ferozepore, dated the 25th August 1916.

Mr. Aziz Ahmad, for the Appellants.

The Hon'ble Pandit Sheo Narain, R. B., for Respondents Nos. 2 and 3.

**JUDGMENT.**—The plaintiffs in this case are residents of Sadai Jaimal Singh. They instituted a suit for possession by pre-emption of 235 *kannals*, 18 *marlas* of land situate in their village on payment of Rs. 4,500 which they alleged to be its market-value. The land in suit had originally belonged to Ganda Singh, a resident of the plaintiffs' village, and had been parted with by him to Chet Singh and Sarmukh Singh, residents of Dhindsab, under a deed of exchange, dated the 15th March 1915. The plaintiffs alleged that although this deed purported to be a deed

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of exchange, the transaction was really a sale under the guise of an exchange. The Trial Court accepted the view advanced by the plaintiffs and granted them a decree for possession of the said land on payment of Rs. 3,655. Against this decree Chet Singh and Sarmukh Singh preferred an appeal to the District Judge who came to the conclusion that the transaction had not been shown to be anything other than what the deed described it to be, that is, that it had not been shown to be a sale, and the plaintiffs' suit was thereupon dismissed. They have now come up to this Court in second appeal, and on their behalf we have heard Mr. Aziz Ahmad, while Mr. Sheo Narain has addressed us on behalf of the respondents.

The document before us, which was executed on the 15th March 1915, is, in its terms, clearly and unmistakably a deed of exchange. It purports to exchange 235 kanals, 15 marlas of land situate in Badni belonging to Ganda Singh for 225 kanals, 17 marlas of land situate in Dhindsah belonging to Chet Singh and Sarmukh Singh. Ganda Singh's land was under mortgage: 154 kanals, 8 marlas were under mortgage to Chet Singh and Sarmukh Singh for Rs. 2,400. The remainder, 81 kanals, 10 marlas, was, (together with other land with which this transaction is not concerned) mortgaged to one Jaimal Singh for Rs. 4,500. The period for this mortgage was ten years, of which seven years still remained. On the day following the execution of this deed, Ganda Singh mortgaged the land he had taken from Chet Singh and Sarmukh Singh in Dhindsah to Chet Singh and Sarmukh Singh: 157 kanals, 8 marlas were mortgaged for Rs. 4,928-8-0 the term being ten years: 78 kanals, 10 marlas were left in possession of Chet Singh and Sarmukh Singh and were to remain in their possession until such time as Ganda Singh redeemed the mortgage in favour of Jaimal Singh, referred to above, and thus released the 81 kanals, 10 marlas which were in possession of Jaimal Singh as mortgagee. Mr. Aziz Ahmad, who argued his clients' case with great ability, contended that, inasmuch as Ganda Singh did not get possession of any of the land in Dhindsah and as the mortgage of 157 kanals, 8 marlas of the Dhindsah land for

Rs. 4,928-8-0 was far in excess of the real value of the land, it should be held that the parties to this deed of exchange intended the transaction to be a sale, the consideration being the sum of Rs. 4,928-8-0. He contended that the circumstances disclosed the fact that Ganda Singh would practically never be able to redeem this Dhindsah land, having regard to the excessive charge thereon, and that, therefore, it should be regarded as clear evidence indicating that he intended to sell that land. In support of his contention our attention was drawn to *Gul Muhammad v. Sabz Ali Khan* (1). There, a deed of exchange was executed on the 19th January 1912 under which Khair Muhammad, etc., exchanged certain land with land belonging to Gul Muhammad. On the 21st January 1912 Khair Muhammad, etc., sold the land they had taken in exchange for Rs. 13,100. On these facts it was held that the intention of the parties was to effect a sale and not an exchange. After giving due weight to Mr. Aziz Ahmad's contention, we are unable to hold that the present case is on all fours with the one relied on by the learned Counsel. In that case there was a complete sale of the land taken in exchange, while in the present case the land taken by Ganda Singh has not been sold. He is entered in the revenue records as the owner and possesses all the proprietor's rights in the land. The land he gave situated in Badni was, as stated above, heavily encumbered. Not unnaturally, Chet Singh and Sarmukh Singh got the encumbrances on the land taken by them transferred to the land given to Ganda Singh in exchange. As far as we can see, Ganda Singh was in precisely the same position *qua* the land taken by him as he was in regard to the land that he gave in exchange. We agree with Mr. Sheo Narain in his contention that, so long as the mortgage continues, it cannot be held to be irredeemable. As pointed out by the learned District Judge, the real values of the land in question are not known. For the purposes of the deed of exchange, the parties fixed a sum of Rs. 5,500 as the value of their respective lands. We agree with the learned District Judge in thinking that this valuation was purely an arbitrary one

(1) 49 Ind. Cas. 275; 104 P. R. 1918; 140 P. L. R. 118.



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and cannot be regarded as conclusively fixing the real market value.

Chet Singh and Sarmukh Singh have made no secret of the object they had in effecting this exchange. They frankly admitted that they desired to obtain a footing in Mauza Badni and were unable to do so by buying land therein, the reason being that any purchase made by them would be open to a pre-emption suit. In order to attain their end, they thought out this method of evading the law of pre-emption. It has been repeatedly held that the law of pre-emption may be evaded by legal means, and there is nothing illegal in effecting an exchange. We agree with the learned District Judge in holding that the present transaction has not been shown to be other than what it purports to be, viz., an exchange, and we, therefore, dismiss the appeal with costs.

*Appeal dismissed.*

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 882 OF 1919.

August 16, 1920.

*Present:*—Mr. Justice Shah and  
Mr. Justice Crump.

AMBALAL SARABHAI—PLAINTIFF—  
APPELLANT

*versus*

THE AHMEDABAD MUNICIPALITY  
— RESPONDENT.

*Bombay District Municipal Act (III of 1901), s. 46, cl. i—Rules and Bye-laws of Ahmedabad Municipality, rule 74, whether ultra vires—Provisions of rule not complied with, effect of.*

Rule 74 of the Rules and Bye-laws of the Ahmedabad Municipality is not *ultra vires* [p. 579, col. 1.]

The effect of that rule is that, for any particular year, the Municipality is entitled to such amount as house and property tax as is determined by the beginning of the year, and not to any increase that may be determined at any time during the year. [p. 579, col. 1.]

Where the Municipality increases a tax without complying with the provisions of rule 74, the assessee is bound to pay only that amount which was fixed for the next preceding year and any excess levied by the Municipality can be recovered by him. [p. 580, col. 1.]

Second appeal from the decision of the Joint Judge, at Ahmedabad, in Appeal No. 77 of 1916, modifying the decree passed by the Subordinate Judge, at Ahmedabad, in Civil Suit No. 502 of 1902.

Mr. Dhirojlal K. Thakore, with him Mr. Ratanlal Ranchoddas, for the Appellant.

Mr. N. K. Mehta, for the Respondent.

## JUDGMENT.

SHAH, J.—This appeal arises out of a suit to recover certain taxes said to have been illegally levied by the Ahmedabad Municipality. In the lower Courts the case has been disposed of on somewhat different grounds, but in the result a refund of the excess of the drainage-tax claimed by the plaintiff is allowed, but a refund of the house and property-tax is not allowed. In the appeal before us, a refund of the excess amount levied in respect of the house and property-tax for the year 1911-12 is claimed on the ground that rule No. 74 of the Rules and Bye-laws of the Ahmedabad Municipality, which were in force at the time, has not been complied with. It is stated that the assessment list with the proposed alteration for the year 1911-12 was published in April 1911, and the notice of the proposed increase in the tax was given to the plaintiff by the Municipality on the 20th of June. The plaintiff objected to the enhancement on the 12th July, but a demand was made for the enhanced amount on the 14th July. A further protest was made by the plaintiff on the 30th July and his objections were heard and disposed of in December 1911 by the officer authorised to deal with such objections. Ultimately, a notice of demand was served on the 27th January 1912 and the amount claimed by the Municipality for the year 1911-12 was paid under protest. I mention these dates as stated on behalf of the plaintiff and not challenged on behalf of the defendant with respect to the proposed enhancement relating to one property though the whole amount levied was in respect of several properties. These dates in substance are applicable to the full demand made by the Municipality with reference to all the properties, as to which a refund is claimed.

The two grounds urged in support of this claim for refund before us are that, under section 65, sub-section (4), there was no

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proper authentication of the list in so far as the officer required by the clause to sign the list did not do so; and, secondly, that the provisions of rule 74 were not complied with at all. As regards the first objection, I do not think that there is any substance in it. It may be that if the list is not signed it could not be accepted as conclusive evidence as provided by sub-section (c). But I do not see how the mere fact that the officer did not sign the list could affect the question as to whether the levy was legal or not, particularly when the amount fixed under the list is not challenged before us.

The second objection which is based on rule 74 seems to me to be good. The rules in question were originally framed under section 32, clause (h), of Bombay Act II of 1884, and under section 2 of the present District Municipal Act these rules were in force in 1911. This position is not challenged on behalf of the Municipality. If the rule is not *ultra vires* it is clear to my mind, from the provisions of this rule, that the intended increase in the house and property tax was to be notified to the house-owners concerned before the 1st of March. All objections to the proposed increase were to be lodged in writing in the Municipal Office before the 15th March, and the investigation was to be completed before the 1st of April and the payment of the tax for the official year was to be considered due on that date. That is, in the present case, if the provisions of this rule had been duly followed, by the 1st of April 1911, all objections should have been considered and the amount payable for the year 1911-12 determined. The effect of the rule seems to me to be that, for the year 1911-12, the Municipality would be entitled to such amount as is determined by the beginning of the year and not to any increase that may be determined at any time during the year. I am unable to agree with the lower Appellate Court on this point. The question is not whether the levy of the tax is illegal apart from rule 74, but the question to my mind is as to what was due to the Municipality by the present plaintiff by way of house and property-tax according to law. The rule distinctly indicates that the amount payable for the year is the amount

fixed at the commencement of the year. Unless the increased amount was determined in the manner contemplated by rule 74, the only amount that could be said to be due by the owner for 1911-12 was the amount which was fixed for the next preceding year. I do not see anything unreasonable in this rule, and, if it is consistent with the provisions of the present Act, I am of opinion that it should be given effect to. If effect is given to it, it follows that the levy of the increased tax for the year 1911-12 was not justified. As a last resort, Mr. Mehta has urged on behalf of the Municipality that this rule is *ultra vires* and inconsistent with the provisions of Act III of 1901. In support of this argument, he relies upon section 67, sub-section (2). On a careful consideration of the scheme of the sections 63, 64, 65, 66 and 67, it is clear that under sub-section (2) of section 67 it is permissible to the Municipality to deal with the matters arising under sections 64, 65, 66 after the commencement of the official year in question. But there is nothing in the Act to show that the matters intended to be dealt with under section 65 must necessarily be dealt with after the commencement of the official year. For instance, section 66, sub-section (3), provides that any alteration made under that section shall have the same effect as if it had been made on the earliest day in the current official year in which the circumstance justifying the alteration existed. Though section 66 does not apply to the present case, sub-section (3) illustrates, to my mind, that when the Legislature intends that, even though the alteration is made after the commencement of the year, it should take effect on the earliest day in the particular official year in which the circumstance justifying the alteration exists an express provision to that effect is made. There is no such provision with reference to matters arising under section 65; and that indicates, in my opinion, that it was open to the Municipality to have such a rule as No. 74 with reference to matters arising under section 65. In prescribing the time when the objections were to be made by the house-owners and dealt with by the Municipality, there was nothing inconsistent with the provisions of the District Municipal

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Act of 1901. It is also clear to my mind that these provisions as to time, when a house-owner is to receive notice of the intended increase and his objections relating to the increase are to be decided, are within the scope of the powers of the Municipality to make rules concerning the levy of the taxes. The words of clause (1) of section 45 are wide enough to justify such a rule; and, though we are not strictly concerned with the question as to whether this rule was *intra vires* under the Act of 1884 it seems to me that, under clause (h) of section 32 of the Act of 1884, it was competent to the Municipality to have such a rule regulating the levy of the house and property tax. It is clear that this rule was binding upon the Municipality as well as upon the house-owners; and the non-compliance with that rule entitles the plaintiff to recover what has been levied by way of house and property-tax in excess of what was payable at the beginning of the year, which would be the amount fixed for the next preceding year. The correctness of the amount claimed by the plaintiff is not challenged on behalf of the Municipality.

The cross-objection with reference to the refund of the drainage tax has not been pressed.

I would, therefore, vary the decree of the lower Appellate Court by allowing to the plaintiff the sum of Rs. 413-5-6 claimed in this second appeal. The plaintiff to have his costs throughout.

The cross objection is dismissed with costs.

CRUMP, J. — I agree.

*Decree varied.*

### LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL  
No. 1023 of 1920.

January 22, 1921.

*Present:*—Mr Justice Martineau.

MUHAMMAD SAID — DEFENDANT

— APPELLANT

*versus*

SHAH NAWAZ AND ANOTHER —

PLAINTIFFS, J. RUSTOMJI —

DEFENDANT — RESPONDENTS.

*Punjab Pre-emption Act (I of 1913), s. 13 (o) —  
Agricultural land, what is.*

The mere fact that a plot of land is assessed to land revenue would not make it agricultural land, unless it is proved that the plot is occupied or let for agricultural purposes or for purposes subservient to agriculture. [p 531, col. 1.]

Miscellaneous second appeal from the order of the District Judge, Lahore, dated the 2nd March 1920, reversing that of the Subordinate Judge, First Class, Lahore, dated the 5th of July 1919.

*Lala Tiroth Ram*, for the Appellant.

*Mr. M. Obaidulla*, for the Respondents.

**JUDGMENT.**—The plaintiffs sue for possession of a piece of land in Manza Shish Mahal by right of pre-emption. They at first treated the land as urban land and claimed pre-emption on the ground of vicinage. The defendant denied that the custom of pre-emption existed in the locality in which the land was situate. The plaintiffs then, with the permission of the Court, amended the plaint and claimed pre-emption on the ground that the land was agricultural and that they were land-owners in the village, while the vendee was not, and they added, in the alternative, that if the land were held to be a residential site in the limits of the town of Lahore they were entitled to pre-empt on the ground of vicinage.

The Subordinate Judge found that the land was not agricultural, but was urban immoveable property, and also that the custom of pre-emption was not proved to exist in that locality, so he dismissed the suit.

On appeal the District Judge has held that the land is agricultural, and he has remanded the case for disposal of the other issues. The vendee has filed a second appeal in this Court.

A preliminary objection is taken on behalf of the respondents that the appeal does not lie, on the ground that the question involved is one of custom, but I do not agree with the contention. The District Judge has not given any decision on the question whether the custom of pre-emption exists in the locality, but has decided only that the land is agricultural land within the meaning of the Pre-emption Act. The finding is one of law, and an appeal from the order of remand lies under Order XLIII, rule 1 (a) of the Civil Procedure Code.

I do not attach much importance to the first ground of appeal, in which it is con-



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tended that the plaintiffs should not have been allowed to amend their plaint. The fact appears to be that they were not certain themselves whether the land was urban or not, and when the vendee disputed the existence of the custom of pre-emption in the locality they thought it advisable to put forward alternative claims. I see no objection to the amendment of the plaint.

On the question whether the land in suit is agricultural I differ from the finding of the lower Appellate Court. The land is no doubt assessed to revenue, but in the last Settlement it was included in the category of residential or building sites and assessed at a rate higher than that which is charged for agricultural land. It has not been proved that the land is occupied or let for agricultural purposes or for purposes subservient to agriculture, and it is improbable that this small plot, only about 13 marlas in area, can be used for pasturing cattle. I hold, therefore, that the land in suit is not agricultural land.

The remaining points taken by the plaintiffs in their appeal in the lower Appellate Court have not yet been determined.

I accordingly accept the appeal, set aside the order of the lower Appellate Court and remand the case to that Court for a fresh decision of the appeal before it. Court-fee on the appeal in this Court to be refunded. Other costs will be costs in the case.

*Appeal accepted.*

### BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 70 OF 1919.

August 4, 1920.

Present:—Sir Norman Macleod, Kt.,  
Chief Justice, and Mr. Justice Fawcett.

LAXMAN MADHAVRAO JAHAGIR.

DAR—DEFENDANT—APPELLANT

VERSUS

BHAGVANSINGH NARSINGBHAI  
NAVALURKAR—PLAINTIFF—RESPONDENT.

*Vendor and purchaser—Agreement to sell—Death of vendor—Possession delivered to vendee by minor widow of vendor, effect of—Adopted son, whether can eject vendee.*

A vendor having died after an agreement of sale was executed but before the completion of the sale, his minor widow received the purchase-money from the vendee and delivered possession of the property to the vendee. Subsequently, the widow adopted the plaintiff who brought a suit to eject the vendee:

*Held*, that the suit must fail. [p. 582, col. 2]

First appeal from the decision of the First Class Subordinate Judge, at Dharwar.

Mr. Tyabji (with him Mr. K. H. Kelkar),  
for the Appellant.

Mr. P. B. Shingne with him Mr. G. R. Mudbhavi, for the Respondent.

### JUDGMENT.

MACLEOD, C. J.—One Narsingbhai was the owner of the suit property. On the 8th of January 1904 he entered into an agreement with the defendant in this suit to sell the property at the rate of Rs. 175 an acre and received Rs. 100 as earnest-money and agreed to pass a regular sale deed. Thereafter, he was attacked by plague and died before the sale deed could be executed. On the 30th of September his widow executed a sale-deed in favour of the defendant putting him in possession of the property. The consideration for the suit-property, at the rate of Rs. 175 an acre, was Rs. 1,307. Rs. 100 having been paid, the balance left was Rs. 1,267. The consideration paid by the defendant is said to have been made up as follows. He took over the mortgage due by the deceased in favour of one Arandibai for Rs. 1,000, and the interest then due amounting to Rs. 215 and a debt of Rs. 75 due to Government on account of *taga-i* making altogether Rs. 1,290, rather more than the actual balance due. The widow at that time was a minor and, therefore, under section 7 of the Transfer of Property Act, not being competent to contract to sell the property, she was not competent to transfer title. Thereafter, she adopted the present plaintiff who brought this suit in 1915 against the defendant to recover possession with subsequent mesne profits of the suit land and for other relief.

The learned Judge held that the plaintiff's adoption was proved, that Nandubai was a minor when the sale-deed (Exhibit 26) was passed, that the agreement to sell the land in suit by Nandubai to the defendant was proved and that the sale deed was passed by Nandubai, his widow, in pursuance of the said agreement. But he found that the

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sale-deed was obtained by the defendant by misrepresentation as stated by the plaintiff in the second paragraph of the plaint, and he finally came to the conclusion that the plaintiff could contend that the sale was invalid on account of the minority of Nandubai and on account of the misrepresentation as alleged by the plaintiff. He passed a decree in favour of the plaintiff for possession if he paid within six months Rs 1,600 to the defendant as compensation for the cancellation of the sale-deed.

Now, when the agreement to sell was passed by Narsingbhan, the defendant acquired a right to a sale-deed on payment of the balance of the purchase-money, and if Narsingbhan had put the defendant into possession of the property without giving him a sale-deed, then, under the Full Bench decision of *Bapu v. Kashinath* (1), if at the time when the agreement was still capable of specific enforcement the vendor sued to recover possession it would be a valid defence that the vendee had been placed in possession of the property and was willing to perform his part of the agreement. The learned Judges considered that where a vendor, who has contracted to sell immoveable property and has under the contract put the prospective vendee in possession, repudiates the fiduciary obligation with regard to possession, he could not sue the latter in ejectment if the vendee was willing to complete the purchase. The learned Judges also stated as follows at page 112 : \* "We are of opinion that a suit for specific performance is not the purchaser's only remedy, and that he may, in the circumstances stated in the question, if there are no other facts operating to his prejudice, successfully plead his contract of sale and the possession acquired under it." I presume that means, the vendee in possession under a contract of sale is not obliged to sue for specific performance and can resist any attempt by the vendor to eject him unless there are other facts, such as fraud or misrepresentation, which may operate to his prejudice. Then, is the defendant's position in this case inferior to that of the defendant in the case I have cited, merely because he was put into possession by the widow of the vendor and not by the vendor himself? No

doubt the sale-deed cannot be considered as effecting a transfer of the property in the legal sense of the word. But there could be no objection to the widow putting the purchaser in possession and receiving the purchase price and so far carrying out the contract which had been entered into by her husband, and I cannot say that the widow herself could have successfully sued the present defendant for possession supposing she had not adopted. It must follow then that the present plaintiff, her adopted son, is in no better position than the adoptive mother, nor is he in any better position than Narsingbhan would have been if he had given possession to the purchaser in his lifetime. That appears to me to be the true answer to the question arising in this case, and there is, therefore, no need to consider any of the points which have been dealt with by the learned Trial Judge. In any case it cannot be said that there are any equities in favour of the plaintiff. We are dealing with a transaction which, apart from the validity of the sale-deed, was completed in 1904. Although after his adoption the plaintiff was still of tender years, he must have known, long before the suit was filed, about this transaction, and it was only in 1915 when, as the learned Judge points out, the value of this property had increased to a considerable extent that he sought to take advantage of the fact that his adoptive mother passed a sale-deed before she attained majority, in order to defeat the defendant's rights.

In my opinion, the decree of the learned Judge must be reversed and the suit dismissed with costs throughout.

The cross-objections are dismissed with costs.

Fawcett, J.—I think the main question in this appeal is, whether the present case falls under the Full Bench ruling in *Bapu v. Kashinath* (1), or whether it has been rightly distinguished from that case by the lower Court. To satisfy the conditions of the principle laid down in that case it is, first of all, a requisite that the agreement to sell the property to the defendant shall still be capable of specific enforcement. On this point I think the contention that such a suit by the defendant would not be time-barred is correct. The case is, of course, governed by Article 113 of the Indian

(1) 39 Ind. Cas. 103; 19 Bom. L. R. 100 at p. 112; 41 B. 438.

\* Page of 19 Bom. L. R.—[Ed.]

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Limitation Act, under which the prescribed period of three years begins to run from the date fixed for performance or, if no such date is fixed, when the plaintiff has notice that performance is refused. In this case the written contract, Exhibit 26, fixed no date for the performance, and the oral evidence as to that important term of the contract is conflicting and must, I think, be excluded under section 92 of the Indian Evidence Act. Then, the only question is, when was it that the plaintiff had notice that performance of this contract was refused? He had, in fact, a conveyance executed by the widow and he cannot, in my opinion, be said to have had any notice that performance was refused within the meaning of this Article 113 until the plea was raised that his conveyance was void as having been executed by a minor. There is no evidence that the defendant knew that the widow actually was a minor, and it would be giving a very inequitable meaning to the words if it were held, because the conveyance to sell was void, that, when the conveyance was executed, there was a refusal to perform the contract to sell. To that extent, therefore, I think the case must be held to fall within the Full Bench ruling.

The next question that arises is, whether the basis on which that ruling rests applies to the present case. It is held in the judgment of the Full Bench that, "where... a vendor, who has contracted to sell immovable property and has under the contract put the prospective vendee in possession, sues the latter in ejectment, he recondites if the vendee is willing to complete the purchase, the fiduciary obligation arising out of the contract and annexed to the ownership of the property, and seeks to treat the vendee as a trespasser. Once it is recognized that the plaintiff is violating his fiduciary obligation, it is clear that the Court cannot grant him the relief which he seeks, for it will not aid him in committing a breach of trust and his suit must fail; the defendant is no trespasser, but is in possession under the contract which the plaintiff has bound himself to carry out." This fiduciary obligation is there specifically described as arising out of the contract and annexed to the ownership of the property, and if that is a correct description, that fiduciary obliga-

tion attaches also to any legal representative of the vendor who has contracted to sell. Also, on principles of equity, it seems to me that the legal representative should be under the same obligation and not escape it merely because the original vendor has died. Consequently, I do not think that the lower Court was right in holding that this Full Bench ruling is distinguishable, because it was not the seller, but the seller's widow, that put the defendant in possession. It is not, I think, right to say that delivery of possession by the widow was non-existent in the eye of the law. It was an actual delivery of possession and it was a delivery of possession under a fiduciary obligation annexed to the ownership of the property.

Therefore, I think, the case falls under the Full Bench ruling and I agree in allowing the appeal.

*Decree reversed.*

## MADRAS HIGH COURT.

CIVIL APPEALS Nos. 247 AND 266 OF 1918.

August 4, 1920.

*Present:*—Sir John Wallis Kt., Chief Justice, and Mr. Justice Seshagiri Aiyar.

IN APPEAL No. 247 OF 1918

IVATURY ATCHAMMA—PLAINTIFF—  
APPELLANT

*versus*

IVATURY PAPIAH AND OTHERS—  
DEFENDANTS—RESPONDENTS.

IN APPEAL No. 266 OF 1918

CHELLAGULLA NAGIAH AND OTHERS—  
DEFENDANTS—APPELLANTS

*versus*

IVATURY ATCHAMMA—PLAINTIFF—  
RESPONDENT.

*Hindu Law—Survivorship—Exclusion of co-parcener—Excluded co-parcener, right of, to succeed by survivorship—Survivorship, rule of, incidents of.*

A member of an undivided family, who has been excluded from the enjoyment of the joint property for the statutory period, is not entitled, on the death of any undivided co-parcener having no direct heir to represent him, to succeed with the other co-parceners by right of survivorship to the share of such deceased co-parcener, because the right of survivorship is incident to the right of joint possession and enjoyment of the estate with the



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others who are jointly entitled, and cannot exist separately when the right of joint possession and enjoyment has been lost. [p. 584, cols. 1 & 2.]

Appeals against the decree of the Court of the Temporary Subordinate Judge, Ellore, in Original Suit No 5 of 1916.

Mr N. Rama Rao, for the Appellant in A. S. No. 247 of 1918, and for the Respondent in A. S. No. 256 of 1918

Messrs. P. Narayanamurthi, E. V. R. Sarma and O. Sambasiva Rao, for the Respondent in A. S. No. 247 of 1918 and for the Appellant in A. S. No. 266 of 1918.

## JUDGMENT.

WALLIS, O. J.—In this case the estate of the last male owner descended to his widow and on her death in 1877 to their four surviving daughters. According to the law in this part of India, they inherited jointly a woman's estate in their father's property determinable on the death of the last survivor when the succession would devolve on the next heir of their father the last male owner. Sundaramma, one of the four daughters, excluded and held adversely to her three sisters, and, on the expiration of the statutory period of 12 years, their rights of suit became barred and their rights in the property were extinguished under section 28 of the Limitation Act, Act (IX of 1908). The present plaintiff, one of the excluded sisters, survived Sundaramma who died in 1895 and instituted within 12 years the present suit in which she sought to recover the estate by right of survivorship from Sundaramma's alienees and her son, the 7th defendant, who is at once heir to his mother's separate estate and the next reversioner to the estate of the last male owner. At the hearing of the appeal the plaintiff's claim to the whole of the estate was hardly pressed, but it was contended that, though she might have become barred as to her own share and the shares of her excluded sisters, she was, at any rate, entitled to succeed by survivorship to the share of her sister, Sundaramma, who continued in possession and enjoyment of the estate until her death, on the happening of which event, it was argued, the plaintiff became entitled for the first time to succeed to her share. In my opinion, this contention is untenable. It has never, so far as I know, been suggested that a member of an undivided family who has been excluded for the statutory period is entitled, on the death of

any undivided co-parcener leaving no direct heirs to represent him, notwithstanding his own exclusion and the statutory extinguishment of his rights in the joint family property, to succeed with the other co-parceners by right of survivorship to the share of such deceased co-parcener. This contention ignores the fact that this so called right of survivorship is incident to the right of joint possession and enjoyment of the estate with the others who are jointly entitled, and cannot exist separately when the right of joint possession and enjoyment has been lost. This, in my opinion, is a rule of general jurisprudence applicable to all cases of joint tenancy. It is laid down in Coke on Littleton 183(a) where the right of survivorship is treated as a *jus accrescendi* or right of accretion to the existing interest of the surviving joint tenant, and a *Latitio maxim* is cited to the effect that there can be no such right of accretion in the absence of an existing interest.

It has also been expressly applied to India in *Katama Natchiar v. Rajah of Shikha-gunga* (1), where the Lords of the Judicial Committee, in negating the right of the other co-parceners to succeed to the separate property of a deceased co-parcener, lay down that the right of survivorship cannot exist apart from the right of joint possession and enjoyment.

"According to the principles of Hindu Law there is co-parcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession. But the law of partition shows that as to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails."

In the present case the plaintiff had no community of interest or unity of possession with her sister, Sundaramma, at the time of the latter's death and, therefore, in their

(1) 9 M. I. A. 533 at p. 611; 2 W. R. P. O. 31; 1 Sath. P. O. J. 520; 2 Sar. P. O. J. 25; 19 F. R. 843.

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Lordship's language, the foundation of the plaintiff's right to take her sister's share by survivorship fails. This view is also supported by the decision of Jenkins, C. J., in *Sachindra Kishore Dey v. Rani Kant Chuckerbutty* (2). It would appear that it is unnecessary to decide the point, that the effect of the interests of the other sisters being barred and their rights being extinguished under the Limitation Act, was to enlarge the estate of Sundaramma and to give her an estate for her own life and the lives of her sisters determinable on the death of the last survivor. I concur in the order proposed by my learned brother.

**SESHAGIRI AIYAR, J.**—One Veerasalingam died in 1864 leaving a widow and five daughters. The widow, Bangarammal, died in 1877. On her death, one of her daughters, Sundarammal, took possession of the entire estate and was in sole possession of it till she died in 1905. She made various alienations during her life time. Defendants Nos. 1 to 6 are the alienees, the 7th defendant is the son of Sundarammal. The plaintiff is the sole surviving daughter of Veerasalingam. She sues for the recovery of the property on the ground that, on the death of Sundarammal, she became entitled to it by survivorship.

One of the contentions of the defendants was that Veerasalingam was succeeded by a son and that, consequently, the plaintiff was not the nearest heir to the property, being the sister of the last male owner.

The Subordinate Judge held that Veerasalingam died last and we agree with him. The defendants have also raised the plea of limitation. The Subordinate Judge says with reference to it, in paragraph 27 of his judgment, that the plaintiff's right to recover the properties is barred by limitation. He has, however, decreed to her some items of the property apparently on the ground that she succeeded to the estate of her sister by survivorship. The plaintiff has preferred Appeal No. 247 in respect of the items disallowed and some of the alienees from the 7th defendant his mother have filed Appeal No. 256. Appeal No. 260 was allowed to be argued first as that raised a contention which, if successful, would render the hearing of the other appeal unnecessary.

(2) 27 Ind. Cas. 250; 18 C. W. N. 904.

It relates to portions of Items Nos. 2 and 3. A decree was given to the plaintiff for the other items, but as no appeal was preferred by the persons affected, we do not think that this is a proper case for exercising our power under Order XLI, rule 3, of the Civil Procedure Code, in their favour.

I shall now consider the plea of limitation. The estate which Sundarammal and the plaintiff has under the Hindu Law was only for life. On their death, the grand-son, tracing descent from his grand-father, will succeed to the full estate. To him the cause of action would arise under Article 141 of the Limitation Act (Act IX of 1908) on the death of the last of the life estate holders, namely, the plaintiff. Under the Limitation, Act XIV of 1859, adverse possession acquired against a life owner was held to bar the reversioner as well. The language of Article 141 of the present Act has been advisedly changed and the cause of action against the reversioner starts only on the death of the last life estate-holder.

Now, the question arises whether, on the death of Sundarammal, who held adversely to the plaintiff, the latter had any title to succeed to the property by survivorship. Mr. Rama Rao contended that what was lost by the plaintiff was her right of enjoyment along with her sister, Sundarammal, and that her right of survivorship was unaffected by the adverse enjoyment. Mr. Narayanamurthy for the defendants contended, that the plaintiff lost both the rights. It was held in *Jiyamba Bai Saiba v. Kamakshi Bai Saiba* (3) after a very elaborate examination of the authorities, by Scott, C. J., and Ellis, J., that two or more lawful wives of a Hindu take a joint estate for life in their husband's property, with rights of survivorship and of equal beneficial enjoyment. The Judicial Committee in *Gnapathi Nilamani v. Gajapathi Rathamani* (4) quote with approval this statement of the law. The Privy Council had already held in *Bhugwandeon Doobey*

(3) 3 M. H. C. R. 424.

(4) 4 I. A. 212; 1 M. 233 (P. C.); 1 Ind. Jur. 589; 1 C. L. R. 97; 3 Sar. P. C. J. 752; 3 Suth. P. C. J. 365; 1 Ind. Dec. (N. S.) 193.

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v. *Myna Basse* (5) that one of the widows had not power of disposition over an estate which she may enjoy conjointly with her co-widow. In *Kothaperumal v. Venkabal* (6) and in *Musammal Dal Koer v. Musammal Panbus Koer* (7) the same view was expressed. It is now well-settled that co-widows and daughters are on the same footing in this respect.

The characteristics of joint tenancy have been described by ancient text writers. In 2 Blackstone it is stated:—

"The properties of a joint estate are derived from its unity, which is fourfold, the unity of interest, the unity of title, the unity of time and the unity of possession, or, in other words, joint tenants have one and the same interest accruing by one and the same conveyance, commencing at one and the same time and held by one and the same undivided possession."

This definition deals, no doubt, with a case of conveyance; but there is no reason for holding that cases of inheritance differ in any material particulars from it. The Judicial Committee in *Kalima Natchiar v. Rajah of Shivogurga* (1) applied it to a case of an ordinary co-parcenary.

The argument of the learned Vakil for the plaintiff is that each one of the characteristics is capable of being separated and enjoyed when occasion arises and that they do not coalesce. On the other hand, Mr. Narayanamurthy contended that it is of the essence of this class of rights that they are inseparable and that each of them is dependent on the other. This contention seems to be supported by the authorities.

Ooke on Littleton, Volume 2, 188 (a), is the foundation for all the propositions which have been subsequently deduced by writers and recorded in Judicial decisions. The law is thus laid down there:—

"And this is to be observed, that there shall be no survivor, unless the thing be in jointure at the instance of the death of him that first dyeth: for the rule is *nihil*

*de re accrescit ei, qui nihil in re quando jus accrescet habet.*"

In commenting upon it in Williams Law of Property, the author says:—

"As joint tenants together compose but one owner, it follows, that the estate of each must arise at the same time; so that if A and B are to be joint tenants of lands, A cannot take his share first and then B come in after him"; and again he says:—

"The incidents of a joint tenancy, above referred to, last only so long as the joint tenancy exists."

Blackstone comments upon the same passage in these terms: "This right of survivorship is called by ancient authors the *jus accrescendi* because the right, upon the death of one joint tenant, accumulates and increases to the survivors."

The authorities to which I shall presently draw attention establish that where there is a disruption of the joint tenancy the right of survivorship is gone. For example, where one of the joint tenants releases his interest in favour of the others, the joint tenancy comes to an end and a tenancy-in-common is created, see *Chesler v. Willan* (8).

It has also been held that a joint tenancy will be put an end to by operation of law, for example, when one of the joint tenants becomes a bankrupt, vide *Thomason v. Frere* (9), *Morgan v. Marquis* (10), *Butler's Trusts*, *In re, Hughes v. Anderson* (11).

In the latter case a male and a female became joint tenants under a bequest. They subsequently married. The question was, whether the female's right of survivorship was lost by this marriage. A strong Bench, consisting of Cotton, L. J., Lindley, L. J., and Bowen, L. J., came to the conclusion that it was not lost. Bowen, L. J., thus states the law:

"It depends on whether the marriage divests the property from the wife and vests it in the husband. If it does, the joint tenancy is severed. If it does not, there is no severance."

(5) 11 M. I. A. 487; 9 W. R. P. C. 23; 2 Suth. P. C. J. 124; 2 Sar. P. C. J. 827; 20 E. R. 184.

(6) 2 M. 194; 4 Ind. Jur. 234; 1 Ind. Dec. (N. S.) 407.

(7) 8 C. W. N. 668.

(8) (1870) 2 Wms. Saund. 98 (a); 85 E. R. 768.

(9) (1809) 10 East 418; 10 R. R. 841; 103 E. R. 834.

(10) (1853) 9 Ex. 145; 2 Com. L. R. 276; 23 L. J. Ex. 21; 96 R. R. 624; 154 E. R. 82.

(11) (1883) 88 Ch. D. 288 at p. 294; 57 L. J. Ch. 643; 59 L. T. 386; 86 W. R. 817.



IVATURY ATCHAMMA v. IVATURY PAPIAH.

Applying the same principle to the present case, if, by virtue of limitation, the right of enjoyment to the exclusion of the plaintiff vested in Sundarammal, the joint tenancy was severed.

This leads me to the consideration of the effect of the Law of Limitation in the case. Article 127 of the Limitation Act is not in terms applicable, because it has been held from the earliest times that widows and daughters, taking as joint tenants, are not entitled, as a matter of right, to alienate their share, or to enter into a partition. No doubt, for the sake of convenient enjoyment, they may ask the Court, if they cannot agree among themselves, to allot particular portions of the property for them during their lives. The Madras High Court appears to have gone further than the other High Courts, but even on the authority of our decisions, Article 127 of the Limitation Act cannot be applied as between the co widows and daughters. The proper Article is 144. That Article, read with section 28 of the Limitation Act, makes it clear that by non-enjoyment for the statutory period the right of survivorship is lost. The expression "the right to such property" in section 28 must include the right to joint enjoyment as well as the right of survivorship. In *Subbammal v. Krishna Aiyar* (12) the learned Judges of this Court held that the right of survivorship is not separable from the right of enjoyment.

Some argument was based on the decision of the Judicial Committee in *Aumirtolall Bose v. Rameekant Mitter* (13) and *Ohotay Lall v. Ohunoo Lall* (14). In both these cases, the question was considered with reference to a right of preference which a married daughter having issue has over barren and unmarried daughters. From the nature of the right it would necessarily follow that the right of survivorship would revive when the preference was gone. I do not think these cases are of any assistance in dealing with this case.

I feel no difficulty in holding that Sundarammal acquired adversely the right

of survivorship possessed by her sister. The only doubt in my mind is, whether on the death of Sundarammal, succession will be in abeyance until the death of the plaintiff because the grand-son, under Article 141 of the Limitation Act and the Hindu Law, does not take the inheritance as long as the last life estateholder is alive. In English Law, under similar circumstances, a civil death is spoken of so as to let in the next heir but I do not think we need apply that principle. In my opinion, the analogy of the English Law regarding estates *pur autre vie* can be extended to this case. The estate for the life of her sister which Sundarammal acquired does not come to an end with her death. An estate *pur autre vie* may arise by express limitation and by assignment of an existing life estate (see 24 Halsbury, paragraph 340). If there can be an assignment of another's estate for life, I fail to see why there should not be an acquisition of an estate for the life of another. It is now settled by legislation in England that this estate *pur autre vie* can be bequeathed and would descend in a particular manner to the heir-at-law or to the personal representative of the holder of the estate. No doubt, it will come to an end with the death of *cestui que vie*, but till his death the legatee donee or the heir is entitled to possession. The death of the holder of the estate *pur autre vie* does not put an end to it.

Now, applying that analogy to the present case, if Sundarammal, by excluding the plaintiff, not only acquired a full right of enjoyment in the property but also acquired an estate *pur autre vie*, that is, for the life of the plaintiff, this estate would descend to Sundarammal's heirs. This view received support from the decision of Sir Lawrence Jenkins, C. J., and Chatterjee, J., in *Sachindra Kishore Dey v. Kajani Kant Chuckerbutty* (2). The learned Chief Justice says this:—"So far as the original title to a moiety is concerned, it is not suggested before us that the claim of the plaintiff could be resisted, but it is said that, inasmuch as Harasundari died in 1906, the plea of adverse possession and the consequent extinguishment cannot prevail as to the share that

(12) 22 Ind. Cas. 399; 26 M. L. J. 479.

(13) 16 B. L. R. 10 (P. O.); 23 W. R. 214; 2 I. A. 113; 3 Sar. P. O. J. 430.

(14) 14 B. L. R. 235 at p. 246; 22 W. R. 496.

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originally survived to Kashiswari on Harasundari's death. So the problem that arises in this case is, what was the effect of adverse possession against the two daughters who succeeded on the death of their father under the Dayabhaga system of law." Then, after discussing some of the cases, he concludes:—"The result appears to me to be that, so far as Kashiswari is concerned, her right was extinguished not only in the original 8-annas that devolved on her, but in respect of the whole 16-annas which passed to her and her sister as a single inheritance on the death of their father."

No doubt, in the case before the Calcutta High Court, the acquirer was a stranger, but the principle of that decision seems applicable to the present case.

On the whole, I have come to the conclusion, though not without some hesitation, that the true rule is that enunciated by Sir Lawrence Jenkins in *Sachindra Kishore Dey v. Rajani Kant Chuckerbutty* (2). That view is in accordance with the English authorities to which I have referred. I must, therefore, hold that the plaintiff lost her right of survivorship by the operation of section 28 of the Limitation Act, and that this suit, so far as a portion of Item No. 2 is concerned, should be dismissed.

Appeal No. 263 of 1918 is allowed with costs.

Appeal No. 247 of 1918 is dismissed with costs.

M. C. P.

*Appeal No. 266 allowed;*  
*Appeal No. 247 dismissed.*

## LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 470 OF 1919.  
November 13, 1920.

Present:—Mr. Justice Broadway.  
DES RAJ-RUGHNATH DAS, THROUGH  
DES RAJ—PLAINTIFF—PETITIONER

VERSUS

DUNI CHAND AND OTHERS—DEFENDANTS  
—RESPONDENTS.

*Provincial Insolvency Act (III of 1907), ss. 16, 24—  
Schedule of creditors, non-preparation of, whether bars  
regular suit against insolvent.*

A firm was adjudicated insolvent, but no schedule of creditors, as required by law, was prepared, nor was notice of the insolvency proceedings served on all the creditors. One of the creditors brought a suit against the insolvents to recover the amount of his debt, but the suit was dismissed on the ground that no permission had been obtained from the Court under section 16 of the Provincial Insolvency Act:

*Held*, that the insolvency proceedings were no bar to the suit. [p. 589, col. 1.]

Petition, under section 25 of Act IX of 1887, for revision of the decree of the Judge, Small Cause Court, Amritsar, dated the 2nd April 1919.

Dr. Nand Lal, for the Petitioner.

The Hon'ble Pandit Sheo Narain, B. B., for Defendants Nos. 3, 4 and 5.

**JUDGMENT.**—The firm of Des Raj-Rughnath Das of Amritsar instituted a suit against Duni Chand, Jethu Mal, Amir Chand, Lakbmi Chand and Thakar Das, described as proprietors of the firm known as Duni Chand Jethu Mal, of Hoti Marden, in the district of Peshawar. It was pleaded by the defendants, *inter alia*, that inasmuch as the firm Duni Chand Jethu Mal of which they were said to be the proprietors had been adjudicated insolvent in 1914, the suit was barred, permission under section 16 of the Insolvency Act not having been obtained from the Insolvency Court. The Judge of the Small Cause Court, at Amritsar, upheld this plea and dismissed the suit. The plaintiff firm of Des Raj-Rughnath Das has come up to this Court on the revision side, through Dr. Nand Lal complaining against this decision, and I have heard Mr. Sheo Narain for the respondents, Amir Chand, Lakbmi Chand and Thakar Das. The other two respondents were absent, although service had been effected on them.

ICHALAL JAGMOHANDAS v. NAGO SINA PATIM.

The first ground taken by Dr. Nand Lal was that the Insolvency Act, III of 1907, was not in force in Peshawar. Mr. Sheo Narain, however, pointed out that this was erroneous and drew my attention to a notification to be found in the Appendix of the N. W. P. Code, at page 673, by which notification Act III of 1907 was extended to Peshawar. Dr. Nand Lal, however, contended that, inasmuch as his clients (the petitioners) had never been served with notice of the insolvency proceedings in Peshawar and as no schedule had been prepared subsequent to adjudication as is required by the Insolvency Act, the insolvency proceedings were no bar to the present suit. In support of his contention he referred me to *Harya v. Mul Chand* (1), which ruling followed *Arunachala v. Ayyavu* (2). The present case is very similar to the case decided by the Chief Court in 1907. With the application which was filed by the insolvents themselves a list of creditors was filed but no schedule was prepared. Notice was issued and on the date fixed six out of 39 creditors appeared. The then petitioners were adjudicated insolvents, and the 27th August 1914 was fixed for the creditors to prove their claims. No creditors appeared and the papers were ordered to be filed. From the record in the insolvency proceedings it appears that the present petitioners were never served with notice of these proceedings. No schedule, as required by law, was prepared and, therefore, the decision in *Harya v. Mul Chand* (1), appears to me to be in point. The conclusions arrived at by the Court below are, therefore, erroneous, and I accept this petition and, setting aside the order of dismissal, direct that the case be proceeded with in accordance with law. Costs in this Court will follow the event.

*Petition accepted.*

(1) 64 P. R. 1907; 89 P. L. R. 1908.

(2) 7 M. 318; 8 Ind. Jur. 244, 2 Ind. Dec. (N.S.) 806.

# BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 369 OF 1919.

August 5, 1920.

*Present*:—Sir Norman Macleod, Kt,  
Chief Justice, and Mr. Justice Fawcett.  
ICHALAL JAGMOHANDAS—PLAINTIFF—  
APPELLANT

*versus*

NAGO SINA PATIM—DEFENDANT—  
RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Arts. 139, 144—  
Suit for joint possession by co-owner—Limitation  
applicable.*

Where a purchaser from a co-owner accepts a lease from his vendor and sues for joint possession of his share after the expiry of the lease, the suit is governed by Article 144, and not by Article 139, of Schedule I to the Limitation Act. [p. 580, col. 1.]

Appeal from the decision of the Joint Judge, Thana, in Appeal No. 29 of 1918, confirming the decree passed by the Subordinate Judge, at Bassein, in Civil Suit No. 116 of 1917.

Mr. R. S. Navalkar, for the Appellants.

Messrs. A. G. Desai and P. B. Shingne, for the Respondent.

## JUDGMENT.

MACLEOD, O. J.—The plaintiff sued to recover joint possession of the plaint land. Plaintiff's father purchased a joint half share in Survey No. 165, Pot No. 1, with other property from Bhiku Dharma and Ann Bhiku on the 22nd of August 1903. On the same day Bhiku and Ann passed a lease in favour of Jagmohandas in respect of the property mentioned in Exhibit 19 for a term of one year and agreed to pay the rent of Rs. 42. The term of the rent-note expired on the 22nd of August 1904. On the 5th of March 1913 Bhiku Dharma, Hari Dharma, Ann Bhiku and Sakharam Hari, sold the entire land, Survey No. 165, Pot No. 1, to the defendant. This suit was filed on the 28th of August 1917. It has been dismissed in both Courts on the ground that Article 139 of the Indian Limitation Act applies, and that when the term of the rent-note expired on the 22nd of August 1904, Bhiku and Ann held adversely to the landlord, and there was no evidence in the case from which a fresh tenancy could be inferred.



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The facts of this case are entirely different from the facts in *Chandri v. Dasi Bhau* (1). It must be remembered that in this case the tenants were the vendors who were tenants-in-common with two other persons of the plaint-land and the fact that they held over would not in any way affect the plaintiff's right as purchaser under the sale-deed to sue for partition against his co tenants in-common. What might have happened if he had let a portion of the land which belonged to the tenancy-in-common to an outsider who held over is a question which does not arise. In this case the plaintiff stood in the shoes of Bhiku and Anu who had a right of partition against the other members, Hari and Sakbaram, and it would depend upon the terms of the partition what portion of the tenancy in common would go to him on division. We think the case clearly comes under Article 144, and not under Article 139.

The appeal must be allowed and the plaintiff's suit decreed with costs.

F. WOERT, J.—I agree. In this suit the plaintiff stated his claim to recover joint possession of the plaint property not as a landlord, but as an owner, and, although he does mention that the land was leased to the defendant's predecessor in-title, yet his claim was clearly brought on the basis of his title as owner. Accordingly, although the tenancy may have determined, I do not think that the case can properly be held to fall under Article 139; and there being no other Article applicable, it falls under the general Article 144. That being so, the grounds on which the lower Courts have held the suit time barred are, in my opinion, wrong.

*Appeal allowed.*

(1) 24 B. 504; 2 Bom. L. R. 491.

## LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2360 OF 1917.

January 29, 1921.

*Present:—*Sir Shadi Lal, Kt., Chief Justice  
and Mr. Justice Wilberforce.

TEHLA MAL—DEFENDANT—APPELLANT  
versus

DHANA MAL—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 104 (1) (f), Sch II, paras 19, 21—Arbitration by intervention of Court—Award—Appeal against order filing award, whether lies.*

Section 104 (1) (f) of the Civil Procedure Code provides for an appeal against an order filing or refusing to file an award in an arbitration without the intervention of the Court, and applies to an award filed under paragraph 21 of Schedule II to the Code. No appeal lies against an order filing an award made in pursuance of an order of reference made by the Court and filed under paragraph 19 of the Second Schedule to the Code.

First appeal from the decrees of the Senior Subordinate Judge, Amritsar, dated the 28th March 1917.

Mr. *Badr-ud-Din Kureshi*, for the Appellant.

Mr. *Dev Rai Sawhney*, for Bhagat Govind Das, for the Respondent.

JUDGMENT.—On the 6th of December 1916 the Subordinate Judge of Amritsar passed an order that the agreement between the parties referring their dispute to arbitration should be filed in Court, and made an Order of Reference to the arbitrator appointed by the parties. The arbitrator duly gave his award which was accepted by the Court and embodied in a decree. Against this decree the defendant has preferred an appeal to this Court.

Now, it is perfectly clear that there is no appeal from a decree passed in accordance with an award. Nor do the provisions of section 104 (1) (f), Civil Procedure Code, apply to the facts of this case. That clause provides for an appeal against an order filing or refusing to file an award in an arbitration without the intervention of the Court, and obviously applies to an award filed under paragraph 21 of Schedule II to the Code of Civil Procedure. In the case before us, the award was made in pursuance of an Order of Reference made by the Court, and the proceedings of the arbitrator were subject to the supervision of the Court. There can be no manner of doubt that an award made under paragraph 19 cannot be

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treated as an award made without the intervention of the Court, and clause (f) of section 104 cannot be invoked for the purpose of sustaining an appeal from an order filing an award under that paragraph.

We are, therefore, perfectly clear that this appeal is incompetent and must be dismissed with costs.

*Appeal dismissed.*

### MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1721 of 1919.

September 17, 1920.

*Present*:—Justice Sir Abdur Rahim, Kt.,  
and Mr Justice Oldfield.

TELLICHERRY PICHU NAIDU—  
DEFENDANT—APPELLANT

*versus*

C. JAFFERSON—PLAINTIFF—RESPONDENT.

*Lease—Covenant for renewal at option of lessee—Rule against perpetuities, whether applies—Covenant, whether enforceable—Transfer of Property Act (IV of 1882), s. 14.*

A covenant in a lease to renew from time to time at the option of the lessee is a covenant running with the land and is not subject to any rule against perpetuities, and is enforceable if the intention in that behalf is clearly shown [p. 592, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Nellore, in Appeal Suit No. 9 of 1919, (Appeal Suit No. 18 of 1919 on the file of the District Court, Nellore), preferred against the decree of the Court of the District Munsif, Nellore, in Original Suit No. 1563 of 1916.

FACTS appear from the judgment.

Mr K. Krishnaswami Aiyangar, for the Appellant.—In the first place, the plaintiff did not ask for renewal of the lease for 8 years after its expiry. He has been guilty of laches and is not entitled to relief.

The covenant for renewal offends against the rule as to perpetuities in section 14 of the Transfer of Property Act.

In *Kolathu Ayyar v. Ranga Vadhyar* (1) &

(1) 18 Ind. Cas. 203; 39 M. 114; 24 M. L. J. 83; 18 M. L. T. 179; (1913) M. W. N. 163.

contract of pre-emption was held to offend the rule against perpetuities. The same principle applies to this case.

Mr. T. V. Ramanatha Aiyar, for the Respondent.—As the plaintiff was in possession, he could have asked for a renewal when he chose. There was no laches. The rule against perpetuities is in respect of conveyances. Here is not a case of conveyance but of a lease. A covenant for perpetual renewal is enforceable.

18 Halsbury's Laws of England, paragraph 935. *Kolathu Ayyar v. Ranga Vadhyar* (1) is a case of pre-emption which stands on a different footing.

JUDGMENT.—The plaintiff had a lease of the land in dispute from the defendant for a period of five years for Mica Mining purposes on the 6th May 1903 with the following clause "I bind myself to give you such leases as you may require from time to time after the expiration of this agreement on same conditions. Should I fail to do so, I bind myself to pay you all your expenses that you incur." The plaintiff entered into possession according to the terms of the lease and erected certain structures on the land with a view to carry on the mining operations. But sometime in 1915 the defendant obtained a decree for possession of the land inasmuch as the present plaintiff had not, on the expiry of the term mentioned in the lease, taken out any renewal. Thereupon the plaintiff called upon the defendant on the 4th November 1916 to execute a lease for 5 years with the clause for renewal in the terms set out above but the defendant refused to grant any such renewal. The lessee then instituted this suit.

Both the lower Courts have held that the plaintiff is entitled to such a lease as he asked for and gave a decree for specific performance. It was argued before the District Munsif that the decree in the suit of 1915 operated as *res judicata*, but he held that in that suit no question as to the plaintiff's right to renewal was decided and that, therefore, the present suit was not barred. No argument has been addressed to us on this plea. Another defence set up was that the plaintiff was guilty of laches in not asking for renewal of the lease since the expiry of the first term in 1903, until 1916. But then he was in possession and was willing to carry out his part of the agreement and

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he was never called upon to take a renewal. The lower Appellate Court has discussed this question fully and is right in holding that the plaintiff's right to enforce the agreement has not been lost by laches.

The point, however, which was pressed before us with great persistence was that the agreement was in violation of the rule against perpetuities as laid down in section 14 of the Transfer of Property Act. That section enacts the well-known rule that no interest in property can be created to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some persons who shall be in existence at the expiration of that period. The short answer to this argument is, that the agreement in question cannot properly be said to be a transfer of property which is defined by section 5 of the Act as "an act by which a living person conveys property, in present or in future, to one or more other living persons or to himself and one or more other living persons." Here there is no conveyance of property after the expiry of the term of five years. The agreement in question is only a covenant to renew at the option of the lessee. A covenant like this is a covenant running with the land and is not subject to any rule against perpetuities. In Halsbury's Laws of England, Volume 18, paragraph 935, it is pointed out that a covenant for perpetual renewal is enforceable if the intention in that behalf is clearly shown. The nearest case that has been cited in support of the appellant's contention is of *Kolathu Ayyar v. Ranga Vadhyar* (1) where a contract of pre-emption was held to offend against the rule against perpetuities for it fixed no time within which the agreement to convey was to be performed. Even there the contract was sought to be enforced against the heirs of the person who had entered into it and not, as here, against the lessor himself. But, apart from that, a contract of pre-emption stands on a different footing from a covenant to renew from time to time which has always been recognised both in England and here as a perfectly valid and enforceable contract.

The second appeal must be dismissed with costs.

M. C. P.

*Appeal dismissed.*COURT OF THE BOARD OF REVENUE,  
UNITED PROVINCES.

SECOND APPEAL No. 10 OF 1919 20.

April 12, 1920.

Present:—Mr. Hopkins, S. M.

PHAGOO KURMI—APPELLANT

versus

Musammam DHARAMRAJI—RESPONDENT.

*Withdrawal of unnecessary plaintiffs, effect of.*

Where unnecessary plaintiffs withdraw from a suit, such withdrawal does not necessitate a dismissal of the suit.

Second appeal from the order of the Commissioner, Gorakhpur Division, dated the 10th of July 1919, in a case of ejectment.

**JUDGMENT.**—The contention that the withdrawal of unnecessary plaintiffs in a suit necessitates its dismissal cannot be accepted. The question whether the plaintiffs who withdraw had or had not any interest in the subject-matter of the suit is one of fact which cannot be raised in second appeal. The appeal fails and is dismissed.

As regards the cross-appeal the facts are not very clear, but there is some indication on the evidence that the *sir* was divided and the Commissioner seems to have found as a fact that No. 641 was actually transferred in 1908. The appeal to *Mahesh v. Hari Khan* (1) which rests on the hypothesis that the *sir* was joint is not made on a fine foundation. The cross appeal, therefore, also fails and is dismissed. The parties in both appeals will bear their own costs.

The Assistant Collector's record, it may be noted, is far from satisfactory and the issue was not properly framed.

*Appeal and Cross-Appeal dismissed.*

(1) Sel. Dec. No. 9 of 1918.



PURSHOTTAM ISHVAR AMIN V. EMPEROR.

BOMBAY HIGH COURT.  
FULL BENCH.CRIMINAL APPLICATION FOR REVISION NO. 196  
OF 1921.

October 11, 1920.

*Present*—Sir Norman Macleod, Kt.,  
Chief Justice, and Mr. Justice Shah,  
Mr. Justice Pratt, Mr. Justice Fawcett and  
Mr. Justice Setalvad.

October 29, 1920.

*Present* :—Sir Norman Macleod, Kt., Chief  
Justice, and Mr. Justice Shah.

PURSHOTTAM ISHVAR AMIN—

ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), ss. 164,  
195, 236—Penal Code (Act XLV of 1860), s. 193—  
Proceeding under s. 164, whether judicial proceeding—  
Statement recorded under s. 164 and statement in judi-  
cial proceeding, whether can be made basis of alterna-  
tive charge for perjury—Sanction of both Courts,  
whether necessary.*

A statement recorded by a Magistrate in the course of a Police investigation under section 164 of the Criminal Procedure Code, is not evidence in a stage of a judicial proceeding within the meaning of Explanation 2) to section 193 of the Penal Code. [p. 599, col. 1; p. 600, col. 1; p. 601, col. 1; p. 602, col. 1; p. 603, col. 2; p. 604, col. 1.]

*Per Curiam, Shah, J. Contra*.—Such a statement can, however, be linked with a statement which is evidence in a stage of the judicial proceeding following on the investigation so that the two can be treated as a series of acts on which an alternative charge can be framed under section 236 of the Criminal Procedure Code of intentionally giving false evidence. [p. 598, col. 2; p. 600, col. 2; p. 601, col. 1; p. 602, col. 1; p. 604, col. 2.]

*Per Macleod, C. J. and Shah, J.*—In the case of an alternative charge under section 193, Penal Code, based upon two statements made before two different Courts, the sanction of both the Courts or of Courts to which these two Courts may be subordinate for such an alternative charge is necessary. [p. 606, col. 2.]

Criminal application for revision from an order passed by the Sessions Judge, Ahmedabad, confirming the conviction but reducing the sentence passed by the City Magistrate, First Class, at Ahmedabad.

ORDER OF REFERENCE TO A  
FULL BENCH.

MACLEOD, C. J.—The accused was found guilty by the City First Class Magistrate, Ahmedabad, of an offence under section 193, Indian Penal Code, and sentenced to two years' rigorous imprisonment. On appeal to the Sessions Judge the conviction was

confirmed but the sentence was reduced to one year's rigorous imprisonment.

He has now applied to the High Court to exercise its revisional powers in his favour. The accused was a witness in what was known as the Nadiad Derailment Case tried by the Commissioners appointed under the Defence of India Act. On the 17th May 1919, the accused, having heard that a warrant for his arrest in connection with that offence had been issued, went to the Resident First Class Magistrate at Nadiad to surrender in order to save himself from arrest if he found that a warrant had actually been issued. As a matter of fact, a summons only had been issued for his attendance under section 160, Criminal Procedure Code. The Magistrate referred him to the Fozdar. He made a statement to that officer who, thereupon, sent him to the Magistrate who recorded his statement under section 164, Criminal Procedure Code. After he had given his evidence before the Commissioners at the trial of the accused in the case, the Commissioners, considering that a certain statement made before them was in direct conflict with a particular statement made before the Magistrate, passed the following order under section 476 of the Criminal Procedure Code:—"Whereas we, the President and Members of the Second Special Tribunal, Ahmedabad, are of opinion that there is ground for inquiry into offence committed by Parshottam Ishwar"...(p. 1-2.)

The accused was put up for trial before the First Class Magistrate, Ahmedabad, who framed a charge against him under section 193 of Indian Penal Code in that he had made a statement on oath, on the 17th May 1919, at the stage of a judicial proceeding into the Nadiad Derailment Case before the Resident First Class Magistrate and another statement, on the 25th July 1919, before the Second Special Tribunal, one of which statements he either knew or believed to be false or did not believe to be true.

On this charge, as above stated, the accused has been found guilty.

A great many points were argued before us by Mr. Jinnah, on behalf of the accused, but there is only one of any real substance which would be sufficient, in my opinion, if decided in favour of the

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accused, to induce the Court to interfere with the findings of the lower Court

It was contended, *inter alia*, by the accused in his petition to this Court that the Commissioners were not a Court and had no power to grant sanction under section 195, Criminal Procedure Code, as they had no appellate or revisional jurisdiction over Subordinate Magistrates; that the statement of the 17th May was not brought to their notice in the course of judicial proceedings; that they had no power to direct the prosecution of the petitioner on an alternative charge without specifying that the statement before them was false; that the order under section 476 was not a proper order; that the prosecution had failed to prove that the statement of the 17th May was made on oath; that the statement was not made voluntarily; and that the Commissioners had erred in declining to call witnesses whose evidence was necessary for the defence.

The latter charge might be a serious one but it has been shown that the defence wished to call Mr. Elliott and Mr. Gandhi, two of the Commissioners, and Mr. Patel, one of the Counsel, in order to ascertain how the statement of the 17th May came under the notice of the Commissioners. But the Resident Magistrate said he forwarded it in the ordinary course to the District Magistrate, and the Trial Magistrate says in his judgment, "it is an admitted fact that the statement was brought under the notice of the Tribunal during the trial of the accused in Case No. 2 of 1919," while the Sessions Judge says: "The First Class Magistrate forwarded it to the District Magistrate who in his turn forwarded it to the Special Tribunal." Nor does it appear from his judgment that any objection was raised before him with regard to the exclusion of evidence. Therefore, we can safely assume that the statement reached the Commissioners in the ordinary course and that there is no substance in the present complaint. The other points have all been adequately dealt with by the lower Court and there is no need for us to deal with them again in detail.

There can be no doubt that the accused has made contradictory statements. That is by no means conclusive proof of his guilt. The accused told the Commissioners that the statement under section 164, Criminal Procedure Code, was made because Inspector Janubhai

said he would go to jail at once if he did not make it. In his statement before the Trying Magistrate he described at great length how he was induced by the Inspector to say what he did before the Resident Magistrate. But the evidence to support this allegation was absolutely disbelieved by the Trying Magistrate and the question was very carefully considered by the Sessions Judge and I see no reason why we should differ from him. The other objections are all technical and, even admitting that there have been errors, omissions or irregularities in the proceedings, we should not be justified in reversing the conviction unless we were satisfied that they had occasioned a failure of justice: section 537, Criminal Procedure Code.

But there are several important questions to be answered before we can confirm the conviction.

1. Whether the statement made before a Magistrate in the course of Police investigation under section 164, Criminal Procedure Code, was evidence in a stage of judicial proceedings?

2. Whether a statement under section 164 can be said to be evidence in a stage of judicial proceedings if the Magistrate who records it has no jurisdiction to inquire into or try the case?

3. Whether, if the statement under section 164 is not evidence in a stage of judicial proceedings, it can form the basis of an alternative charge under section 193, Indian Penal Code?

4. Whether the answers to the first three questions can be in any way affected by the fact that the judicial proceedings in the case were before a Tribunal appointed under the Defence of India Act?

The difficulty in answering questions Nos. 1, 2, and 3, lies not only in the fact that there are many conflicting decisions of the Indian Courts upon them, but also in the fact that there have been changes from time to time in the law which had to be determined in those cases.

Section 236, Criminal Procedure Code, enables a charge to be made in the alternative if a single act or a series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute.

It might be fairly deduced from the terms of the section that to procure a conviction on

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one charge facts would have to be proved which would constitute an offence, so that if it could not be proved that one of two contradictory statements was false, a conviction under section 193, Indian Penal Code, could not result. Under section 555, Criminal Procedure Code, the forms set forth in the Fifth Schedule, with such variations as the circumstances, of each case require, may be used for the respective purposes there in mentioned. The Form XXVIII (II) (4) gives the form for a charge of making contradictory statements one of which is known or believed to be false and thereby committing an offence under section 193, Indian Penal Code. In *Queen v. Mohamed Hoomayoon Shaw* (1) it was held by a majority of a Full Bench that a conviction on such a charge was good notwithstanding that the Jury had not distinctly found which of the two statements was false. On the other hand, in *Queen-Empress v. Kabhai* (2) it was held by this Court that in the case of contradictory statements, separate heads of a charge should be framed imputing to the accused falsehood on each of the occasions. If a conviction was justified only on one or other of the heads and it was uncertain on which of the two occasions falsehood was uttered section 72 of Act XLV of 1860 applied directly. The judgment in such case should be framed in the alternative and punishment inflicted for the lesser offence. Mr. Mayne in his work on the Penal Code does not agree with this view of section 72. He says, at page 365, 4th Edition: "It certainly seems to me that this mode of charging two contradictory statements, made at different times, as making out a single offence, does not come within the terms of section 72, Indian Penal Code." And at page 41 (4th Edition) he says: "It will be observed that to authorise a conviction under this section, the doubt must be as to which of the offences the accused has committed, not whether he has committed either." And this seems to be correct.

To set these doubts at rest illustration (b) was added to section 236 which made it clear that the section might legally be construed as enabling a Court to charge an accused under section 193 in the alter-

native with 'making contradictory statements and to convict him, although it could not be proved which of the statements was false. But it is only when the statements constitute a series of acts that an alternative charge can be framed under section 236, Criminal Procedure Code. Section 193, Indian Penal Code, provides punishments for two classes of perjury. A person is said to give false evidence when, being legally bound on an oath or by any express provision of law to state the truth or being bound by law to make a declaration upon any subject, he makes any statement which is false and which he either knows or believes to be false or does not believe to be true. It makes a difference with regard to the maximum punishment which can be imposed whether he intentionally gives false evidence in any stage of a judicial proceeding, or in any other case, and the question arises whether a statement in a stage of a judicial proceeding and a statement in any other case can be linked together so as to form a series of acts on which a charge can be framed in the alternative under section 236.

In *Queen-Empress v. Mugapa* (3) it was held by the Full Bench, following *Queen-Empress v. Annia* (4), that where a person had made two contradictory statements one to a Police Officer, under Chapter XIV of the Criminal Procedure Code, and another to a Magistrate holding an inquiry, he could not be charged on an alternative charge. That case was under the Code of 1832 when a person could be convicted under section 193 for making false statements before a Police Officer investigating an offence under Chapter XV of the Criminal Procedure Code. Unfortunately, no reasons are given for this decision, nor for the decision in *Queen-Empress v. Annia* (4), and it can only be presumed that the learned Judges thought that the two statements did not constitute a series of acts, although they might be made in the course of the investigation and the trial respectively of the same offence. No reference was made to *Queen-Empress v. Parbham Raysing* (5) in which it was decided that a Police investigation was by

(1) 12 B. L. R. 324 F. B.; 21 W. R. 72.

(2) Rat. Unrep. Cr. C. 386; Cr. Rg. No. 26 of 1857.

(3) 18 B. 377 F. B.; 9 Ind. Dec. (N. S.) 759.

(4) Rat. Unrep. Cr. C. 518; Cr. Rg. No. 40 of 1860.

(5) 8 B. 216; 4 Ind. Dec. (N. S.) 518.



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reason of Explanation (2) to section 193, Indian Penal Code, a stage of a judicial proceeding.

In *Queen Empress v. Bharmā* (6) the following question was referred to a Full Bench: "Whether a statement made before a Magistrate in the course of a Police investigation is made in a stage of judicial proceeding so as to suffice as a basis in part, of an alternative charge of an offence under section 193 of Indian Penal Code."

The Police were investigating a case of murder and the statement was recorded by a Third Class Magistrate. The answer given by the Full Bench was that as the Magistrate had no authority to carry on the preliminary inquiry in the case, the statement made before him was not evidence in a stage of a judicial proceeding. None of the previous authorities were discussed and no reasons were given for the decision. It might be inferred that the learned Judges considered that if the Magistrate had authority to carry on the preliminary inquiry, the statement would have been evidence in a stage of a judicial proceeding, but this is by no means certain. They may have thought that, in any event, the fact of his having no authority was sufficient to dispose of the case. It would certainly be illogical if the question whether a proceeding before a Magistrate under Chapter XIV, Criminal Procedure Code, was a stage of a judicial proceeding, depended on whether or not he had authority to deal with the case under Chapter XV. It does not appear to me that the explanation to section 164, which was added in 1892, makes any difference. Certain doubts had been expressed as to the desirability of Magistrates who had no jurisdiction in the case recording confessions and statements under section 164 [*Reg. v. Vahul Jetha* (7)] and the explanation was added to remove these doubts.

Now, if an investigation under Chapter XIV of the Criminal Procedure Code is an investigation directed by law preliminary to a proceeding before a Court of Justice, then, under Explanation (2) to section 193, such an investigation is a stage of a judicial proceeding, and this is the view which

has been adopted by the High Courts of Allahabad and Madras. In *Queen-Empress v. Khem* (8) a witness made a statement before a Third Class Magistrate under section 164 and another before the Magistrate at the trial. It was held he might be convicted under the second, if not the first, paragraph of section 193, Indian Penal Code. *Queen-Empress v. Bharmā* (6) was referred to but as the Third Class Magistrate had jurisdiction to try the case it did not apply. But the learned Judges seem to doubt the correctness of the decision, and it may be inferred that they thought that, even if the statement was not evidence in a stage of a judicial proceeding, it was evidence in another case and could be linked with a statement made in a stage of a judicial proceeding. But they were clearly of opinion that if the Magistrate had authority to try the case the statement recorded by him was evidence in a stage of a judicial proceeding. In *Queen-Empress v. Alagu Kone* (9) a Magistrate recorded a statement in a murder case under section 164, Criminal Procedure Code. Afterwards, the witness withdrew his statement and he was charged in the alternative under section 193 with intentionally giving false evidence. It was held that *Queen-Empress v. Bharmā* (6) was not applicable as the Magistrate who recorded the statement was the Committing Magistrate. In *Suppa Tevan v. Emperor* (10) a statement was recorded by a Magistrate in a murder case investigation under section 164, Criminal Procedure Code. It was held that the Magistrate was a Court and when he took down the statement under section 164 he was acting in discharge of a duty imposed by law and was authorised to administer oath. It was argued that the conviction of the accused under section 193, Indian Penal Code, was not legal, and it was held that, in the face of the Explanation attached to section 193, that contention could not be accepted. An investigation under Chapter XIV of the Criminal Procedure Code was a stage of a judicial proceeding and, therefore, the appellants gave false evidence. The illustration

(8) 22 A. 115; A. W. N. (1899) 207; 9 Ind. Dec. (N. S.) 1107.

(9) 16 M. 421; 1 Weir 175; 5 Ind. Dec. (N. S.) 1000.

(10) 29 M. 89; 8 Cr. L. J. 870.

(6) 11 B. 702 (F. B.); 6 Ind. Dec. (N. S.) 462.

(7) 7 B. H. C. R. 56 Cr.

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to Explanation (2) was referred to, but, with due respect, the illustration does not give an answer to the question whether an investigation under Chapter XIV, Criminal Procedure Code, comes within the Explanation. It may be said the investigation referred to in the illustration is an investigation after the inquiry has commenced, but is preliminary to the actual trial, because the Magistrate has no authority to try the case.

It does not appear that it was seriously argued in the Trial Court that in ordinary cases a statement recorded under section 164 is not evidence in a stage of a judicial proceeding, while before the Sessions Judge from his judgment it seems to have been admitted that it would be. But it was argued that this was not an ordinary case. The Tribunal was constituted under Act IX of 1915 which abrogated all provisions of the Criminal Procedure Code so far as they related to committal proceedings. That, therefore, the Magistrate, though a First Class Magistrate, had no authority to carry on the preliminary inquiry in this case, so that the decision in *Queen-Empress v. Bharna* (6) was directly applicable. On the other side it was argued that, though by section 5 of the Act, the Tribunal might take cognizance of a case without a committal order, there was nothing in the Act to bar committal proceedings being taken if the authorities so decided, though naturally the intention of the Act was to do away with the necessity of the stage of the ordinary procedure so that the Tribunal might deal with all cases whether triable by a Court of Session or not as if they were warrant cases. It seems to me it would be difficult to say that the Magistrate had no authority, considering the powers which were vested in him to carry on the preliminary inquiry in the case, merely because it had been enacted by the Legislature that in a particular class of cases within which this one fell there should be no preliminary inquiry, but the point is sufficiently doubtful, considering the ruling in *Queen-Empress v. Bharna* (6), to make it desirable that it should be referred to a Full Bench with the other questions which this case has afforded an opportunity for getting finally decided so far as this Court is concerned. The following questions are referred to a Full Bench :—

1. Whether a statement recorded by any Magistrate in the course of a Police investigation under section 164, Criminal Procedure Code, is evidence in a stage of a judicial proceeding within the meaning of section 193, Indian Penal Code, Explanation (2) ?

2. Whether such a statement can be said to be evidence in a stage of a judicial proceeding if the Magistrate who records it has no jurisdiction to inquire into or try the case ?

3. Whether if such a statement is not evidence in a stage of a judicial proceeding but comes within the meaning of the words 'evidence in any other case' in section 193, Indian Penal Code, it can be linked with a statement which is evidence in a stage of the judicial proceeding following on the investigation so that the two can be said to be a series of acts on which an alternative charge can be framed under section 236, Criminal Procedure Code, of intentionally giving false evidence ?

4. Whether the Magistrate who had authority to carry on the preliminary inquiry, but for the notification under the Defence of India Act, had any jurisdiction to inquire into or try the case after the notification ?

5. Whether, if the Full Bench are of opinion that question 1 should be answered in the affirmative, it makes any difference that the original case was directed to be tried by a Tribunal under the Defence of India Act instead of being tried in the ordinary course, so that the investigation under Chapter XIV of the Criminal Procedure Code cannot be considered a stage of the proceedings before the Tribunal ?

SHAH, J.—I agree that the only point of substance arising in this application is, whether the statement of the petitioner recorded by the First Class Magistrate of Nadiad, on the 17th of May 1919, under section 164, Criminal Procedure Code, after the Notification No. 3778 of the Local Government under section 3 of the Defence of India Act (IV of 1915), was published on the 14th of May, can form a basis, in part, of the alternative charge of an offence under section 193, Indian Penal Code.

The other points raised by Mr. Jinnah on behalf of the accused do not afford any good ground for interference in revision.

Several questions have been argued in

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connection with the point, which require to be considered. These questions have been formulated by my Lord the Chief Justice at the end of his judgment, with which I generally agree. They are all important questions and some of them are not free from difficulty. There is diversity of judicial opinion as regards some of them; and there is the question of applying the Full Bench decisions of this Court in *Queen-Empress v. Bharna* (6) and *Queen-Empress v. Mugapa* (3) to the statement recorded under the special circumstances of this case. For a satisfactory disposal of this case it is desirable that these questions should be referred to a Full Bench. Accordingly, I concur in the proposed reference.

I do not desire to express any opinion on any of these questions at this stage: nor do I mean necessarily to suggest any doubt as to the correctness of the Full Bench decisions above referred to so far as they go.

In pursuance of the foregoing, the case came before a Full Bench on the 4th October 1920.

Mr. Jinnah with him Mr. G. N. Thakor, for the Accused.

Sir Thomas Strangman, Advocate General, with him Mr. S. S. Patkar Government Pleader, for the Crown.

## OPINION OF FULL BENCH.

PRATT, J.—(October 11, 1920).—The questions referred for decision to the Full Bench are,—

1. Whether a statement recorded by any Magistrate in the course of a Police investigation under section 164, Criminal Procedure Code, is evidence in a stage of a judicial proceeding within the meaning of section 193, Indian Penal Code, Explanation (2)?

2. Whether such a statement can be said to be evidence in a stage of a judicial proceeding if the Magistrate who records it has no jurisdiction to inquire into or try the case?

3. Whether, if such a statement is not evidence in a stage of a judicial proceeding, but comes within the meaning of the words 'evidence in any other case', in section 193, Indian Penal Code, it can be linked with a statement which is evidence in a stage of the judicial proceeding following on the investigation, so that the two can be said to be a series of acts on which an alternative charge can be framed under section 236,

Criminal Procedure Code, of intentionally giving false evidence?

4. Whether the Magistrate who had authority to carry on the preliminary inquiry, but for the notification under the Defence of India Act, had any jurisdiction to inquire into or try the case after the notification?

5. Whether, if the Full Bench are of opinion that question No. 1 should be answered in the affirmative, it makes any difference that the original case was decided to be tried by a Tribunal under the Defence of India Act instead of being tried in the ordinary course, so that the investigation under Chapter XIV of the Criminal Procedure Code cannot be considered a stage of the proceedings before the Tribunal.

A Police investigation under Chapter XIV of the Criminal Procedure Code is not itself a judicial proceeding within the meaning of that term as used in the Indian Penal Code. Under that Code a judicial proceeding is a proceeding before a Judge as defined in section 19. Nor does it become a stage of a judicial proceeding by virtue of the Explanation to section 193. The words of the Explanation are: "An investigation directed by law preliminary to a proceeding before a Court of Justice." A magisterial inquiry preparatory to commitment is an inquiry directed by law preparatory to the trial. This direction is expressed in section 206 of the Code of Criminal Procedure. The effect of the Explanation is, therefore, to make a magisterial inquiry preparatory to commitment, a stage of a judicial proceeding. But there is no direction of law that the Police investigation should precede a trial. It very often does not, e.g., when the Magistrate takes cognizance on a complaint or 'suo motu'. Nor is it enough that the Police investigation does, as a matter of fact, often precede a trial. The section requires something more. There must be an express direction by law just as under Explanation (4) there must be an express direction by a Court of Justice.

To hold that a Police investigation is a stage of a judicial proceeding would lead to anomaly. A Magistrate trying a warrant-case is a Court of Justice (section 20, Indian Penal Code); but a Magistrate holding an inquiry preparatory to commitment is not [section 19, illustration (d)]. A Police



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investigation preparatory to a trial by a Magistrate would, therefore, be a stage of a judicial inquiry, while a Police investigation preparatory to a magisterial inquiry for commitment would not.

No doubt a Magistrate examining a witness under section 164 would do so on oath. But the definition of judicial proceeding in section 4 (m) of the Criminal Procedure Code is limited to that Code and does not apply to that phrase as used in the Indian Penal Code.

A statement recorded by a Magistrate of a witness in the course of a Police investigation under Chapter XIV is, I think, not evidence in a stage of a judicial proceeding and I differ on this point from *Queen-Empress v. Parshram Raysing* (5), *Queen-Empress v. Alagu Kone* (9) and *Suppa Teoan v. Emperor* (10).

It is quite immaterial whether the Magistrate had or had not jurisdiction to inquire into or try the case. Under the Code of 1872, there were cases where the fact that the Magistrate had jurisdiction was regarded as indicating that the examination was not under section 164, as it professed to be, but should be considered to have been taken in the course of the inquiry or trial: *Empress v. Anuntram Singh* (11), *Empress of India v. Yakub Khan* (12). Subsequent changes in the Code of 1882 have made these cases obsolete. But they have left their mark on the case of *Queen-Empress v. Bhurma* (6). There, in a case of murder, a statement was made under section 164 before a Third Class Magistrate and was afterwards contradicted before the Committing Magistrate. The Court held that the statement before a Third Class Magistrate was not evidence in a judicial proceeding that Magistrate not having authority to carry on the preliminary inquiry. The reservation as to the Magistrate's jurisdiction was, we think, made in order to leave open the question whether, if the Magistrate had jurisdiction, the statement, though professing to be made under section 164, should not be considered part of the commitment inquiry. In *Queen-Empress v.*

*Bharma* (6) the Full Bench merely answered the question propounded and did not consider whether the accused could not have been convicted of a charge in the alternative for false evidence under section 193, Part I, before the Committing Magistrate, or of false evidence under section 193, Part 2, before the Third Class Magistrate. But in the case of *Queen-Empress v. Ismail* (13), decided three months later, though reported in I. L. R. 11 Bom. 659, a conviction was confirmed in the alternative for giving false evidence before a Magistrate or false evidence before a Police Officer (under section 161 of the Criminal Procedure Code of 1882).

In the case of *Queen-Empress v. Kabhai* (2) it was held in a similar case that a charge for one offence in Form X XVIII (II) (4) of Schedule V of the Criminal Procedure Code could not be framed, but that separate heads of charge in the alternative should be framed under section 236. This was followed by the case of *Queen-Empress v. Annia* (4), where the statement made to the Police Officer was in answer to questions which tended to expose the accused to a criminal prosecution. The Court held that this was not false evidence as the accused was not bound to answer truly. This was sufficient to dispose of the case, but the judgment, professing to follow *Queen-Empress v. Kabhai* (2), added that even if the statement to the Police was false evidence, the case was not one in which alternative charges could be framed. This was not only an *obiter dictum* but an incorrect statement of the decision in *Queen-Empress v. Kabhai* (2), nevertheless the Full Bench in *Queen-Empress v. Mugapa* (3) approved the case of *Queen-Empress v. Kabhai* (2), that a charge in the Criminal Procedure Code form was not possible, and at the same time followed *Queen-Empress v. Annia* (4) in holding that alternative charges could not be framed. The judgment acknowledged the discrepancy between *Queen-Empress v. Annia* (4) and *Queen-Empress v. Kabhai* (2), but gave no reason for following the *obiter dictum* in the former rather than the decision in the latter—and it does not even refer

(11) 5 O. 954; 6 O. L. R. 297; 3 Shome L. R. Cr. 23 2 Ind. Dec. (N. S.) 1916.

(12) 5 A. 253; A. W. N. (1883, 25; 3 Ind. Dec. (N. S.) 250.

(13) 11 B. 65; 12 Ind. Jur. 152; 6 Ind. Dec. (N. S.) 133.

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to the case of *Queen-Empress v. Ismail* (13).

The confusion seems to have arisen out of the apparent inconsistency between section 236 and the Form of Charge, Schedule V, Form XXVIII (II) (4). The Form sets forth two statements each in a judicial proceeding, "one of which statements you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under section 193 of the Indian Penal Code." It appears to be a Form of Charge with one head for a single offence and thereby invites the criticism of Mr. Mayne quoted in the referring judgment. But the form comes under Part II of Form XXVIII "Charges with two or more heads." The charge is really a charge in the alternative either of an offence under section 193 on the first statement or of an offence under section 193 on the second statement. But because the two offences happen to be under the same part of the same section, the form uses the words "an offence" under section 193. It is this somewhat inaccurate wording that has led to the erroneous opinion that alternative charges could not be framed where the contradictory statements fell under different parts of section 193.

But under section 236 it is quite clear that a charge in the alternative may be framed for different offences. The prosecution cannot establish exclusively any one offence, but are able to prove any act or series of acts which exclude the innocence of the accused, and shew that he must have committed one of two or more offences. The prosecution establish a *corpus delicti* on the facts which can be proved and the facts which cannot be proved are subsidiary facts important only to this extent that they decide under which penal provision the delictum falls, or on what occasion the offence was committed. In illustration (a) the recent possession of stolen property is the *corpus delicti*. Whether the accused stole it himself or subsequently received it from the thief are subsidiary facts which only affect the question whether his delictum falls under section 379 or section 411 of the Indian Penal Code. In illustration (b) the two contradictory statements constitute the *corpus delicti* and what cannot be proved is the subsidiary fact on which occasion the

false evidence was given. If the one statement was evidence in a judicial proceeding and the other evidence in any other case, the alternative charges would be one under the first part and one under the second part of section 193. Judgment could be in the alternative under section 367 (3), Criminal Procedure Code, and the punishment would be for the minor offence under section 72, Indian Penal Code.

It is argued that false evidence in a Police investigation and false evidence in a judicial proceeding do not form a series of acts and cannot be linked together in alternative charges. If false evidence in a commitment inquiry and false evidence in a trial can be charged in the alternative I cannot understand how it can be argued that false evidence in a Police investigation stands on a different footing. It is said that the acts must form a series. True, but the only factor that makes them a series is that they each lead to an inference as to the guilt of the accused. There may be a number of acts apparently distinct and even different transactions but when they form a chain of circumstantial evidence pointing to the guilt of the accused they become a series. This circumstantial evidence may prove the accused's connection with a murder. These acts and the murder are the *corpus delicti* and the accused may be charged in the alternative with murder or abetment of murder. So with contradictory statements the connection is that, taken together, they lead to an inference of the accused's guilt.

I think that charges in the alternative can be framed for giving false evidence in a judicial proceeding or giving false evidence in any other case. I think the decision in *Queen-Empress v. Mugapa* (3) is incorrect and the decisions in *Queen-Empress v. Ismail* (13) and *Queen Empress v. Khem* (8) are correct.

The Defence of India Act provides for exclusive trial before the constituted Tribunal. It in no way affects the Police investigation or the Magistrate's jurisdiction to take part in the investigation. Indeed, section 9 contemplates the fact that a statement may have been taken before the Magistrate. I would therefore, answer the questions referred:—

- (1) In the negative. (2) In the negative.
- (3) In the affirmative, and questions (4) and (5) do not arise.

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MACLEOD, C. J.—(October 11, 1920).—I agree that the answers to the questions referred to the Full Bench should be as given in the judgment of my brother Pratt. The third question is the most difficult one. Section 236 of the Criminal Procedure Code contemplates a case where an accused person has committed an act or a series of acts and it is uncertain on the facts proved which of two or more offences has been committed. A series of acts means two or more acts connected together by some common relation. Clearly, a statement on oath before a Committing Magistrate and a statement on oath at the trial of the same accused on the same charge would constitute a series of acts. Accordingly, under section 236 a witness could be charged with having given false evidence either before the Committing Magistrate or at the trial. The doubt which arose owing to conflicting decisions was, whether it was necessary to prove that one of the statements was false or whether the mere fact that the statements were contradictory was sufficient for a conviction of the offence of giving false evidence. This doubt was set at rest by the addition of illustration (b) to section 236. It does not appear to have been noticed that section 236 was originally framed to meet the case where it was doubtful whether offence A or offence B had been committed at the time when the charge had to be framed. Schedule V, Form XXVIII, provided for the framing of charges under two or more heads in accordance with the provisions of section 236. But in the case of contradictory statements the doubt would be whether perjury had been committed on occasion A or occasion B, a very different matter. The form of charge in Schedule V, Form XXVIII (1) (4), is, therefore, strictly speaking, not a charge under two heads but a charge under one head for a single offence. The charge should be "either that you committed an offence of giving false evidence on occasion A or on occasion B and because the statements are contradictory you must have committed that offence on one of the two occasions." The illustration (b) made it clear that it was not necessary to prove on which of the two occasions false evidence had been given. But the illustration does not alter but merely explains the section, and it cannot be that only the contradictory statements

mentioned therein can form the basis of an alternative charge.

The next point to be noticed is, that section 191 of the Indian Penal Code defines the offence of giving false evidence. Section 193 provides for the punishment. It does not say that there are two kinds of perjury, but that if perjury is committed in the stage of a judicial proceeding it may be punished more severely than if committed in any other case. The offence is perjury wherever it may be committed.

In illustration (b) to section 236, Criminal Procedure Code, the common relation is the inquiry as to the committal of a particular offence by one or more individuals and that enables the statements made on two different occasions to be considered as a series of acts. But the Police investigation under Chapter XIV has also a common relation though it is a wider one, viz, the inquiry into the committal of a particular offence. Therefore, a statement at the Police investigation under section 164 and a statement after judicial proceedings have commenced form a series of acts within the meaning of section 236. If, on the other hand, the common relation can only be the inquiry as to whether one or more particular individuals committed a particular offence, then they cannot form a series of acts. But there is no reason why the wider relation, if it exists, should not be taken into account. To hold otherwise would have this disastrous effect that witnesses might make the most incriminating statements under section 164 resulting in persons being charged under the Indian Penal Code, with only the bare chance of such witnesses being held guilty of perjury, if they resiled from their statements at the trial. For nothing is more difficult to prove than the fact that a witness has made a statement which he knew or believed to be false or did not believe to be true. It is only when he makes contradictory statements that a real chance of conviction arises. I think unnecessary confusion has been caused by the phraseology of section 191 of the Indian Penal Code. The act which constitutes the offence is the making of a false statement on oath on an occasion when by the law the person making the statement is bound to tell the truth. If that act had been called 'perjury', a term which every one understands, there would have been no difficulty. But to call it 'giving false



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evidence' involves the use of a word which itself has several meanings. Clearly, 'evidence' is not used in its restricted meaning of evidence which is given or can be used in the course of judicial proceedings, but in its widest sense including any formal enunciation of facts made for the purpose of establishing a particular conclusion. Thus, a creditor who makes a false affidavit of claim against an insolvent's estate or an insolvent who makes a false schedule, gives false evidence. And, if either of them happened to make contradictory statements before the Court in the course of proceedings under the Presidency Towns Insolvency Act, I do not see why they should not be convicted under section 194 without the prosecution having to prove which of the statements was false: the common relation being the particular insolvency in which the statements were made. In my opinion, therefore, there is a common relation between the statement made before the Magistrate under section 164 and the statement before the Tribunal so that they form a series of acts. No doubt, this opinion is in conflict with the Full Bench decision in *Queen-Empress v. Mugapa* (1). But with all due respect to the learned Judges who tried that case, the value of their considered opinion is deprived of much of its value by the fact that no reasons are given, and the contrary decision of this Court in *Queen-Empress v. Ismail* (13) was not even referred to. It may be that section 236 was considered, but, in my opinion, the real crux is whether the inquiry into the committal of a particular offence, without dealing with the question whether a particular individual has committed it, can constitute the common relation between the two statements and it is impossible to say whether their Lordships considered the question before them from that point of view.

SHAN, J.—(October 11, 1920).—I agree with the judgment of my brother Pratt as regards questions Nos. 1, 2, 4 and 5 referred to the Full Bench. I would answer these questions in the same sense, generally, for the reasons given in that judgment.

As regards question No. 3, I regret that I am unable to accept the conclusion reached in that judgment.

I would answer that question in the negative.

I have carefully considered the arguments and the statutory provisions bearing on this question, as also the various decisions cited before us. The provisions of section 236, Criminal Procedure Code, are of an enabling and not obligatory nature, and it is open to the Courts, on a fair interpretation of the section, to hold that a statement, which is not evidence in a stage of a judicial proceeding, ought not to be linked with a statement which is evidence in a judicial proceeding or at a stage of a judicial proceeding so as to form the basis of an alternative charge. In determining whether any two contradictory statements can form the basis of an alternative charge, the Court must have regard to the nature of the statements. A statement recorded by a Magistrate under section 164, Criminal Procedure Code, in the course of an investigation under Chapter X.V before the inquiry or trial has commenced, generally speaking, cannot be evidence at the trial, while a statement recorded before a Committing Magistrate in the course of the inquiry can be evidence at the trial. The statement recorded under section 164 is one which a witness is under no legal obligation to make, though if he elects to make it he is bound to state the truth, in view of the provisions of the Indian Oaths Act. The scheme of the Code of Criminal Procedure makes a clear distinction between the stage of Police investigation and that of judicial proceedings by way of inquiry or trial. Though the obligation to state the truth is common to statements recorded under section 164, as well as those made at the inquiry or trial, there is, in my opinion, a clear distinction between these two classes of statements. There is also a difference in the circumstances and surroundings under which the two sets of statements are recorded. This may be taken to be recognised by the Legislature, as the statements recorded under section 164 are not permitted to be treated as evidence at the trial under the Code of Criminal Procedure or the Indian Evidence Act.

I am not speaking here of the special provisions of section 9 of the Defence of India Act (IV of 1915). It is not necessary to express any opinion, for the purpose of the case, as to whether that section applies to statements recorded under section 164, Criminal Procedure Code. Assuming, without admitting, that such statements may be used as

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evidence under the special circumstances stated in that section, I do not think that that circumstance affects in any way the broad consideration that such statements cannot be treated as evidence at any inquiry or trial under the Code of Criminal Procedure.

In determining whether a statement recorded under section 164 during the Police investigation and a statement recorded in the course of judicial proceedings at the trial can constitute a 'series of acts' within the meaning of section 236, there is no adequate reason to ignore the difference between the two acts. In spite of these considerations, I might have taken the view, which is now contended for by the learned Advocate-General, and which, it is said, is well within the scope of section 236 had it not been for the fact that a Full Bench of this Court had by necessary implication put a restricted interpretation upon the terms of section 236. That is the decision in *Queen-Empress v. Mugapa* (3). The Full Bench, consisting of Sargent, O. J., and Telang, Candy and Fulton, JJ., held that a statement made to a Police Officer under section 161 of the Code of 1882 and that made before the Committing Magistrate could not form the basis of an alternative charge, much less of a conviction under section 193, Indian Penal Code. In that case one of the statements was made at a stage of a judicial proceeding and the other was made at a stage of investigation under Chapter XIV of the Code then in force, the person making the statements being under an obligation to state the truth on both the occasions. It is true that no reasons are given for this decision, and no reference is made to the terms of section 236, Criminal Procedure Code. I do not feel any doubt, however, that the conclusion was reached after a careful consideration of section 236, which in terms was the same as the corresponding section in the Code of 1898. Though this reported decision was before the Legislature when the Code of 1898 was enacted, I do not find any change in the section, which can be reasonably construed as overruling or rendering obsolete that decision. Illustration (b) to the section was added for the first time in the Code of 1898. I do not think, however, that the illustration touches the present point. As I read the illustration,

it only makes clear that two contradictory statements, one made before the Committing Magistrate and the other at the trial, can form the basis of an alternative charge of giving false evidence. It is not pressed before us, and I do not think that it could be reasonably suggested, that the word 'Magistrate' in the illustration can mean any Magistrate other than the Committing Magistrate. The illustration, so far as it goes, refers to the linking of two contradictory statements in the course of judicial proceedings for an alternative charge under the same part of section 193, Indian Penal Code. I do not think that the alteration in section 61 of the Code of 1888 makes any difference so far as the application of the decision in *Mugapa's* case (3) to the point, which we have to decide, is concerned.

I am humbly of opinion that the decision in *Queen-Empress v. Mugapa* (3) is correct, and may be followed so far as it applies to the present case. The effect of that decision, in my opinion, is that two contradictory statements, one recorded before the commencement of the inquiry or trial and the other recorded at the inquiry or trial, cannot form the basis of an alternative charge, or conviction under section 193, even though with reference to each statement the charge of giving false evidence at a stage of a judicial proceeding or merely of giving false evidence, as the case may be, can be established if the prosecution be in a position to prove that the particular statement is false in fact. The statement recorded under section 164 in the present case stands, for the purpose of the point under consideration, on the same footing as the statement made to the Police Officer under section 161 under the Code of 1882 in *Mugapa's* case (3).

Fawcett, J.—(October 11, 1920).—I agree in the answers and reasoning given in the judgment of my brother Pratt.

As to the third question, it is true that illustration (b) to section 236, and the Form of Charge in No XXVIII of Schedule V of the Criminal Procedure Code, presumably relate to contradictory statements in an inquiry before a Committing Magistrate and in a trial before a Sessions Court; but this by no means justifies the view that the Legislature intended to confine the power

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to frame an alternative charge under section 236 to the case of contradictory statements falling under the first part of section 193, Indian Penal Code, or to a case where both statements fell under the same part of that section. The illustrations and forms are useful guides to the meaning of a section, but do not constitute the main enactment.

The expression 'series of acts' in section 236 is very wide, and I do not think there is any legitimate ground for holding that the circumstances that a statement under section 164 is voluntarily made and cannot itself be treated as evidence of the facts stated therein operate to prevent it being one of a 'series of acts', taken in conjunction with a connected statement made by the same person 'in a stage of a judicial proceeding.' The offence of "giving false evidence," which is defined in section 191, Indian Penal Code, applies to each of the two acts, if the statement is false, etc.; and the fact that under section 193 one of the acts is liable to a greater penalty than the other is immaterial, except in regard to the question of punishment, which is dealt with in section 72, Indian Penal Code. Sub-section (3) of section 367, Criminal Procedure Code, makes it clear that there can be a conviction in the alternative in a case where there is a doubt as to which of two parts of the same section applies, just as much as in a case where a doubt arises as to which of two sections applies. And this suffices to show that section 326 is also intended to cover the former case. Nor does it seem necessary to state in the charge that one of the statements falls under a particular part of section 193, Indian Penal Code, and the other statement under another part of that section. Thus, section 304, Indian Penal Code, is divided into two parts, drawing a distinction in the penalty to be inflicted for culpable homicide not amounting to murder, according to the convict's intention or knowledge but the Form of Charge under section 304 in No. XXVIII (1) (6) and II (2) of Schedule V of the Code does not require the particular part of section 304, under which the accused is charged, to be stated. Under section 221 (2) it suffices to give the specific name of the offence, which, in the case under consideration, is that of "giving false evidence," whether it be "in a stage of

a judicial proceeding" or "in any other case."

SETALVAD, J.—(October 11, 1920).—I agree in the answers given in the judgment of Pratt, J., to the questions referred to the Full Bench. As regards question No. 3, I fully concur in the reasons given in the judgment of the learned Chief Justice. The real question is, whether a statement made by a witness on oath under section 164 of the Criminal Procedure Code during the course of investigation under Chapter XIV, and a statement made by the same witness at the trial, constitute a series of acts within the meaning of section 236 of the Criminal Procedure Code, so that an alternative charge can under that section be framed in respect of such statements. I have no doubt that they do constitute a 'series of acts'. On information being given of an alleged offence, an investigation takes place under Chapter XIV of the Criminal Procedure Code; following on such investigation the inquiry before the Committing Magistrate takes place and lastly comes the Sessions trial. There is a common relation between all acts done in the course of these three stages and statements made by the same witness at one or more of these stages constitute 'a series of acts'. It was contended that only offences of identical nature can be the subject of an alternative charge. There is no such restriction to be found in section 236 of the Criminal Procedure Code. But assuming there is such a restriction, the offences which form in this case the subject of the alternative charge are, in my opinion, identical. The charge is that the accused in this case either gave false evidence when he made his statement under section 164 or he gave false evidence in his statement before the Tribunal. Giving false evidence before the Tribunal, being in a stage of a judicial proceeding, falls within the first part of section 193 of the Indian Penal Code, and giving false evidence in the course of a statement under section 164 of the Criminal Procedure Code, falls within the second part of section 193 of the Indian Penal Code. But in either case, the offence is the one defined in section 191 of the Indian Penal Code, viz., "giving false evidence."

After the decision of the Full Bench the case came before a Division Bench (Macleod, C. J. and Shah, J.) on the 20th of



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October 1920, for final disposal.

Mr. Jinnah, with him Mr. G. N. Thaker, for the Applicant.

Sir Thomas Strangman, Advocate General, with him Mr. S. S. Patkar, Government Pleader, for the Crown.

#### FINAL JUDGMENT.

MACLEOD, O. J.—(October 29, 1920).—It has now been decided in this case by the Full Bench that the statement made on oath by a witness before a Magistrate under section 164, Criminal Procedure Code, can be made the basis of an alternative charge together with a statement made on oath at the trial, provided there was a common relation between the two statements. There is a common relation in this case, and, therefore, the accused could be convicted with having given false evidence by the mere fact that he had made contradictory statements, one before the Magistrate and one at the trial.

It has been argued, however, that there has been either a want of or an irregularity in the sanction required by section 195, Criminal Procedure Code. Assuming that, when contradictory statements are made before different Courts, the sanction of each of those Courts is required before a Court can take cognizance of the charge of giving false evidence, and assuming that the Magistrate in this case who recorded the statement under section 164, Criminal Procedure Code, was a 'Court', there is no doubt that the sanction of the Magistrate was not obtained. But the sanction given by the Tribunal was to the effect that an inquiry should be made with regard to the contradictory statements made by the accused before the Tribunal and before the First Class Magistrate when he was examined under section 164, Criminal Procedure Code. There is no doubt that the accused had ample notice of what he was being charged with, and it was open to the accused when the Magistrate commenced the proceedings to take the objection that the Magistrate could not take cognizance of the charge for want of sanction of the First Class Resident Magistrate who recorded the statement under section 164, Criminal Procedure Code. Although an objection was taken before the Trying Magistrate no application was made to a higher Tribunal to stop the proceedings on the ground that a proper sanction had not been given. It is

true that in appeal the learned Sessions Judge thought that no sanction was necessary because he considered that the Resident Magistrate was subordinate to the Tribunal.

However that may be, assuming that there is an irregularity in the sanction which was required by section 195, Criminal Procedure Code, before the Magistrate could take cognizance of the charge against the accused, section 537, Criminal Procedure Code, is very clear as to what course is open to the High Court in revision when it is brought to its notice that there has been an irregularity in the sanction. It provides that "no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account of... (b) the want of or any irregularity in any sanction required by section 195 (Criminal Procedure Code) or any irregularity in proceedings taken under section 476, ... unless such error, omission, irregularity, want... has in fact occasioned a failure of justice."

In *Sunder Dasadh v. Sital Mahto* (14) the petitioners were convicted and sentenced to fine under section 206, Indian Penal Code, without any sanction being given under section 195, Criminal Procedure Code, and the Court said: "No doubt sanction to the prosecution should have been given before the Magistrate took cognizance of that offence, but unless the want of such sanction has, in fact, occasioned a failure of justice (section 537, Code of Criminal Procedure), the conviction is not bad only on that account. There is nothing in the proceedings to show that this is so."

I should not go so far as to say that in this case there was a want of sanction, that is to say, an entire want of sanction, as there was the sanction of the Tribunal. It may be said that there was a deficiency in the sanction as the Magistrate had not sanctioned prosecution. But, however that may be, it cannot be said that this want of sanction or deficiency or irregularity in the sanction granted has in fact occasioned a failure of justice. It has been proved that the accused had made directly contradictory statements which constitute the offence of giving false evidence within the meaning of section 191, Indian Penal Code, taken in conjunction with

(14) 25 C. 217 at p. 229, 6 C. W. 5, 221.

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section 233, Criminal Procedure Code. Therefore, there is no reason why we should interfere with the conviction on the ground of any want of sanction or deficiency or irregularity in the sanction.

It seems to me the question whether the Magistrate recording a statement under section 164, Criminal Procedure Code, is a 'Court' or not is now irrelevant, considering the Full Bench in this case has held that these two contradictory statements can form the subject of a charge of giving false evidence. If he is not a Court, no sanction would be required. But it has been held by the Madras High Court that a Magistrate recording a statement on oath under section 164, Criminal Procedure Code, was a Court see *Queen-Empress v. Alagu Kone* (9)] and that decision was followed in *Suppa Tevan v. Emperor* (10). It seems unfortunate that although the words 'evidence', 'judicial proceedings', 'Court', 'Court of Justice' are used in the Indian Penal Code, Criminal Procedure Code, the Indian Evidence Act and other Acts, there is no general definition of these terms applicable to any Act in which they appear. But 'Court' is defined in the Indian Evidence Act, section 3, as including "all Judges and Magistrates, and all persons, except arbitrators, legally authorised to take evidence;" and under section 164, Criminal Procedure Code, a Magistrate is bound to record the statements made to him in such of the manners therein-after prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. If there were anything at all in the point, I should say that there was considerable justification for the decision of the Madras High Court that the Magistrate recording a statement under section 164, Criminal Procedure Code, was a 'Court'. But it seems to me the point is immaterial because, under section 191, Indian Penal Code, the offence of giving false evidence is committed by making a false statement on oath when a person making a statement is legally bound by an oath or by an express provision of law to state the truth. When the law provides, therefore, for any case in which a person can be bound by an oath to speak the truth, and such a person makes a statement which is false, and which he either knows or believes to be false or does not believe to be true, then he is said to give

false evidence, and there is no necessity that such a statement should be made in or before a Court, whatever the definition of 'Court' may be. He is liable to be punished under section 193, Indian Penal Code, which provides, however, that a more severe punishment can be inflicted if the offence is committed at any stage of a judicial proceeding than if it is committed in any other case. Therefore, there is no reason to interfere with the conviction in this case. The original sentence of two years passed by the City First Class Magistrate was reduced by the Sessions Judge to one year's rigorous imprisonment, and, therefore, that is well within the period of imprisonment prescribed by section 193, Indian Penal Code, when the false evidence is not given in any stage of a judicial proceeding. Considering all the circumstances, we reduce the sentence to six months. This decision will cover the other two cases, Revision Applications Nos. 198 and 199, in which also the sentences are reduced to six months respectively.

SHAR, J.—(October 29, 1920).—I concur in the order proposed by my Lord the Chief Justice. In view of the opinion of the majority of the Full Bench, by which this Court is bound, it is clear that the two contradictory statements, one of which is recorded by the Magistrate under section 164, Criminal Procedure Code, not at any stage of a judicial proceeding, and the other recorded by the Tribunal in the course of a judicial proceeding, can form the basis of an alternative charge under the latter part of section 193, Indian Penal Code.

There is only one more point which has been raised on behalf of the applicant, that the sanction of the Magistrate before whom the statement under section 164, Criminal Procedure Code, was recorded was not obtained in this case, and that, without his sanction, the Trial Magistrate could not take cognizance of the case on an alternative charge. No doubt, an order under section 476, Criminal Procedure Code, was made by the Commissioners appointed under the Defence of India Act. But it is clear, on the decisions of this Court as also on the provisions of the Code, that in the case of an alternative charge under section 193, Indian Penal Code, based upon two statements made before two different Courts, the sanction of both the Courts or of Courts to which these two Courts may be subordinate for such an

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alternative charge is necessary. It is true that the applicant in this case could not have applied to this Court to revise the order under section 476, Criminal Procedure Code, made by the Commissioners appointed under the Defence of India Act. But after the proceedings were sent up to the Trial Magistrate in this case, the plea based upon the want of sanction of the Magistrate who had recorded the statement under section 164, Criminal Procedure Code, could have been taken, and, as I understand from the argument, it was taken. The Trial Magistrate apparently overruled that objection. It was open to the present applicant at that stage to have moved this Court to stay proceedings for want of such a sanction. The Trial Court, however, proceeded with the case and the accused was convicted. The Sessions Judge has overruled the plea on the ground that such sanction was granted in this case by the Commissioners under the Defence of India Act, as a superior Court. This point is now taken before us.

In view of the provisions of section 537, Criminal Procedure Code, it is clear that the want of any sanction or any irregularity in the sanction required by section 195, Criminal Procedure Code, cannot be made the basis of interference in revision unless such want of sanction or irregularity has occasioned a failure of justice. It cannot be said in the present proceedings that the want of such a sanction has occasioned a failure of justice though the objection was raised apparently before the Trial Court. I may add that I am unable to accept the Sessions Judge's view that, for the purpose of section 195, the First Class Magistrate was a Court subordinate to the Commissioners appointed under the Defence of India Act. I take it, for the purpose of this argument, that the Magistrate recording the statement under section 164, Criminal Procedure Code, was a 'Court' under the Code of Criminal Procedure. In my opinion, there can be no doubt that the duty which the Magistrate is required to perform by way of recording a statement under section 164 Criminal Procedure Code, is to be performed by him as a Magistrate, i.e., as a Court. The further argument which has been urged on the basis that the Magistrate is not a Court does not really arise. But I may add with reference to that argument that if the Magistrate were not a Court, the position

of the applicant would become weaker and not in any sense stronger, so far as the point relating to the want of sanction is concerned.

Thus, it seems to me that, though the sanction of the First Class Magistrate of Nadiad, who recorded the statement under section 164, Criminal Procedure Code, was necessary, we cannot interfere in revision on that ground under the circumstances of this case.

*Rule discharged.*

LAHORE HIGH COURT.  
CRIMINAL APPEAL No 624 OF 1920.  
February 1, 1921.  
Present :—Mr. Justice Scott-Smith.  
MANGU AND ANOTHER—CONVICTS—  
APPELLANTS

*versus*

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 27—  
Pardon, whether can be tendered after charge is framed.*

There is nothing in section 27 of the Criminal Procedure Code, to prevent a pardon being tendered to a person after a charge has been framed against him [p. 60r, col. 1.]

Appeal from the order of the Magistrate, First Class, exercising enhanced powers under section 30 of the Criminal Procedure Code, Montgomery, dated the 14th August 1920.

Mr. Badr ud-Din Kureshi, for the Appellants.

Mr. H. A. Herbert, Government Advocate, for the Respondent.

JUDGMENT.—Mangu and Budh Singh, appellants, have been convicted by a Magistrate invested with section 30 powers of dacoity under section 395 of the Indian Penal Code, and have been sentenced to seven years' rigorous imprisonment each. The dacoity was committed on the night between the 27th and 29th February 1920 in the house of Chiman Ram which is situated at a distance of 100 feet from the canal rest-house at Jiwan Shah in the Montgomery District. The dacoity is said



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to have been committed by five persons, viz., the two appellants, Ram Singh, approver, and Bishan Singh and Ghona, who are said to have absconded. The dacoits were pursued from the scene of the occurrence to Chak No. 51, the exact distance of which is not stated on the record, and as the night was a moonlight one, the members of the pursuing party had ample opportunity of seeing their faces and being able to identify them subsequently. Ram Singh was at first put on his trial along with the two appellants and charges were framed against all three of them on the 14th May 1920. A pardon was tendered to Ram Singh on the 7th June and he was examined as a witness in the case on the 17th. The first objection taken by Mr. Kureshi on behalf of the appellants is that it was illegal to tender a pardon to Ram Singh and examine him as a witness after a charge had been framed against him. There is, however, nothing in section 337, Criminal Procedure Code, which prevents a pardon being tendered during the hearing of the case to one of the persons being tried, and Mr. Kureshi is unable to cite any authority in support of his argument. Moreover, section 338 of the Code allows a Court to which a commitment has been made, with the view of obtaining on the trial the evidence of any person supposed to have been concerned in, or privy to, any such offence, as is mentioned in section 337, to tender, or order the Committing Magistrate or the District Magistrate to tender, a pardon on the same condition to such person as is referred to in section 337. There is nothing in the Code to prevent a similar course being taken in a case not committed for trial. I, therefore, overrule this objection.

It does not appear exactly why it was considered necessary to tender a pardon to Ram Singh, for there was ample evidence before this was done, which, if believed, would support the conviction of the appellants. The Magistrate has written a very detailed judgment and I have gone through the evidence on the record so far as it concerns the appellants with the help of their Counsel and the Government Advocate. There is ample evidence of eye-witnesses to show that both the appellants took part in the dacoity. Nura, Lakha, Robella and

Goman identified both the appellants at an identification parade in the presence of Bawa Mani Ram, Inspector (P. W. No 32), and Nawab and Allu, both of whom were injured at the hands of the dacoits, identified the appellants at another identification parade presided over by Pandit Mangat Rai, Tahsildar (P. W. No. 35). These two gentlemen are entirely reliable witnesses and there is no reason whatsoever for supposing that the identification parades were not conducted in a proper manner and with all necessary precautions. Goman witness actually arrested Budh Singh in Chak No. 51 and he, therefore, had a very good opportunity of identifying him. There was no delay about the arrest of either of the appellants during the Police proceedings, and there is no reason for supposing that the direct evidence against them has been concocted. Mr. Kureshi frankly admits that if the direct evidence be believed, the conviction must be maintained. His main argument is that in the first information report made to the Police it was not stated that the members of the pursuing party would be able to identify the dacoits. This report was made by Mangal Das, son of Chiman Ram, who does not himself profess to identify any of the dacoits. He was, it appears, in a state of bewilderment when he made the report, and I do not consider that it is of any importance that he did not state that some of the members of the pursuing party would be able to identify the offenders. I cannot see any sufficient reason for rejecting the very strong direct evidence which has been produced in the present case, and it is, therefore, quite unnecessary for me to refer to any of the other evidence on the record. The dacoity was a serious one and grievous hurt was caused to two of the villagers by the dacoits who used *chhavis* as well as a gun. The appeal is, therefore, dismissed.

*Appeal dismissed.*

PONANGI VENKATASUBBARAYUDU v. ZEMINDAR OF NUZVID.

MADRAS HIGH COURT.

APPEAL AGAINST ORDERS Nos. 126, 143, 145,  
and 150 of 1919.

April 27, 1920.

Present:—Justice Sir Abdur Rahim, Kt.,  
and Mr. Justice Oldfield.

PONANGI VENKATASUBBARAYUDU  
AND OTHERS—DEFENDANTS—APPELLANTS

versus

Sree Rajah LAKSHMI VENKATA  
NARASIMHA RAO BAHADUR,  
ZEMINDAR OF NUZVID—PLAINTIFF  
—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI,  
r. 23, O. XLII, r. 1 (u)—Decision of main question by  
Appellate Court—Remand for findings on minor issues  
—Decision, whether on preliminary point—Order of  
remand, whether appealable

Where an Appellate Court decides the main point  
in a suit and remands the case for disposal on the  
remaining issues, its decision is not a decision on a  
preliminary point and the order of remand is outside  
the scope of Order XLI, rule 2, of the Civil Pro-  
cedure Code; and consequently not appealable  
under Order XLII, rule 1 (u).

*Athappa Chetty v. Ramanathan Chetty*, 53 Ind. Cas.  
417; 10 L. W. 319; 37 M. L. J. 38; *Vijayaraghava  
Reddi v. Komarappa Reddi*, 15 Ind. Cas. 387; 22 M. L.  
J. 409; (1912) M. W. N. 410; 11 M. L. T. 19; *Raghu-  
nandan Singh v. Jadunandan Singh*, 19 Ind. Cas. 49;  
3 P. L. J. 253; 4 P. L. W. 450; *Abdul Karim Abu  
Ahmed Khan Ghuznavi v. Allahabad Bank, Limited*,  
41 Ind. Cas. 598; 44 C. 929; 21 C. W. N. 877; 26 O. L.  
J. 49, followed.

Appeal against the decrees of the Court of  
the Subordinate Judge, Kistna, at Ellore, in  
Appeal Suits Nos. 414, 410, 402, 413, 419 and  
430 of 1917, preferred respectively against  
the decrees of the Court of the Additional  
District Munsif, Kovvur, in Original Suit  
Nos. 64, 60, 14, 63, 126 and 127 of 1916.

FACTS appear from the judgment.

Messrs. V. Ramesam and V. Suryanarayana,  
for the Respondents, took the preliminary  
objection that no appeal lay from the order  
of remand. The main question in the case,  
viz., plaintiff's right to collect water-tax  
from the defendants was decided by the  
Appellate Court. The case was remanded for  
disposal on the remaining minor issues.  
The disposal was not on a preliminary point  
within Order XLI, rule 23, Civil Procedure  
Code. See *Abdul Karim Abu Ahmed Khan  
Ghuznavi v. Allahabad Bank, Limited* (1),

*Vijayaraghava Reddi v. Komarappa Reddi* (2),  
*Raghunandan Singh v. Jadunandan Singh* (3),  
*Athappa Chetty v. Ramanathan Chetty* (4).

Messrs. P. Nagabhushanaim and P. Soma-  
sundram, for the Appellants.—There were a  
number of issues on which no finding was  
given. The decision was on a preliminary  
point and the case was not finally disposed of.

JUDGMENT.—This appeal is against the  
judgment of the Subordinate Judge by  
which he decided the main question in the  
suit i. e., the right of the plaintiff to collect  
water-tax from the defendants and remanded  
the suit to the District Munsif for disposal  
on the rest of the issues. The point which  
has been decided could not, in our opinion,  
be called a preliminary point, if any signi-  
ficance is to be attached to the qualification  
“preliminary.” According to a number of  
rulings of this Court, the most recent of  
which is reported as *Athappa Chetty v. Rama-  
nathan Chetty* (4), and also of another  
decision in *Vijayaraghava Reddi v. Komarappa  
Reddi* (2), the decision of the Patna High  
Court in *Raghunandan Singh v. Jadunandan  
Singh* (3) and of the Full Bench decision of  
the Calcutta High Court in *Abdul Karim  
Abu Ahmed Khan Ghuznavi v. Allahabad Bank,  
Limited* (1), the order of remand in this  
case must be treated as one not coming  
within the scope of Order XLI, rule 23,  
but within section 151 of the Code. The  
preliminary objection is good and no appeal  
lies to this Court under Order XLII, rule 1  
(u). The appeal is, therefore, dismissed  
with costs.

M. C. P.

*Appeal dismissed.*

(2) 15 Ind. Cas. 387; 22 M. L. J. 409; (1912) M. W.  
N. 410; 11 M. L. T. 199.

(3) 43 Ind. Cas. 959; 3 P. L. J. 253; 4 P. L. W.  
450.

(4) 53 Ind. Cas. 417; 10 L. W. 359; 37 M. L. J.  
523.

(1) 41 Ind. Cas. 598; 44 C. 929; 21 C. W. N. 877;  
26 O. L. J. 49.

DAYAL SINGH v. BAHAL SINGH.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 472 OF 1917.

January 24, 1921.

Present:—Mr. Justice Scott-Smith and  
Mr. Justice Leslie-Jones.

DAYAL SINGH AND ANOTHER, MINORS,  
THROUGH Musammat NARAIN DEVI—  
DEFENDANTS—APPELLANTS

versus

BAHAL SINGH—PLAINTIFF AND Musammat  
JUGLO—DEFENDANT—RESPONDENTS.

*Hindu Law—Joint family—Ancestral trade—Debts  
contracted by managing member—Minor members,  
liability of.*

Under Hindu Law a joint family which carries on a trade handed down from its ancestors becomes a trading family, and the shares of the minor coparceners in the property of such a family are liable for debts contracted by the managing member for the purposes of the family trade or for purposes incidental to it. [p. 611, cols. 1 & 2.]

First appeal from the decree of the Senior Subordinate Judge, Delhi, dated the 8th November 1916.

Lala Moti Sagar, R. S., for the Appellants.

Lala Jagan Nath and Mr. A. R. Chopra,  
for Mr. Gullu Ram, for Bahal Singh, Re-  
spondent.

**JUDGMENT.**—Plaintiff's suit for the recovery of Rs. 5,775 upon the basis of a promissory note executed by Laehhman Singh, defendant No. 1, having been decreed against all the defendants. Dial Singh and Sultan Singh, minors, have appealed on the ground that they as minors are not bound by the act of Laehhman Singh. The appellants are the sons of Nanna Singh who was the son of Laehhman Singh. Nanna Singh died one year before the institution of the suit and in the plaint it was alleged that all the defendants were members of a joint Hindu family. The defendants-appellants denied this and alleged further that the money borrowed by Laehhman Singh was not spent on the ancestral family business and there was no necessity for the loan. The lower Court held that the minors had not discharged the onus which lay upon them of proving that they were not members of a joint Hindu family and that it had been satisfactorily established that the money for which the promissory note was executed was spent on the ancestral family business.

In the first ground of appeal to this Court it is again urged that the appellants are not members of a joint Hindu family, but Mr.

Moti Sagar in arguments did not attempt to show us that the decision of the lower Court on this point was wrong. On the other hand, he frankly admitted that he could not press this point. It is admitted that the joint family have an ancestral shop in which the business *kandla kash* is carried on. Laehhman Singh also carries on a wine shop, but it is contended on behalf of the appellants that this was a separate business carried on by Laehhman Singh quite independently of the ancestral family business of *kandla kash* and that the money borrowed by him was spent in this separate business. The lower Court has held upon the evidence that the wine shop is merely a branch of the ancestral family business and that it has been financed from the ancestral shop. We have perused the evidence on the record and, in our opinion, this finding of the lower Court is clearly correct, as will appear from the statements of the following witnesses:—

Narang Singh, page 6, lines 24 and 25 of the paper-book, says: The wine shop was started 17 years ago. Nanna Singh started it. He is Laehhman Singh's son. The wine business was a branch of the old firm. Our money was used in both the firms. Both shops belonged to Laehhman Singh and Nanna Singh.

Laehhman Singh (page 7, line 33 of the paper-book) says: Laehhman Singh started the wine shop. The funds for this shop came from the shop of *kandla kash*. Nanna Singh managed both the shops. Laehhman Singh also worked with him. Nanna Singh had no separate business.

Man Singh (see page 8, line 21, *et seq*) says: Laehhman Singh and his son both did the business (i.e., liquor business). Nanna Singh used to check the accounts and shops in the evening. Nanna Singh used to do *kandla* business also. Laehhman Singh and his son both owned the shop.

Jawabar Singh (page 9, lines 5 and 8) says: The liquor shop was also joint. Nanna Singh mostly worked on the *kandla* shop. He used to attend the wine shop also. The funds for the wine shop were taken from the *kandla* shop.

The important points of Kishan Parshad's evidence are given in detail in the lower Court's judgment, printed at page 18 of the paper-book, and we agree with the conclusion



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drawn by the lower Court therefrom.

Kalla Ram (page 12, line 34) says: Both supervised the wine shop, but mostly

Laohhman Singh attended it. Laohhman Singh, defendant No. 1, has given evidence in support of the plaintiff's claim and has stated that the family was a joint one and that his son, Nanna Singh, did his business on whatever shop he was required, that there was no *kharch khata* in the liquor shop, that all the property was purchased from the *kandla* shop and that all the profits were conveyed to that shop. Moreover, all losses were debited to the *kandla* shop. Having regard to this evidence, we have no doubt that the lower Court is correct in holding that the liquor shop was a branch of the *kandla* shop and as such it must be considered to be an ancestral family trade.

Mr. Moti Sagar has referred *inter alia* to *Ganpat Rai v. Munni Lal* (1), in which it was held that there was no presumption that a debt contracted by the manager of a Hindu family was contracted for the benefit of the family, also to *Krishnadran Banerji v. Sanyasi Oharan Mandal* (2), in which it was held that a certificated guardian cannot start a new trade for the benefit of his ward at any rate without the sanction of the Court.

On the other side we are referred to *Brij Lal v. Jaishi Ram* (3), where it was held that it was not a correct statement of Hindu Law to say that when a debt was contracted by one member of an admittedly joint Hindu family, it was necessary for the plaintiff to show that the debt was raised for joint family purposes; to Mulla's Principles of Hindu Law, 3rd Edition, page 211, where it is stated that the manager of a joint family has an implied authority to contract debts and pledge the credit and property of the family for the ordinary purposes of the family business, and to *Raghunthji Tarachand v. Bank of Bombay* (4), where it was held that under Hindu Law a joint family which carried on a trade handed down from its ancestors became a trading family and that where a minor was co-parcener in a joint

family his share in the family property was liable for debts contracted by his managing co-parcener for any family purpose or any purpose incidental to it.

Having regard to these authorities, we are quite clear that the minor appellants are liable for the debts for which defendant No. 1 executed the pro-note sued upon, to the extent of the family property in their hands. We, therefore, dismiss the appeal with costs and maintain the decree of the lower Court.

*Appeal dismissed.*

### MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2159 OF 1918.

December 2, 1919.

*Present* :—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

NARAYANASAMY RAO AND ANOTHER  
—DEFENDENTS NOS. 4 AND 5—APPELLANTS

*versus*

RAMASAMY NAICKER AND OTHERS—  
PLAINTIFFS NOS. 1 AND 2 AND DEFENDANTS—  
Nos. 1 AND 3—RESPONDENTS.

*Indemnity-bond—Covenant to pay—Sale of specific property in case of failure to pay—Mortgage, whether created—Priority, over intermediate mortgages.*

An indemnity-bond executed by a vendor of immoveable property in favour of the vendee which covenants for the payment of compensation to the latter if he is deprived of possession, and which provides for the sale of certain specific property to secure the payment of compensation, is sufficient for the creation of a mortgage in respect of the property so specified, and such mortgage has priority over intermediate mortgages created at a time when there was no debt owing by the vendor to the vendee. [1913, 111.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Ramnad, in Appeal Suit No. 28 of 1918 (Original Suit No. 209 of 1917, District Court, Ramnad) preferred against the decree of the Court of the Additional District Judge, Tirupattur, in Original Suit No. 223 of 1916.

Messrs. K. N. Aiyar, T. S. Krishna Row and A. Narayanasami Aiyar, for the Appellants.

(1) 18 Ind. Cas. 84; 84 A. 135; 9 A. L. J. 54.

(2) 5 Ind. Cas. 597; 23 O. W. N. 500; 29 C. L. J. 280.

(3) 30 Ind. Cas. 500; 172 P. L. R. 195; 106 P. W. B. 1915.

(4) 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 255.

NARAYANASAMY RAO v. RAMASAMY NAICKER.

Messrs. T. R. Vankatrama Sastriar and T. M. Ramiswami Aiyar, for the Respondents.

**JUDGMENT.**—One Perumal Naick was the owner of the three classes of properties which are known as the A, B and C properties. His son is also known as Perumal Naicker. The son brought a suit against the father in Original Suit No. 11 of 1905 for partition. During the pendency of the suit, the father mortgaged all the properties to one Parthasarathy Iyengar by Exhibit E on the 16th September 1908. On the 15th October 1910 he sold a property alone to plaintiff for Rs. 2,000 by releasing that property from the mortgage to Parthasarathy Iyengar by paying the consideration received from the plaintiff to the mortgagee. As the suit for partition was pending then, the father executed Exhibit A on the same date as the sale-deed, Exhibit B, agreeing to indemnify the plaintiff under certain conditions. In January 1911 he mortgaged the B and C properties to the 4th defendant. The decree for partition between the father and the son was passed on the 29th September 1917. Parthasarathy Iyengar sued the first defendant, the son, and the fourth defendant, the second mortgagee, for the balance due to him under the mortgage. In execution of the decree, B and C properties were sold to the fifth defendant on the 2nd March 1914 for about Rs. 5,400. Out of this, a sum of Rs. 3,700 was paid to Parthasarathy Iyengar and the balance of Rs. 1,700 was paid into Court. The fourth defendant applied for the payment of this balance to him in satisfaction of his claim under the second mortgage. It was resisted by plaintiff. On the claim being allowed, the present suit was instituted by the plaintiff asking for a declaration that the balance in Court must be paid to him as his claim under the indemnity-bond was prior in date to that of the mortgage in favour of the fourth defendant and for other reliefs. The District Munsif gave a decree for Rs. 1,00 and costs in favour of the plaintiff. On appeal, that decree was modified by decreasing the plaintiffs' claim for priority to the extent of Rs. 1,300. This second appeal is against that decree.

Mr. Ayya Aiyer has argued a number of questions before us. The most important of them is whether Exhibit A, the indemnity-bond,

creates a charge or a mortgage on the properties mentioned in it. It ought to be stated that Exhibit A only refers to the B Schedule properties. It must also be stated that the decree in the partition between the father and the son allotted to each of the sharers a half of every item of the properties in suit. This was an unfortunate procedure which has led to the present complication. If the Court had been apprised of the fact since the suit mortgage and sales have been created by the father, it would have allotted to the father the properties over which he created the mortgage and would have directed him to discharge his own debt leaving the son's share unaffected by the father's transactions. However, that was not done. In our opinion, Exhibit A does create a mortgage. The Subordinate Judge, referring to *Imbichi v. Achampat Arukoya Haji* (1), has come to the conclusion that a charge was created. In the judgment relied on the learned Judge, differing from *Madho Misser v. Sidh Binai's Upadhya* (2) and *Harjas Rai v. Naurang* (3), say that for the creation of a charge, it is not essential that there should be an existing liability. It does not appear that it was argued in that case that there is a distinction in this respect between the language of section 58, and that of section 100 of the Transfer of Property Act. Whereas, by the terms of section 58, a present mortgage can be effected for a future debt, there are no such words in section 100. Therefore, if the decision in *Imbichi v. Achampat Arukoya Haji* (1) is to be literally understood as relating to the creation of a charge as different from a mortgage, as at present advised, we would have directed the case to be further argued; but, in our opinion, it is not necessary to canvass that decision as we think that a mortgage was created by the terms of Exhibit A. The same remark would apply to the dictum of Krishnaswamy Aiyar, J., in *Balasubramania Nadar v. Sivaguru Asri* (4). Therein, the learned Judges speak of the creation of a charge as opposed to that of a mortgage. As was pointed out in *Rama Brahmam v.*

(1) 39 Ind. Cas. 267; 33 M. L. J. 58; 6 L. W. 115; (1917) M. W. N. 533.

(2) 14 C. 687; 7 Ind. Dec. (N. S.) 456.

(3) 3 A. L. J. 220; A. W. N. (1906) 82.

(4) 11 Ind. Cas. 629; 21 M. L. J. 562.

HARBARAN LAL U. NAURANGI KUNWAR.

*Venkatamarasu Puntulu* (5) and *Ramachariar v. Dorasami Pillai* (6), there are apt words in Exhibit A which are sufficient for the creation of a mortgage in respect of the properties given as indemnity. The date is specified; the property is specified; there is a covenant to pay. These are words which indicate that the property is to be sold in case the debt is not re-paid.

One other contention of Mr. Ayya Aiyar must be noticed, that is, although the mortgage in terms might have been created on the date of the execution of Exhibit A its legal consequence attached to the property given as security only on the happening of the contingency contemplated, namely, the deprivation of plaintiff's possession. We are unable to agree with this contention. The language of section 58 is clear and, unless the parties contemplated the bringing into existence of the mortgage on a future date, the rule is that, on the date of the execution of the document, the mortgage takes effect. Instances of mortgages for future debts are very common. In such cases it has never been suggested that an intermediate mortgage would deprive the creditor of his priority if such intermediate mortgage was created at a time when there was no debt owing from the debtor to the creditor. In our opinion, there was a mortgage, and that mortgagee, that is, the plaintiff, is entitled to priority over the 4th defendant's mortgage. In this suit the question of right of subrogation need not be considered.

The two further subsidiary questions are, whether the lower Court is right in giving the plaintiff 12 per cent. interest. The plaintiff is not entitled as of right to any particular rate of interest. All that he is entitled to is, some compensation for the deprivation of possession. The value of the property would, no doubt, be the particular amount on which interest by way of compensation will have to be awarded. We think that the interest at 12 per cent. awarded by the Subordinate Judge is too high. Six per cent. should be the rate of interest.

The last question relates to the nature of the decree that we should pass. As held

(5) 18 Ind. Cas. 209; 23 M. L. J. 131; (1912) M. W. N. 1124.

(6) 29 Ind. Cas. 605.

in *Balasubramania Nadar v. Sivaguru Asari* (4), the plaintiff, who is an intermediate mortgagee between Parthasarathy and the fourth defendant, is entitled to sue for the sale of the properties mortgaged to him, as he was not a party to the suit by Parthasarathy. The equities in the case cannot be satisfactorily worked out without impleading Parthasarathy. We must reverse the decrees of the Court below and remand the suit to the Court of first instance with the following directions:—

(a) Parthasarathy should be made a party.

(b) He must be directed to deposit in Court the monies received by him with interest thereon at 6 per cent. per annum.

(c) The monies paid by the fifth defendant for the purchase should then be paid to him out of this sum and out of the money in Court with interest at 6 per cent. from the date of payment.

(d) The properties B and C should then be brought to sale afresh.

(e) Parthasarathy should be paid the balance due to him out of the sale-proceeds.

(f) Out of the balance, the amount due to plaintiff should be paid with respect to the properties given as indemnity.

(g) The balance, if any, should be paid to the fourth defendant.

Costs will be provided for by the first Court.

M. C. P.

*Decree reversed.*

# ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 814 OF 1918.

July 9, 1920.

Present:—Mr. Justice Kanhaiya Lal.

HARBARAN LAL—DEFENDANT—

APPELLANT

versus

SHRI NAURANGI KUNWAR—

PLAINTIFF—RESPONDENT.

*Third and Revenue Courts—Ejectment—Dispute between—Procedure, proper.*



HARBARAN LAL v. NAURANGI KUNWAR.

The Civil Court has jurisdiction to eject a trespasser, but the mere denial by a sub-tenant of his tenancy does not make him a trespasser. [p. 614, col. 2.]

Where in a suit for ejectment the defendant is described as a sub-tenant, and he denies the sub-tenancy and practically sets up that he is the tenant-in-chief, it is open to either of the parties to seek in the Civil Court a declaration that he is the tenant-in-chief, as that Court is the proper Court to try all disputes between rival claimants to a tenancy, and if, in such a suit the Court finds that the defendant is a sub-tenant, it ought not to decree possession and damages; the proper decree is for a declaration that the plaintiff is entitled to hold as tenant-in-chief. [p. 614, col. 2; p. 615, col. 1.]

Second appeal from the decision of the Additional Subordinate Judge, Jaunpur, dated the 29th of March 1912.

Mr. Haribans Sahai, for the Appellant.

Messrs. Gokul Prasad and Badri Narain, for the Respondent.

**JUDGMENT.**—The dispute in this appeal relates to a plot No 96/2 *khassra* situated in the village Kuli Kalan. The plaintiff, *Musammatt Nuranghi Kunwar*, claims to be the occupancy tenant of the said plot in succession to her husband, *Brindaban*. The land is at present in the actual cultivation of the defendant, *Harbaran Lal*. The plaintiff filed a suit for the ejectment of the defendant in the Revenue Court alleging that the latter was her sub-tenant. The defendant denied that he was a sub-tenant of the plaintiff. The Revenue Court evidently accepted his defence and dismissed the suit.

The plaintiff then filed the present suit for possession of the said land with mesne profits, alleging that the defendant had wrongfully denied the title of the plaintiff in the Revenue Court. The defendant re-asserted that he was holding possession of the land in his own right and that the plaintiff had no right to it and had not been in possession of it within 12 years previous to this suit. His story was that the land in question was lying fallow behind his house and that about 10 or 12 years prior to the suit he brought it under cultivation at his own expense and has been in possession since. Several Zemindars, however, gave evidence on behalf of the plaintiff and supported her claim to the tenancy of the disputed land. In the revenue papers her husband, *Brindaban*, who was formerly the *Patwari* of the village, was recorded as the occupancy tenant of

that plot, holding it rent free. The Court of first instance distrusted that evidence and came to the conclusion that the plaintiff, or her husband, had no real title to the said land and that the plaintiff had not been in possession of it as a tenant-in-chief at any time within 12 years prior to the suit. It accordingly dismissed the claim. On appeal, the lower Appellate Court found that the husband of the plaintiff was the tenant in chief of the disputed plot and after the death of her husband the plaintiff got into possession and that the defendants held possession of the same as a sub-tenant of the plaintiff from the year 1314 F. It decreed the claim accordingly for possession and mesne profits.

The learned Counsel for the defendant-appellant contends that, on the findings arrived at by the lower Appellate Court, no suit for ejectment was entertainable in the Civil Court. He relies on the decision in *Ram Sukh v. Gokul Chand* (1) and in *Bechu Sahu v. Nand Ram Dos* (2). In both these cases it has been held that an agricultural lease can be determined only by the lessor taking proceedings under the Tenancy Act, and the reason which the land holder may have for desiring to eject the tenant has nothing to do with the procedure to be adopted for his ejectment. It is unquestionable that a trespasser can be ejected through the Civil Court, but the mere denial by a sub-tenant of his tenancy does not make him a trespasser. If the person whom the plaintiff describes as a sub-tenant sets himself up as a tenant-in-chief it is open to either of them to seek in the Civil Court a declaration that he is the tenant in chief of that land. In *Narain Singh v. Gobind Ram* (3) it was held that the Civil Court has no jurisdiction to eject as a trespasser a person whom the plaintiff, an occupancy tenant, described as his sub-tenant but who, he asserted, had lost his right by reason of his having set up in a previous proceeding the title of a chief tenant and obtained a decision to that effect from the Revenue Court. As

(1) 21 A. 143; A. W. N. (1893) 213; 9 Ind. Dec. 800.

(2) 24 Ind. Cas. 700; 12 A. L. J. 902.

(3) 9 Ind. Cas. 1022; 8 A. L. J. 431; 33 A. 523.

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pointed out in *Bhup v. Ram Lal* (4), a Civil Court is the proper Court to try all disputes between rival claimants to a tenancy. But a person found to be a sub-tenant cannot be ejected by it. The defendant here denies the sub-tenancy alleged by the plaintiff and practically sets up that he is himself the tenant-in-chief. He does not claim proprietary right against the Zemindar who is not even a party to the suit. The plaintiff can obtain a declaration against him that she is the tenant-in-chief of the disputed plot and not the defendant. She cannot, however, eject him through the Civil Court if he is her sub-tenant as the lower Appellate Court finds him to be. The case is somewhat complicated by the fact that the Revenue Court is stated to have already found in the ejectment proceeding that the defendant was not a sub-tenant of the plaintiff, but, even if he is not a sub-tenant, the plaintiff, as a tenant-in-chief, can still claim such rent from him as may be found equitable under section 34 of the Agra Tenancy Act (II of 1901). The plaintiff is, therefore, not without remedy. The decree for possession and damages cannot, in any case, stand. Though no objection as to the jurisdiction was raised by the defendant in this suit, the finding of the lower Appellate Court brings that question prominently up and in view of the ruling of their Lordships of the Privy Council in *Minakshi Naidu v. Subramanya Sastri* (5), the proper course seems to be to discharge that portion of the decree of the lower Appellate Court which grants the plaintiff proprietary possession and mesne profits over the property in dispute against the defendant who has been found to be her sub-tenant, and to grant instead a declaration that the plaintiff is entitled to hold the land in question as a tenant-in-chief. The appeal is allowed accordingly in so far that, in lieu of the decree granted by the Appellate Court, the plaintiff will be granted a declaration that she is entitled to hold the disputed land as a tenant-in-chief. She will get her costs here and heretofore from the defendant appellant who will bear his own costs throughout.

*Appeal allowed.*

(4) 11 Ind. Cas. 268; 8 A. L. J. 1007; 33 A. 775.

(5) 11 M. 26 at p. 35; 4 Ind. Dec. (N. S.) 18; 14 I. A. 160; 5 Sar. P. C. J. 54; 11 Ind. Jur. 293 (P. C.).

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1739 of 1919.

August 31, 1920.

Present:—Justice Sir Abdur Rahim, Kt., and Mr. Justice Oldfield.

BHUMIREDDI SURANNA AND OTHERS  
—PLAINTIFFS—APPELLANTS

versus

BHUMIREDDI APPADU AND OTHERS  
—DEFENDANTS—RESPONDENTS.

*Hindu Law—Joint family—Claim against family property—Claim referred by some members to arbitration—Arbitration, whether binding on family property.*

Where a person makes a claim against the property of a joint family, and the claim is referred to arbitration by some members only of the family and a settlement is effected by them with the claimant, the arbitration and settlement are not binding on the family property. [p. 616, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Vizagapatam, dated the 7th July 1919, in Appeal Suit No. 123 of 1918, preferred against the decree of the Court of the District Munsif, Chodavaram, dated the 27th September 1916, in Original Suit No. 403 of 1915.

FACTS appear from the judgment.

Mr. P. Narayanamurti, for the Appellants.—The award is not binding on the family as the reference to arbitration was not by all the members of the family. It is not competent to second and third plaintiffs to make the reference so as to bind the family. The authority or consent of the first plaintiff was not obtained.

Mr. B. Satyanarayana, for the Respondents.—The award was the result of a *bona fide* settlement with the third defendant. *Bona fide* compromise by the manager of a family is binding on the family. At any rate, the award will be binding on the second and third plaintiffs, the parties to the reference, though not on the other members. When it is competent for a co-parcener to alienate his share for consideration it is also competent to him to bind himself by a reference to arbitration.

JUDGMENT.—The third defendant in the suit who is the principal respondent before us claimed to have been adopted by a member of the family of the three plaintiffs. During the absence of the first plaintiff from the village, the two other plaintiffs who are the remaining members of the family and the third defendant

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referred the question as to the latter's status to the arbitration of five persons. One of these persons did not act; the four others made an award giving the land in dispute to the third defendant. The District Munsif decreed the plaintiff's suit holding that there was no valid award nor anything which can be called a valid and binding settlement of a family dispute. The Subordinate Judge has reversed that decree. He agreed with the Munsif that the adoption was not proved by evidence, but he says that the award, though made only by four out of five arbitrators originally named by the parties had been accepted by the second and third plaintiffs and, therefore, was binding on them either as an award or at least as a family settlement.

The question arises whether second and third plaintiffs had any authority to bind the family by means of arbitration or by a settlement with the third defendant. The first plaintiff did not join them at all and there is nothing to show that, in his absence and without his consent, the other two plaintiffs, the remaining members of the family, had authority to enter into a transaction of this nature.

There can be no doubt that, if all the members of the family combined and agreed to an arbitration or settlement like this, it would be valid, but that did not happen in this case. It might also be, though it is not necessary to decide the point, that a manager of a family might, by entering into a *bona fide* compromise of a claim of this nature, bind the family. Even that has not been sought to be made out in this case. Alienation by a member of a joint Hindu family of joint family property for valuable consideration has been upheld in this Court. But there is no authority in support of the proposition that some members of a Hindu family can bind the family property by submitting to an arbitration a claim made by a third person, or by entering into an arrangement with him. In the absence of any authority, we should not be justified in extending the law as to the power of an ordinary member of a joint Hindu family to deal with his share in the joint family property. If the arbitration or settlement was without authority, the result would be that it would not bind any members of the family and not as contended for by the

learned Pleader for the respondent, third defendant, that it would bind those who were parties to the settlement, though it would not affect the share of the member who did not join.

We reverse the judgment of the Subordinate Judge and restore the judgment of the District Munsif with costs here and in the Court below.

M. C. P.

*Appeal allowed.*

### PATNA HIGH COURT.

CIVIL REVISION No. 184 of 1920.

December 15, 1920.

Present:—Mr. Justice Jwala Prasad.

Musammam NAINU—PETITIONER

versus

BHUPENDRA NATH RAKHIT AND OTHERS  
—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 60, 6 — Claim petition—No finding as to possession and interest of claimant, effect of.*

Certain property was attached in execution of a decree N claimed an interest in, and possession of, the property. The court disallowed the claim, holding that N had some interest but not the entire interest, without finding what the nature of N's interest was in the property or whether the judgment-debtor or M. was in possession:

*Held*, that, under Order XXI, rules 60 and 61, of the Code of Civil Procedure, the order was illegal, and was liable to be set aside in revision by the High Court. [p 617, col 2; p 618, col. 1.]

Application for revision against the decision of the Small Cause Court Munsif, Arraria, District Purneah, dated the 10th May 1920.

Mr. Akbari, for the Petitioner.

Mr. Shambhu Saren, for the Opposite Party.

JUDGMENT.—This is an application against the order of the Munsif, dated the 10th May 1920, disallowing the claim of the petitioner under Order XXI, rule 58, to the property attached in execution of the decree of the opposite party. The Court dismissed the claim, holding that the petitioner got the property from her husband by way of inheritance and consequently she cannot claim entire interest in the property to the exclusion of her



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son, the judgment-debtor, and as the property attached is only 5-annas share the claimant's interest is not affected by the attachment.

It is contended that the above finding of the Court was not sufficient to dispose of the claim-case lodged by the petitioner, inasmuch as it was incumbent upon the Court to determine as to whether the property was in the possession of the judgment-debtor or the claimant, and if the Court found that the property was not in the possession of the latter, the claimant, then the claim should have been allowed. It is also said that the finding of right or title to the property does not dispose of the claim under the said order. In support of this the learned Counsel has relied upon the case of *Monmohiney Dassee v. Radha Kristo Dass* (1) and contends that the order of the Mansif disallowing the claim was not without jurisdiction although it did not determine the question of possession. In that case the authority of the order passed under the corresponding section 278 of the old Code of Civil Procedure was challenged by the person against whom the order was passed as well as by another person who was not a party to the claim-case in a suit brought by the purchaser of the property for the recovery thereof from the aforesaid persons. It was there held that the order passed disallowing the claim was not without jurisdiction and was conclusive between the parties. The *ratio decidendi* of the case was, that the Court in the claim-case based its decision not only upon the finding of possession but upon the finding of any interest in the property. In the case of *Rani Kanta Rai v. Kedar Nath Biswas* (2) the objection to the claim preferred by the purchaser of a holding to the attachment and sale of the property in execution of a rent-decree obtained by the landlord on the ground that the decree was a money decree and that the interest of the judgment-debtor having passed to the claimant the landlord was not entitled to attach it, was overruled by the Court holding that the claim, although preferred under section 47 of the Code of Civil Procedure,

was in fact one under Order XXI, rule 58 and the Court dismissed it by virtue of section 170 of the Bengal Tenancy Act. The High Court of Calcutta (Tannon and Cuming, JJ.) refused to interfere in revision on the ground that, although the Subordinate Judge committed an error of law in holding that the application came under Order XXI, rule 58, yet the petitioner had other remedies.

In the case of *Maung San Ba v. Maung Lun Bye* (3), the Burma Court declined to interfere in revision with the order releasing the property from attachment holding that the property was in the possession of the claimant. The ground urged for revision was that the Court had not applied its mind to the consideration of the provisions of section 110 of the Evidence Act and had not considered the evidence produced. This was held to be not a sufficient ground for interference. This case does not help the opposite party, inasmuch as the Court's decision was based upon the finding of possession. The same remark applies to the case of *Bhairon v. Musummat Ramnia* (4).

In none of the authorities relied upon by the opposite party the question was directly raised as to whether, in a claim based entirely upon possession, the order of the Court disallowing the claim without any finding as to possession is valid or not. This question was answered in the negative in the case relied upon by the learned Counsel for the petitioner, namely, *Monmohiney Dassee v. Radha Kristo Dass* (1).

In the present case the petitioner claimed not only interest in the property but also possession of the entire property. The Court held that she had some interest but not the entire. It did not find as to what was her interest exactly in the property and whether it covered the share wholly or partly claimed by the petitioner, namely, six-annas. It did not come to any finding as to whether the claimant or the judgment debtor was in possession of the six annas attached. The order was clearly wrong under rules 60 and 61 of Order XXI.

(1) 29 C. 543.

(2) 147 Ind. Cas. 180.

(3) 42 Ind. Cas. 74; 3 U. B. R. (1917) 18; 11 Bur. L. T. 123.

(4) 23 Ind. Cas. 209.

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The question then is, whether this Court is competent in revision to interfere with the aforesaid illegal order. Mr. Shambhu Saran contends that the Court has no power. Mr. Akbari strenuously resists this contention. The lower Court, no doubt, had jurisdiction to entertain the claim preferred by the petitioner and also to disallow or to allow it, but in the exercise of that jurisdiction it committed material irregularity in not coming to the finding of possession upon which alone its order disallowing the claim could be supported. In this view this Court has jurisdiction to set aside the order and remand the case to the Munsif to dispose of the application in accordance with law. The fact that the losing party has other remedy, namely, of instituting a suit, does not, in my opinion, relieve the lower Court from exercising jurisdiction properly, legally and regularly. The claimant has a right to get her redress under Order XXI, rule 58, if she establishes her interest and possession in the property attached and there is no reason why this should be disallowed simply because the Court has jurisdiction to disallow or allow the claim, when the Court has not come to a definite finding upon which alone its order rejecting the claim could be sustained.

The result is that I allow this application and remand the case to the Munsif for determination in accordance with law. It will be open to the parties to adduce such evidence as they can.

The costs of remand will abide the result. Hearing fee one gold mohur.

*Appeal allowed.*

# COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND CIVIL APPEAL No. 5 OF 1919-20.

January 30, 1920.

Present : — Mr. Harrison, J. M.

MUHAMMAD ZAMAN BEG AND OTHERS—  
APPELLANTS

*versus*

Sheikh ILAHI BUX AND OTHERS—

RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 8 (8)—Lease—

*Heritable and transferable rights conferred on lessees—  
Status of lessees—Rent, whether liable to enhancement.*

The status of a lessee who, by the terms of the lease, has conferred upon him both heritable and transferable rights, is that of an under-proprietor within the meaning of section 3 (8) of the Oudh Rent Act, and the rent payable by him is not liable to enhancement.

Second appeal from the order of the Commissioner, Lucknow Division, dated the 20th of August 1919, in a case of enhancement of rent.

**JUDGMENT.**—This is a second appeal in a suit brought under Chapter VIIA of the Oudh Rent Act for the enhancement of rent which was alleged in the plaint to be favourable.

The Commissioner has held that the defendant respondent has under proprietary rights and that his rent is not, therefore, liable to enhancement under the Resumption Chapter of the Act. The only question in this appeal is, whether the perpetual lease upon which the defendant respondent relied had an effect of creating under proprietary rights. The appellant relies solely upon the terms of the lease itself. The terms of the lease recited that the rent fixed at the time of the grant was to be payable up to the next Regular Settlement but then it was to be liable to revision. It is argued from this that the rent was not, in consequence, formally and finally fixed. This, however, seems to me to be a useless contention, for the plain meaning of the lease is merely that the rent was to be liable to revision at the next Settlement. As a matter of fact, this result would probably have ensued even if there had been no condition to that effect.

The other point taken by the appellant is that, again, according to the terms of the lease, if the lessees sold or mortgaged their rights, they were to sell or mortgage them to the lessor or his heirs. This seems to me to reserve a kind of right of pre-emption and does not take away the general power to transfer.

There is no doubt that the document conferred both heritable and transferable rights on the lessees. They are clearly brought within the definition of under-proprietor in section 3 (8) of the Oudh Rent Act. There is no provision in the

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Act for enhancing the rent of an under-proprietor and the Commissioner rightly held that the failure of the appellant to get the rent revised at the last Settlement cannot affect the respondent's rights.

I agree with the Commissioner's finding and dismiss the appeal with costs.

*Appeal dismissed.*

### LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 3240 OF 1916.

January 20, 1921.

Present:—Mr. Justice Broadway and  
Mr Justice Abdul Raouf.

MOHAN LAL—DEFENDANT—APPELLANT  
versus

NIRANJAN DAS AND ANOTHER—PLAINTIFFS  
—RESPONDENTS.

*Hindu Law—Will, construction of—Donee, estate taken by—Gift over, validity of.*

The Will of a Hindu testator contained the following clause:—"My wife will be the owner of this house. She will be at liberty to alienate it or dispose it of according to her wishes. None of my descendants will have any concern with it during her lifetime. If my wife does not give or alienate it to any person, it will remain the joint property of my grandsons".

*Held*, 1 that the widow obtained an absolute estate in the house under the Will [p. 60, col. 1]

(2) that the gift over in favour of the grandsons was null and void. [p. 60, col. 1]

In interpreting a Will the whole of it must be read, its language must receive its literal construction, its wording must be construed in its plain ordinary meaning in its plain and obvious sense, no portion of it should be treated as redundant and contradictory and the ambitions and wishes of the testator with respect to the devolution of his property must be taken into consideration [p. 62, col. 2]

The word '*malik*' implies 'absolute ownership' unless there is anything in the context or surrounding circumstances to qualify such meaning and it is not so qualified by the fact that the donee is a widow. [p. 62, col. 2; p. 623, col. 1]

If an estate is given in terms which confer an absolute estate to a named donee, and, then further interests are given merely after or on the termination of that donee's interest, and not in defeasance of it, his absolute interest is not cut down and the further interests fail. [p. 624, col. 1]

When an absolute interest has been given to the first taker, followed by a gift over of what may not be required by him, the gift over, though couched

in the most direct and precise words, is void for uncertainty [p. 24, col. 1]

First appeal from the decree of the Subordinate Judge, First Class, Lahore, dated the 8th November 1916.

Mr. Zafar Ullah Khan, Bakhshi Tek Chand and Lala Mehar (Kama Maharon, for the Appellant.

Messrs. Manohar Lal and Diwan Mehar Chand, for the Respondents.

**JUDGMENT.**—This was a suit for the possession of a house known as Garhiwala, situate in Kucha Muteaddi Mal, Lahore City. It belonged to Rai Bahadur Lala Gopal Das. The plaintiffs, Niranjn Das and Narisingh Das, are two of the grandsons of the Rai Bahadur. The defendant, Lala Mohan Lal, is also a grandson of the said Rai Bahadur. Before stating the facts on which the claim is based it is necessary to set out the pedigree of the family to which the parties belong. Rai Bahadur Lala Gopal Das had four sons, namely, Lala Narain Das, Rai Sahib Lala Kishan Chand, Lala Bishen Das, Rai Sahib Lala Devi Das, and a daughter, Bishen Devi. Lala Narain Das died in the lifetime of his father on the 13th December 1911 leaving Niranjn Das, plaintiff No. 1, and Narisingh Das, plaintiff No. 2. Mohan Lal is the son of Lala Bishen Das, who is said to have died on the 9th October 1914. Mr. Brij Lal, Barrister-at Law, is the son of Rai Sahib Lala Devi Das, both of whom are alive and have figured in this case as witnesses for the defence. The daughter, Bishen Devi, is married to one Lala Kidar Nath, by whom she has a daughter Musammat Jasoda, who is married to one Ram Chand, also a witness for the defence. Shortly put, the allegations on which the plaintiffs came into Court are as follows:—

On the 12th January 1912 Rai Bahadur Gopal Das made his last Will by which he bequeathed all his moveable and immoveable property in favour of his sons, grandsons and his wife, Musammat Uttam Devi. One of the properties bequeathed under the Will was a house known as Garhiwala, situate in Kucha Muteaddi Mal, in the City of Lahore. The third clause in the Will dealt with the house in dispute and ran in these words:—

"The house known as Garhiwala, situate at Lahore, Kucha Muteaddi Mal, was acquired by me (Rai Bahadur Gopal Das).



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It adjoins the walls of the house of Pandit Ganesh Das. *Musammot Uttam Devi*, my wife, will be the owner of this house. She will be at liberty to alienate it or dispose it of according to her wishes. None of my descendants will have any concern with it during her lifetime. If my wife does not give or alienate it to any person, it will remain the joint property of *Niranjan Das* and *Narsingh Dass*, my grandsons."

The testator died on the 9th July 1912, and on his death *Musammot Uttam Devi*, his widow, and the plaintiffs continued to be in possession of the said house. The lady, *Musammot Uttam Devi*, having also died on the 9th May 1913 the plaintiffs continued in possession as before. In December 1914 the defendant having taken unlawful possession of the house during the absence of the plaintiffs the latter lodged a complaint under section 443 of the Indian Penal Code, but the dispute being of the nature cognizable by a Civil Court the defendant was discharged. The plaintiffs thereupon instituted the present suit claiming possession of the house under the terms of the Will of their grandfather, *Rai Bahadur Lala Gopal Das*, dated the 12th January 1912.

The suit was resisted principally on the grounds that, under clause 3 of the Will, the house in suit was given absolutely to *Musammot Uttam Devi* with full power of alienation, that she had acquired full ownership thereof on the death of the testator, and that the provision in respect of gift over in favour of the plaintiffs being opposed to law was void and unenforceable. It was further pleaded that in any case the plaintiffs could not succeed as the entire house had been gifted by *Musammot Uttam Devi* in favour of the defendant's father *Bishen Das*, who in his turn had by a Will, dated the 7th October 1914, devised it in favour of the defendant.

By way of a reply to the pleas in defence the plaintiffs filed a replication in which they raised a plea of estoppel against the defendant to the effect that the latter having previously realized Rs. 1,209 from the plaintiffs under the first clause of the Will in enforcement of a similar provision, it was not open to the defendant to challenge the condition in respect of the remainder over as being null and void.

Five issues were struck by the learned Subordinate Judge with reference to the allegations arising on the pleadings.

The first issue related to the factum of the alleged gift of the house by *Musammot Uttam Devi* in favour of the defendant's father.

The second issue raised the question whether she was competent to make the gift or whether she had only a life-interest in the house.

The third issue related to the question whether the provision "if my wife does not give or alienate it to any person it will remain the joint property of *Niranjan Das*, and *Narsingh Das* my grandsons," is null and void according to law.

The fourth issue raised the general question as to who would be legally entitled to the house in suit in case the alleged Will in favour of the defendant's father was not established and the claim of the plaintiffs to succeed after the widow under clause 3 of the Will was not made out.

The fifth issue raised the question of the estoppel against the defendant as stated above.

The learned Subordinate Judge found that the defendant had failed to establish by evidence the alleged gift of the house by *Musammot Uttam Devi* to his father *Bishen Das*. He considered the question of the Will in favour of the defendant by *Bishen Das* immaterial, but held the evidence as to the Will to be unsatisfactory. The evidence as to the possession of the defendant was also held to be worthless. The Issues Nos. 2 and 3 relating to the nature of the interest created in favour of *Musammot Uttam Devi* and as to the legality of the remainder over were found in favour of the plaintiffs. The Issue No 5 was also found against the defendant, who was held to be estopped from questioning the legality of the provision as to the gift over. In view of the above findings, the property in question was held not to be the *istridhan* of the widow and not, therefore, heritable by *Musammot Bishen Devi*, her daughter, as such. The finding on Issue No. 4 was also in favour of the plaintiffs. In accordance with the above findings, the claim of the plaintiffs was allowed and a decree for possession of the house in suit was given in their favour.

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The defendant has come up in appeal to this Court and the pleas raised by him in the Court below have been reiterated in the memorandum of appeal to this Court and the decision of the learned Subordinate Judge has been impugned upon all points. Mr. Tek Chand has read the evidence bearing on the question of the gift by *Musammatt Uttam Devi* in favour of the defendant's father, the Will in favour of the defendants by his father and their possession under the gift. As regards the value of the evidence we are in entire accord with the learned Subordinate Judge. The first witness as to the alleged gift is *Rai Sahib Lala Devi Das*. On the face of his evidence, it is clear that he is an interested witness and not well disposed towards the plaintiffs with whom he has been at feud. We have no hesitation in rejecting his evidence.

The next witness on the point is *Mrs. Maroof*. Her evidence is altogether vague and indefinite. Moreover, a case of cheating was pending against her and she was involved in debt and appeared to be under the influence of the defendant, who was a *Naib-Tahsildar*, in the District of Lahore, at the time. Having regard to her status and position it is not at all safe to rely upon her evidence and it was rightly rejected by the learned Subordinate Judge.

The evidence of *Dr. Ram Jas* and *Mr. Brij Lal* also is not of much value, having regard to their connection with *Lala Devi Das* whose evidence has already been rejected on grounds mentioned above. The learned Subordinate Judge has given cogent reasons for disbelieving the evidence of *Ram Chand*, and we entirely agree with him.

The evidence of *Ishar Das*, *Diwan Chand* and *Atma Ram* has not been much relied upon in the argument before us and does not possess much value. Much stress was not laid upon the evidence on the question of possession and the Will by *Lala Bishen Das* in favour of the defendant. It is, therefore, unnecessary to discuss it in this judgment.

The main and the most important question on which lengthy arguments were addressed by the Counsel for both the parties was the question of the construction of the Will by *Rai Bahadur Lala Gopal Das*, and we will now deal with the several questions raised in the argument relating to the respective rights of the parties under the

said Will. A translation of the Will is printed at pages 57-60 of the paper-book, and it is admitted by the Counsel of the parties to be fairly accurate. As indicated above, the learned Subordinate Judge has held that, according to the construction put by him on the third clause of the Will, only a life interest was created in favour of the widow, *Musammatt Uttam Devi*, and the clause "if my wife does not give or alienate it (*Garhiwala house*) to any person it will remain the joint property of *Niranjan Das* and *Narsingh Das*, my grandsons" was not opposed to law and operated to confer the house on the plaintiffs as the lady had not given or alienated it to any person. After a careful consideration of the contents of the Will and the authorities cited by the Counsel, we are constrained to come to a different conclusion from that of the learned Subordinate Judge for the following reasons. After reciting the preamble, the Will proceeds to lay down the conditions. It is divided into three clauses. The first clause relates to moveable property and may be stated here in full, as on the provision of this clause the question of estoppel was raised. It runs thus :

"My moveable property of every description, whether cash, ornaments, clothes, utensils, or anything else, shall be entirely owned by my wife till her lifetime, if she survives me (*is sab jaedid manqul ki malik meri aurat ta hayat hogi*). Whatever is left after her death shall be owned by my two grandsons, *Niranjan Das* and *Narsingh Das*, sons of *Lala Narain Das*, deceased, in equal shares. If this property, left at the death of my wife, is worth more than Rs. 1,500, then my two grandsons, *Niranjan Das* and *Narsingh Das*, shall pay Rs. 1,500, out of it to my third son, *Lala Bishen Das*. No other descendant of mine shall have any concern whatsoever with this moveable property of mine. If my wife predeceases me, then whole of this moveable property shall be owned by my aforesaid grandsons *Niranjan Das* and *Narsingh Das*, and they shall pay Rs. 1,500, out of it to *Bishen Das*, provided the value of the property exceeds Rs. 1,500."

Now in this clause it is clearly provided that the widow would own the property till her lifetime (*ta hayat*). Here the testator intended to create a life interest only and

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gave effect to it by making use of appropriate, clear and unmistakable words.

The clause 2 relates to immoveable property. The first three items of properties are given to Niranjan Das and Narsingh Das, and it is provided that "all these three houses shall be owned by Niranjan Das and Narsingh Das, sons of Lala Narain Das, deceased. Other descendants of mine shall have no concern whatever with the said house." The words in vernacular are (in *har seh makinat ke malikan Niranjan Das aur Narsingh Das pisan Lala Narain Das mutw fi honge*).

There can be no possible doubt as to the intention of the testator as regards the nature of the interest given. Similar words are employed with regard to the houses allotted to Lala Kishen Chand, Lala Bisen Das and Lala Devi Das. Keeping in mind the expression "*ta hayat*" used in clause 1 and the words "*malikan*" or "*malik*" as used in clause 2 we have now to discover the intention of the testator with regard to the interest created under clause 3. The clause 3 opens with the significant words that "the house known as 'Garhiwala,' situate at Lahore, Kucha Muteaddi Mal, is my self-acquired property." Evidently, by describing the property as his self-acquired property the testator intended to convey that he had full right of transfer over the property. Then the testator goes on to provide that "my wife, Musammnat Uttam Devi shall be its proprietor" (*is ki malik meri Zauja Uttam Devi hogi*). Evidently, he intended to employ the word "*malik*" in this clause in the same sense in which he had used it in clause 2. "*Malik*" means a full or absolute owner. In order to emphasize his intention further the testator went on to say, "she is at liberty to transfer it or dispose it of in whatever way she likes" (*us ka ikhtiyar hai keh jis tarah chahé ba maré khul us ko intikal ya sarf karé*): "None of my descendants shall have any concern whatever with this house during her lifetime." The ownership of Musammnat Uttam Devi is not limited by the expression "*ta hayat*" as it was done in clause No. 1.

The farther provision as to her unlimited power of transfer left no room for speculation as to what sort of interest the testator intended to create. A large number of rulings and commentaries have been cited

before us laying down rules to be observed in construing a Will. It is not necessary to refer to those authorities specifically, as the following passage in the judgment of the learned Subordinate Judge fairly and accurately describes the law on the subject:—

"That in interpreting a Will the whole of it must be read, that its language shall receive its literal construction, that its wording will be construed in its plain ordinary meaning in its plain and obvious sense, that no portion of it is to be treated as redundant and contradictory, and that the ambitions and wishes of the testator with respect to the devolution of his property will be taken into consideration."

In the Court below reliance was placed on behalf of the defendant on *Norentra Nath Sarcar v. Kamalbasini Dasi* (1) and *Lala Ram ewan Lal v. Dal Koer* (2), and it was argued that, under section 111 of the Succession Act, 1865, applicable under the Hindu Wills Act, 1800, the legacy to the plaintiffs could not take effect and the original gift to the widow was absolute and indefeasible on the testator's death. In rejecting this argument the learned Subordinate Judge observed that the case of a son being the beneficiary under a Will stands on quite a different footing from that of a widow who ordinarily has a life interest. Whatever at one time might have been the view with respect to an estate which a female took under a Will giving her that estate as a *malik*, there is no doubt left as to the nature of such an estate and the meaning of the word *malik* in the light of authoritative pronouncements on the question by their Lordships of the Privy Council and the decisions of the various High Courts in this country. In the case of *Surajmani v. Erbi Nath Ojha* (3) their Lordships of the Privy Council held that "the use of the word '*malik*' implies 'absolute ownership' unless there is anything in the context or surrounding circumstances to qualify such meaning and

(1) 23 O. 563 (P. C.); 23 I. A. 18; 6 Sar. P. O. J. 667; 6 M. L. J. 7; 12 Ind. Dec. (N. S.) 374.

(2) 24 C. 406; 12 Ind. Dec. (N. S.) 938.

(3) 30 A. 84; 35 I. A. 17; 7 O. L. J. 181; 5 A. L. J. 67; 12 O. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 8 M. L. T. 144 (P. C.).



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it was not so qualified by the fact that the donee was a widow."

The distinction pointed out by the learned Subordinate Judge between the cases of a male and a female donee under a Will, therefore, has no force, in the light of the authoritative pronouncements of their Lordships of the Privy Council.

In the case of *Thakur Parshad v. Jamna Kunwar* (4), a Division Bench of the Allahabad High Court, following the ruling of their Lordships of the Privy Council in *Suramani's* case (3), held that "unless there is something in the context qualifying it the word 'malik' used in a Will bears its technical meaning."

In the case of *Wazir Devi v. Ram Ohand* (5), decided by a Division Bench of the Lahore High Court, "A Hindu executed a Will bequeathing his moveable and immoveable property in equal shares to his mother and widow using the words 'kulli ikhtiyar wa milkiat' in the document. After his death his mother made a gift of her share to her daughter and daughter's son. The next heir of the testator then brought a suit for a declaration that the gift should not affect his reversionary right." The learned Judges held that a Will by a Hindu in favour of a female must be interpreted in the same way as if it was in favour of a male, and that the word 'milkiat' implies an absolute estate unless there is something in the context to qualify it. It was argued in that case, on the authority of *Rallia Ram v. Musammatt Fed Kaur* (6), that it may be presumed, in the absence of clear indication to the contrary, that a devise of immoveable property to a Hindu widow does not give a state of inheritance, but only a life-estate or a widow's estate as understood by Hindu Law. The learned Judges held that this view, however, could no longer be held to be good after the decision of the Privy Council in the case of *Suramani v. Rabi Nath Oha* (3). On the authority of these rulings, we must give effect to the contention of the appellant that the provision constituting *Musammatt Uttam Devi*, the 'malik' of the house in dispute conferred an absolute and full pro-

prietary interest on her. We have, however to see whether anything can be discovered in the context which may have the effect of cutting down the absolute state to a state for life only. On behalf of the respondent reliance is placed upon the very clause which is impugned as null and void, creating a gift over after creating an absolute state. That clause, as already mentioned, run thus :—

"Ba shart i ke meri aurnt kisi ko makan na de jaye ya intikal na kare to phir makan mere har dopoton Naranjan Das aur Narsingh Das ka mustharka hoga", that is, if my wife does not give this house to anybody or does not alienate it, then this house shall remain the joint property of both of my grandsons, Naranjan Das and Narsingh Das.

If effect cannot be given to this provision according to law, as we shall presently state, it cannot have the effect of cutting down the absolute state to a state for life only. Reliance has also been placed by the respondent upon the following words in clause 3, namely, "none of my descendants shall have any concern whatever with this house during her lifetime", and it has been contended that it was contemplated by the testator to limit *Musammatt Uttam Devi's* right to a life only. In order to construe the Will, according to the well recognised canons of construction, we must construe these words in such a manner that no portion of it may be redundant and contradictory. In our opinion, while making use of the above expression, the testator had in contemplation the clause by which he was going to provide for a gift over in favour of his two grandsons. He evidently intended to lay down that his two grandsons would have no concern whatever with the house during his widow's lifetime. We are clearly of opinion, after reading the clause 3 as a whole, that an absolute and complete ownership was conferred by the testator on *Musammatt Uttam Devi*. The clause provides "ke us kark kar kar keh jistarah chah ba meri ikhad us ko intikal ya sarf kare." It is difficult to conceive what more could have been done by the testator to secure to his wife a full and heritable interest.

The next question we have to decide is, whether the clause conferring the house on the plaintiffs after the death of *Musammatt*

(4) 2 Ind. Cas. 474; 6 A. L. J. 420; 31 A. 303.

(5) 58 Ind. Cas. 988; 1 L. 415.

(6) 27 P. R. 1898.

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Uttam Devi is null and void, and the plaintiffs are not entitled to claim it. The question of the construction of a Will containing almost identical provisions came up for decision before a Division Bench of the Calcutta High Court in the case of *Sures Chandra v. Lalit Mohan Dutta* (7). A very exhaustive judgment was delivered by the Hon'ble Mr. Justice Mookerjee, in which all the authorities both English and Indian *pro* and *con* were considered and discussed. Most of the cases cited before us by the Counsel for the respective parties have been discussed and criticised by that eminent Judge. The facts of that case, as summarised in the head-note, were these:—A Hindu testator appointed his wife as his executrix. A clause in the Will vested in her whatever might remain, after the payment of debts and expenses, absolutely and with complete power of alienation. Other clauses provided for the adoption of sons and in case of there being no adopted son or no son or wife of the adopted son at the time of the death of the widow, the heir, according to the Hindu Shastras, who should be alive at the time, should get the properties which should remain after disposal by the widow by way of gift or sale.

The following rules were laid down in that case:—

(a) That the testator gave an absolute interest in his estate to his widow with full powers of alienation; that the gift over of what might remain undisposed of by her was void and inoperative in law.

(b) If an estate is given in terms which confer an absolute estate to a named donee, and, then further interests are given merely after or on the termination of that donee's interest and not in defeasance of it, his absolute interest is not cut down and the further interests fail.

(c) When an absolute interest has been given to the first taker followed by a gift over, of what may not be required by him, the gift over, though couched in the most direct and precise words, is void for uncertainty.

An attempt was made by the Counsel for the respondent to distinguish that case from

the case before us on the ground that in the reported case along with the word *malik* the word "*nirbuyadha*" was used, which indicated an absolute ownership. The Arabic word *malik*, according to its true import, also carries the meaning of full and complete ownership. In fact, after the decision of their Lordships in *Suraimani's* case (8) no possible doubt can exist as to the exact meaning of the word *malik*, granting for a moment that the learned Judge, who decided the Calcutta case, attached some importance to the word "*nirbuyadha*". We find in this case an equally emphatic and significant provision which clearly indicates that what the testator intended to confer upon his wife was a complete and absolute interest. A full owner has the right to transfer his property as he may wish without any control or limitation. In the present case, as already pointed out, full authority is given to *Musammatt Uttam Devi* to transfer the house or dispose it of in whatever way she may like. If the testator had intended to limit the power of transfer in order to keep the property intact for the benefit of his grand-sons after the life of the widow he would have made suitable and clear provision enjoining upon the widow to keep the property intact to be left by her for the benefit of these two grandsons. The decision of the Calcutta High Court, therefore, fully applies to the facts of this case.

Similar rule has been laid down in the cases of *Nistarini Debya v. Behari Lal Mukhopadhyaya* (9) and *Sulochana Debi v. Jagattarini Debi* (10). It is clear from the explicit provision of the clause 3 that the plaintiffs were to get the house only in the case of the widow not exercising her power of alienation. The element of uncertainty as to the devolution of the property on the plaintiffs makes the gift null and void as held in various cases.

The learned Subordinate Judge has relied upon three cases in support of his view that only a life interest was conferred upon *Musammatt Uttam Devi* under the Will, namely, *Lallu v. Jagmohan* (10), *Ram Chand*

(7) 31 Ind. Cas. 405; 23 C. W. N. 463; 22 C. L. J.

(8) 27 Ind. Cas. 239; 19 C. W. N. 52.

(9) 53 Ind. Cas. 602; 30 C. L. J. 51.

(10) 22 B. 403; 11 Ind. Dec. (N. 3) 855.

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v. *Dewan Chand* (11) and *Hara Kumari Dasi*  
v. *Mohim Chandra Sarkar* (12).

The first case was decided by the Bombay High Court before the decision of the Privy Council in *Surajmani v. Rabi Nath Ojha* (3). Moreover, there was element of uncertainty as to the devolution of the property in that case as the whole property was kept intact to be handed over to Mahalaxmi, see page 413.

The second case, *Kam Chand v. Dewan Chand* (11), is also clearly distinguishable. In the Will construed in that case power of alienation was not given to *Musammot Darga Davi*. It was clearly understood that the whole property was to go intact to *Hukam Davi*.

The third case, *Hara Kumari Dasi v. Mohim Chandra Sarkar* (12), lays down a rule somewhat different from that laid down in *Sures Chandra v. Lalit Mohan Dutta* (7), but, as observed by Mr. Justice Mookerjee, where it can be clearly gathered from the provisions of a Will that only a life-interest was intended to be conferred upon the first donee, a gift in remainder can validly be made in favour of a second donee after the life of the first donee.

Each case must be decided according to the special features of its own. Having regard to the construction we have placed upon clause 3, we are of opinion that the rulings in *Sures Chandra v. Lalit Mohan Dutta* (7), *Sulochana Debi v. Jagattarini Debi* (9) already referred to and *Tripurari Pal v. Jagat Tarini Dasi* (13) are more applicable to this case.

The decision of the Court below on the question of estoppel, in our opinion, also cannot be supported. The defendant claimed and took Rs. 1,500 provided by clause 1 of the Will. The interest in the moveable property was created only for life. Therefore, the condition providing the payment of Rs. 1,500 to the defendant out of the residue was not void or inoperative. We fail to see how the defendant is estopped

from taking exception to the condition as to the gift over in clause 3 of the Will.

In the view we have taken of the case the plaintiffs are not entitled to maintain this suit under the Will. It is not necessary to decide in this case as to who else is legally entitled to the house in dispute. The plaintiffs having failed to establish their title the suit must be dismissed. We accordingly allow the appeal, set aside the decree of the Court below and dismiss the suit of the plaintiffs with costs in all Courts.

*Appeal allowed.*

# COURT OF THE BOARD OF REVENUE UNITED PROVINCES.

PETITION No. 12 OF 1918.

December 21, 1918

Present:—Sir Lovett, S. M., and  
Mr. Ferard, J. M.

COURT OF WARDS, AJODHIA  
ESTATE—DEFENDANT—  
APPELLANT

versus

RAGHUBAR SINGH—PLAINTIFF  
—RESPONDENT.

*Landlord and tenant—Ejectment—Tenant permitted by landlord to continue after termination of lease—Landlord, right of, to eject.*

A landlord who permits his tenant to hold on after expiration of the term of the lease is not thereby precluded from ejecting the tenant.

Second appeal from the order of the Commissioner, Fyzabad Division, dated the 21st June 1918.

## JUDGMENT.

LOVETT, S. M.—(December 9, 1918).—In this case the respondent held the land in suit under a seven years' lease which expired in 1321 *Fasli*. The landlord allowed him to hold on for another year and then caused a notice of ejectment to issue.

The Commissioner holds that by not ejecting immediately, the landlord re-admitted the tenant to a fresh and statutory tenure. I cannot take this view.

The first plea urged by the respondent before the Commissioner is to the effect that after 1324 *Fasli* "he remained in

(11) 18 Ind. Cas. 571; 65 P. R. 1912; 99 P. L. R. 1912; 209 P. W. R. 1912.

(12) 12 C. W. N. 412; 7 C. L. J. 540

(13) 17 Ind. Cas. 696; 40 C. 274; 17 C. W. N. 145; 13 M. L. T. 1; (1913) M. W. N. 34; 17 C. L. J. 15; 15 Bom. L. R. 72; 40 I. A. 37 (P. C.).



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possession by virtue of the same *patta*." This conclusively shows that there was no re-admission or fresh agreement.

The circumstances of this case differ widely from those of *Ramdatt v. Raja Muhammad Ali Khan* (1) referred to by the Commissioner. I would accept the appeal and uphold the ejectment notice. I would give the appellant costs and Pleader's fees in all Courts.

FERRARD, J. M.—I concur. This case is clearly distinguishable from *Ramdatt v. Raja Muhammad Ali Khan* (1), which lays stress on the length of the period, *vis.*, three years, during which the appellants were accepted and treated by the respondent as his tenants after the expiry of their lease. The inference of admission to a fresh statutory period of tenancy was clear. The present case is very different. The period for which the tenant has stayed on after the expiry of his term of lease is only one year, which in itself is hardly sufficient to warrant such an inference here, and it is further negatived by his own plea that he was in possession by virtue of his expired lease.

*Appeal allowed.*

(1) Sel. Dec. No. 17 of 1891.

### ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 380 OF 1917.

July 6, 1920.

*Present* :—Sir Grimwood Mears, Kt.,  
Chief Justice, and Mr. Justice Ryves.  
HARAKH RAM JANI AND ANOTHER—  
DEFENDANTS—APPELLANTS

*versus*

LAKSHMI RAM JANI AND OTHERS—  
PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), Sch. II, paras. 14, 20—Arbitration—Award—Order refusing to file award, nature of—Arbitrator omitting to decide matter which parties have settled—Misconduct.*

An order rejecting an application to file an award is not a decision that the award is in law a bad award. [p. 628, col. 2]

Where, after a reference to arbitration and before the making of an award, the parties interested arrive at an agreement as to one of the matters in controversy, and the arbitrator omits to decide that matter,

or to record as part of the award the agreement of the parties, the omission does not amount to such misconduct on the part of the arbitrator as would necessarily make the whole award bad. [p. 630, cols. 1 & 2.]

First appeal from the decision of the Subordinate Judge, Benares, dated the 16th of June 1917.

Mr. Haribans Sahai, for the Appellants.

Messrs. B. E. O'Connor and Radha Kant Malaviya, for the Respondents.

JUDGMENT.—The parties to this litigation are members of the same family. In 1911 a dispute arose and it was decided to submit all matters in controversy to arbitration out of Court. On the 21st of April 1913 the arbitrator made his award. The history of what occurred in the interval between these two years is fully stated in the judgment of this Court in *Hari Kunwar v. Lakshmi Ram Jani* (1), and we shall have to refer to that decision later on. Within six months of the award being made, two of the plaintiffs applied to the Subordinate Judge, under paragraph 20 of the Second Schedule of the Code of Civil Procedure, to have the award filed. The Court took appropriate action under that paragraph and issued notice to the other side. They appeared and objected but their objections were overruled and the Court passed an order under paragraph 21 of the Schedule for filing the award and ordered a decree to be prepared in accordance with its terms. From that order the defendants appealed and raised in their appeal substantially the same objections which they had taken in the Court below and which are taken again here. We will refer to them later. This Court, on appeal in the case already mentioned, held that the lower Court should not have ordered the award to be filed. It appears that after the award was made the parties obtained possession of the property involved according to the terms of the award. After the decision of this Court the plaintiffs filed the suit out of which this appeal arises for a declaration that the award of the 21st of April 1913 was a good and valid award and one which bound all the parties, and asked to be maintained in their possession. They did this, because the defendants had taken steps to recover possession of property of

(1) 35 Ind. Cas. 633; 38 A. 380; 14 A. L. J. 481.

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which the plaintiffs had taken possession under the award. The defendants-appellants here raised two main contentions. One was that, under the law as amended by Act V of 1908, the suit was not maintainable because the decision of this Court in *Hari Kunwar v. Lakhmi Ram Jani* (1) operated as *res judicata*; and, secondly, that on the merits, there was misconduct on the part of the arbitrator such as would vitiate the award, and that there were other defects also in the submission to arbitration. The Trial Court, after hearing evidence, has decreed the suit and the defendants come here in appeal. The same two grounds again are pressed but the only misconduct on the part of the arbitrator that has now been pressed is, that he omitted to determine at least one of the questions submitted to him for decision.

As regards the plea of *res judicata* the argument is as follows. Section 89 of the new Code of Civil Procedure introduces a new legal position, and by that section it is enacted that the procedure to be adopted in all arbitration proceedings is that laid down in the paragraphs contained in the Second Schedule of the Act, unless otherwise provided for by special legislation. It is urged that the result of this amendment was to overrule all the older cases, such as *Kunji Lal v. Durga Prashad* (2), in which it had been held that an order under section 525 of the old Code, refusing to file an award did not operate as *res judicata* in a subsequent suit to enforce the award. It is said that now the only course open to a party who has obtained an award in his favour, and who wishes to avail himself of it, is to make an application within six months of its date under the terms of paragraph 20 of the Second Schedule of the Code. If he does not do so, then, the argument is, that the award becomes mere waste paper and is ineffectual for any purpose either by way of attack or of defence. Similarly, or rather, *a fortiori*, it is argued that if a Court acting under paragraph 21 refuses to make an award a rule of Court that decision is final, and the finality of that decision is emphasised by the fact that a new paragraph has been introduced in clause (f) of sub-

section (1) of section 104 of the new Code. It seems to us that this contention is not well-founded. The framers of the new Act took all the sections in the old Act which referred to arbitration out of the body of the Code and re-enacted them in very much the same language as before in the Second Schedule. Some changes in language were made, but only, apparently, with the object of getting rid of the conflict which existed in the various Courts in India in the interpretation of the old sections. Having done this; it seems to us, it was necessary for the framers of the new Act to enact some such section as section 89 in the body of the Act, to show that the procedure to be adopted in arbitration proceedings was to be found in the Second Schedule and that the rules in that Schedule would govern all such proceedings unless otherwise provided for by some special Act. We do not think that this 89th section made any new substantial innovation of law. It left matters practically as they were before.

When we turn to paragraphs 14 and 15 of the Schedule, it is not very easy to follow the language used. Thus, in paragraph 15, it is said "an award remitted under paragraph 14 becomes void on failure of the arbitrator or umpire to reconsider it." From this it would seem that an award which contained a flaw in it, inasmuch as the award had left undetermined any of the matters referred to arbitration, referred to in paragraph 14, was not in itself void, but that it only became void if, after it had been remitted to the arbitrator or umpire, he had refused or failed to amend it. Be that as it may, these sections are found in that part of the Schedule which refers to the procedure to be adopted in arbitration made in pending suits. The rules which govern arbitrations made out of Court are to be found in paragraphs 20 and 21. In paragraph 20 the words are that "any person interested in the award may apply to any Court having jurisdiction." It does not say that the "person interested" shall or must apply. It does not say that if he does not apply under that paragraph, then the award ceases to have any effect. If this had been the intention of the Legislature, as argued, we think it would have been very easy for it to have used suitable words. Now, where such an application has been filed under

(2) 6 Ind. Cas. 127; 32 A. 494; 7 A. L. J. 425.



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paragraph 20, the Court after issuing notice as laid down in that section can pass only one of two orders. If it "is satisfied that the matter has been referred to arbitration and that an award has been made thereon and where no ground, such as is mentioned or referred to in paragraph 14 or paragraph 15, is proved, the Court shall order the award to be filed." If, on the other hand, it finds that, for reasons mentioned in paragraphs 14 and 15, there is a flaw in the award, it cannot remit it, according to the rulings of this Court, and unlike the English Act of 1889, but must confine itself to dismissing the application. An appeal can be made from such an order specifically under section 104 (1) (f) of the present Code. It is argued that this implies that the Code meant to give finality to a decision under paragraph 21, and that the arguments which appeared to have found favour with the Judges of this Court in *Kunji Lal v. Durga Prasad* (2) and which they seemed inclined to adopt, but were prevented from adopting by reason of the *cursus curiæ* of this Court, applied with great force. In our opinion, however, the object of enacting clause (f) was to remove the conflict of opinion which prevailed in the various High Courts in India as to whether an appeal lay under the old section 525. Incidentally, also, it cleared up another matter that was open formerly to debate, namely, whether an order under section 525 was not really a decree and appealable as such. It is made quite clear that an order under the corresponding section, that is paragraph 21, is not a decree but is an order from which an appeal has been allowed. In our opinion, the amendments made in the new Act have in no way affected the law as it stood and, therefore, on this part of the case we think the appeal fails. We may note that, just as the lower Court could only pass one of two possible orders as stated above, so this Court in appeal could only decide whether the lower Court was right in passing the order which it made. It had no wider jurisdiction. The only point which it could, and which, in fact, it did, decide was that the proper order for that Court to have made, was to reject the application, and to that extent, and to that extent only, is the decision authoritative and binding.

It did not find, and could not have

found, decisively that the award was in law a bad and inoperative award. In fact, the learned Judges are careful to say so, vide page 389\* of the report, and, therefore, any observations which they have expressed as to the validity of the award, are only to be read as their reasons for refusing to file the award, having regard to paragraph 14 of the Schedule, and are not binding on us as a decision that the award was in law a bad award. Now, on the merits it has been argued that the award is vitiated by the misconduct of the arbitrator; and we agree that, if the defendants could prove that there was misconduct which in law would vitiate the award, then they were entitled to establish it. Now, in the present case the misconduct which is said to vitiate the award is the allegation that the arbitrator failed to determine one of the questions submitted to him. That question related to the future residence of *Musammât Hari Kunwar*. The Trial Court has taken evidence on the matter and has come to a finding with which we agree; and the facts appear to be these. At the time when the submission to arbitration was made, this question, as to the future residence of the lady, had not been decided and it was submitted to the arbitrator as one of the matters which he had to determine. The arbitrator has sworn that before he came to make his final award on the 21st of April 1913, that is, two years after the submission to arbitration, he had an interview with the lady and she expressed her desire to continue to reside in the house in which she was then living and had been living before. Thereupon, the arbitrator went to Rabi Ram Jani, the owner of the house, and told him of the lady's wishes. He said that he was perfectly willing to allow her to live in his house as long as she liked, and the other parties to the arbitration offered no objection. It was a matter which did not concern them. As the only two parties who were concerned in the matter, namely, the lady and Rabi Ram Jani, were agreed on this point the arbitrator came to the conclusion that that matter was no longer in controversy, and, therefore, he said nothing about it in his award. On this state of facts we have

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to see whether his omission to record a finding to the effect that the parties interested had agreed amongst themselves as to the residence of this lady in the future, did really amount to an omission by him to decide a matter in controversy which required his decision. We are inclined to think that it did not. Reliance has been placed on the general rule in England, as set out in Halsbury's Laws of England, Volume I, page 469, in paragraph 185, which is based on the case of *Randall v. Randall* (3) and other cases which are collected there, to the effect that the failure of an arbitrator to decide one out of several matters referred to him vitiates the award. In that case it appears that there were three matters in sharp conflict between the parties and the arbitrator was asked to decide each one of them. He failed entirely to decide one and, therefore, one point in controversy remained entirely undecided in spite of the arbitration. It was held that, under those circumstances, the whole arbitration award was bad. In the view which we take in this case of the action of arbitrator, we think this case can be distinguished on the ground that no question really remained undetermined at the time the award was made. It appears, however, that the rule so broadly stated has been to some extent modified by Indian decisions. We were referred by the appellants to the case of *Ganes Narayan Singh v. Malida Koor* (4). In that case, similarly, the Court below had ordered an award to be filed under paragraph 21 of the Schedule although one at least of the matters in controversy had not been decided. In dealing with this point, the learned Judges, after stating the law as laid down in *Randall v. Randall* (3) and other English cases, and going on to say that the same rule had been adopted in the American Courts, state that in their opinion the arbitrator had failed to adjudge on all the matters in question "for the award, upon a reasonable construction of the whole of the instrument, must be taken to have left undecided one of the cardinal points in controversy, namely, whether the testator belonged with the present appellants to a joint Hindu family."

It seems to us that in that particular case the omission to decide a point which went to the root of the matter, as that did, was in itself quite enough to vitiate the award. But another case of the same Court has been relied upon. It is to be found in *Ramji Ram v. Salig Ram* (5). But if it is examined carefully it seems to us to be a complete answer to both parts of the appellants' argument. In that case an award was made by the umpire on the 18th of April 1909 in an arbitration out of Court, that is to say, it was an award which was made after the present Code (Act No. V of 1908) came into force. It was patent on the face of that award that the arbitrator had entirely failed to decide one of the most important matters which had been referred to him, namely, how much money was due by one party to the other. Within six months from the date of the award Salig Ram commenced that suit. It was a suit, according to the plaint, for the establishment of his rights and for partition of the estate. The foundation of the claim was unquestionably the arbitration award but the plaintiff prayed in the alternative that if, in the opinion of the Court, the award of the umpire was not for any reason a valid award the suit might be treated as one for partition, for accounts and for incidental reliefs. The claim was resisted on every conceivable ground, among others, that the arbitrator had been guilty of misconduct. No less than 20 issues were fixed by the Trial Judge. It would seem to be obvious that that was not an application made under paragraph 20 of the Schedule, nevertheless the District Judge, in spite of the comprehensive character of those issues, treated the suit as one under paragraph 20 of the Second Schedule and, having heard objections, overruled them and ordered the award to be filed and a decree to be prepared in accordance with it. This naturally satisfied neither party. The decree on the award as it stood failed to give the plaintiff the relief he sought, namely, the money which he claimed was due to him, and the defendant objected to the award on the ground of various allegations of misconduct on the

(3) (1805) 7 East 81; 8 R. R. 601; 103 E. R. 32.

(4) 10 Ind. Cas. 450; 13 C. L. J. 290 at p. 403.

(5) 11 Ind. Cas. 181; 14 C. L. J. 184.

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part of the arbitrator, quite apart from the fact that he had omitted to decide one of the questions submitted to him. The Calcutta High Court allowed both the appeals and, when dealing with the question as to how far the failure of the arbitrator to decide one of the matters referred to him vitiated the award, again referred to the English rulings which we have already discussed. The learned Judges in the end go on to say that "an award will not be set aside if the question undecided was not notified to the arbitrator as a matter in difference, or the parties showed by their conduct that they did not mean him to decide it." Now, in this case, as we have said above, the parties had agreed and, therefore, it may be said, that they did not intend the arbitrator to decide a matter which was already settled by the time when he was to make his award. However, in remitting the case back for trial to the Court below it is instructive to note the direction which they gave to that Court. "The case will be remanded to the District Judge in order that he may first take up the question of misconduct of the arbitrators and the umpire raised in the 15th paragraph of the written statement. The parties will be allowed to adduce evidence upon this matter. If it is decided in favour of the defendants, the whole of the award must be treated as invalid and inoperative in law. The questions in controversy between the parties will then be decided upon evidence as if no award had ever been made. If, however, the objection taken by the defendants on the ground of misconduct fails, the suit will be tried out on the merits on the footing that the questions raised in the first four issues before the arbitrators have been definitely settled by them. These questions, and these questions alone, will be taken to have been finally decided by the arbitrators, all other questions which arise on the pleadings in this suit and are covered by the issues must be determined on evidence and a final decree made." It appears from this decision that it is not necessary for a party to an award to make an application under paragraph 20 and also that if an award fails to determine a particular matter it does not necessarily make the whole award bad, but that in a suit bet-

ween the parties so much of the award as is good will be taken as such and so much as is not covered by the award will be left for decision.

It would be lamentable if we were forced now, seven years after it has been carried into effect, to upset the award on the ground simply that the arbitrator failed to record as part of his award the agreement under which this lady who was living in the house has continued to live in it ever since and which is not really a matter in issue.

On all these grounds we think that the appeal fails, and it is accordingly dismissed with costs including fees on the higher scale.

*Appeal dismissed.*

### MADRAS HIGH COURT.

A FINAL ORDER No. 300 OF 1919.

September 4, 1920

Present:—Justice Sir Abdul Rahim, Kt.,  
and Mr. Justice Ogers.

AYYAVU alias SYED MUHAMAD

ROWTHER—DEFENDANT No. 1—

APPELLANT

versus

ARU. ARU. SOMA. SOMA SUNDARAM

CHETTIAR, REPRESENTED BY HIS AGENT,

MAYANDI CHETTIAR—PLAINTIFF

—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 48—  
Evasion of arrest, whether fraudulent prevention of  
execution—Limitation, fresh starting period of.

The wilful evasion by a judgment-debtor of arrest under a warrant taken out by the decree-holder, in order to avoid payment of the decree-amount, amounts to fraud within the meaning of section 48 of the Civil Procedure Code so as to give a fresh starting period of limitation, and is a fraudulent prevention of the execution of decree within the meaning of clause 2 of that section.

Appeal against the order, dated 26th February 1919, of the Court of the Subordinate Judge, Trichinopoly, in Execution Petitions Nos. 1518 and 1524 of 1914, in Original Suit No. 11 of 1902, (Tinnevely Sub-Court).

GEORGE HENRY HOOK v. ADMINISTRATOR-GENERAL OF BENGAL.

Mr. V. C. Seshachariar (with him Mr. K. V. Sessa Aiyangar), for the Appellant.

Mr. C. S. Venkatachariar, for the Respondent.

### JUDGMENT.

ABDUR RAHIM, J.—There can be no doubt, upon the facts as found by the lower Court, that the judgment-debtor, appellant before us, has been evading arrest for a long time. No less than 6 warrants were taken out for his arrest, and there is no difficulty in coming to the conclusion, as the lower Court has done, that he has been wilfully evading arrest in order to avoid payment of the decree-amount.

According to the rulings of this Court and also of the Allahabad High Court, those facts would amount to fraud within the meaning of section 48 of the Civil Procedure Code, that is, wilful evasion of arrest under warrants taken out by the judgment-creditor, is fraudulent prevention of the execution of the decree, within the meaning of section 48 (2) of the Civil Procedure Code. It is not necessary for the judgment-creditor to prove by positive evidence that, but for the conduct of the judgment-debtor, he would have realised the decree. The law on the subject was first laid down in *Annamalai Goundan v. Rangasami Chetti* (1), although in that case there were other fraudulent acts as well on the part of the judgment-debtor. This ruling has been followed in *Abdul Khadir v. Ajiyur Ahammad* (2), and *Nathuram Sivagi v. Krishna Kommolthy* (3). The same view of the law is taken in the Allahabad High Court in *Mohsen Ali v. Masoom Ali* (4). There is no doubt a dictum of Shephard, J., in *Seshachalam Chetty v. Rajam Chetty* (5), to the contrary. But it does not appear that the authorities on the point were brought to the notice of the learned Judge. Following the decisions mentioned above, we must hold that there was fraud in the sense of section 48 of the Civil Procedure Code so as to give a fresh starting period of limitation. The appeal must be dismissed with costs.

(1) 6 M. 365; 2 Ind. Deco (N. S.) 534.

(2) 12 Ind. Cas. 679; 35 M. 670; (1911) 2 M. W. N. 434; 10 M. L. T. 413; 22 M. L. J. 35.

(3) 18 Ind. Cas. 1608; 24 M. L. J. 270; (1913) M. W. N. 182; 13 M. L. T. 226.

(4) 11 Ind. Cas. 672; 34 A. 20; 8 A. L. J. 1020.

(5) 8 M. L. J. 203.

ODGERS, J.—I agree, and I would only add a word as to the case in *Seshachalam Chetty v. Rajam Chetty* (5), cited by the learned Vakil for the appellant. It was a case before Mr. Justice Shephard and I think it is important to notice that, as I understand the case, there was no evidence of fraud and that the decision turned on that finding. In this case I agree with my learned brother because there is ample evidence of fraud within the meaning of section 48 of the Civil Procedure Code. It is quite clear to my mind that the case in *Seshachalam Chetty v. Rajam Chetty* (5), can have no bearing on the point before us. I also agree as to the effect of the Madras and Allahabad decisions cited before us.

M. C. P.

*Appeal dismissed.*

### PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

February 10, 1921.

Present:—Lord Buckmaster, Lord Phillimore, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

GEORGE HENRY HOOK—APPELLANT

versus

THE ADMINISTRATOR GENERAL OF BENGAL AND OTHERS—RESPONDENTS.

Res judicata—Previous decision in same suit, effect of—Civil Procedure Code (Act V of 1908), s. 11, whether exhaustive.

When a question at issue between the parties to a suit is heard and finally decided, the judgment given on it is binding on the parties at all subsequent stages of the suit. Its binding force depends not upon the Code of Civil Procedure, section 11, but upon general principles of law: if it were not binding, there would be no end to litigation. [p. 634, col. 2.]

*Ram Kripal Surtal v. Rup Kuari*, 11 I. A. 37; 6 A. 269; 4 Sar P. C. J. 483, 3 Ind. Deco. (N. S.) 718, followed.

Appeal from an order of the Calcutta High Court, (Lanslot Sanderson, C. J., and Woodroffe, J.), dated July 1st, 1918, reversing an order of Chaudhri, J.

FACTS of the case are stated in their Lordships' judgment. It may be added that the appellant, the Reverend G. H. Hook, was Pastor of the Lal Bazar Baptist



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Church: the Reverend B. Evans, Pastor of the Howrah Baptist Church, was respondent No. 4 and supported the present appeal. The Appellate Bench of the High Court held that the question whether the gift over to charities infringed the rule against perpetuities was not *res judicata*; and that such gift over was invalid under section 101 of the Indian Succession Act. Hence the present appeal.

Messrs. De Gruyther, K. O., and R. B. Hodge, for the Appellants.

Messrs. Tomlin, K. O. and A. A. Uthwatt, for Respondent No. 1, (the testator's next-of kin).

Mr. Turnbull, for Mr. Dube, for Respondent No. 4.

Mr. De Gruyther, K. O., for the Appellant, submitted that section 101 of the Indian Succession Act, 1865, did not apply to bequests to religious or charitable uses; alternatively, that it did not apply to the bequest in question, which was valid in law. But, further, the matter was *res judicata*; Chaudhri, J., had decided once for all that the bequest was good. The contention before him was that the gift over might not operate within perpetuity limits: he held that this was not so, and that the vesting was immediate. The Appellate Bench had erred in allowing the question to be raised again. A decision between the parties in the same suit operates as *res judicata*.

*Ram Kirpal Shukul v. Rup Kuari* (1).

The next-of-kin could have appealed from the 1912 decision of Chaudhri, J., but failed to do so.

Mr. Tomlin, K. O., for Respondent No. 1, (he was asked to confine himself to the question of *res judicata*) submitted that the frame of the Will was that during lives certain annuities should be paid and the surplus income dealt with in a particular way: after that, there was a definite gift of corpus: a condition imposed on a gift to one charity: and a gift over.

The Court which dealt with the case in 1912 dealt only with the first gift. The question how the corpus should go could not be determined and was not determined.

With regard to the first gift no question

of perpetuity arose; as to the second gift, it did.

Under the decree the question as to the disposal of the corpus was left over in the widest terms, with liberty to all parties to apply.

The reason there was no appeal was that the parties thought the question was left over.

Mr. Uthwatt followed.—The two gifts were quite independent, and the judgment of Chaudhri, J., decided nothing as to the second.

Mr. De Gruyther, K. O., in reply.—It is clear from the judgment of Chaudhri, J., in 1912, that the contention before him was that the gift over might not take effect till after the period when vesting must occur, and that he overruled that contention.

### JUDGMENT.

LORD BUCKMASTER.—On the merits of this controversy their Lordships are not called upon to decide, for, in their opinion, the respondents are estopped from raising the contention they desire to advance by reason of the judgment that has already been given between themselves and the appellant upon the point.

The dispute arises under a Will and four codicils made by one Dr. Henry Wilkin Jones, who died on the 8th July 1909.

By his Will the testator appointed the Administrator-General of Bengal as executor and trustee, and bequeathed to him his real and personal estate upon trust for sale and investment, and directed, after payment of debts, funeral expenses, and legacies, that the residue should be held to apply the income as therein provided, during the life of his wife. On the death of his wife, he directed payment of certain legacies and then created trusts of the income of the fund to endure during the lifetime of certain named persons. By paragraph 17, he directed that, on the death of the survivor of these named persons—and such survivor was Miss Eliza Humphreys—a further trust should be imposed upon his trustees to sell and convert his real property, apparently forgetting that that had already been done. He also again provided for the investment of the proceeds of sale and declared that the trustees should hold the same;—

(1) 11 I. A. 37; 6 A. 269; 4 Sar [P. C. J. 489; 8 Ind. Dec (N. s.) 718.

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"For the full sum of Rs. 30,000 if the said trust funds shall amount to so much or exceed that sum but not otherwise and if the said trust funds shall not amount to so much then to hold the whole thereof upon trust to pay the income thereof quarterly to two of the Deacons for the time being of the Circular Road Baptist Church to be by them applied in manner following, namely, as to a moiety thereof for the Poors' Fund in connection with the said Church for the sustenance and support of the poor belonging to the said Church or the congregation usually worshipping in the said Baptist Chapel and as to the other moiety for the General Fund in connection with the said Church for the following purposes, namely, the support of the Pastor for the time being the expenses of the religious services held in the said Chapel repairs to the Chapel Pastor's dwelling-house and out-offices connected therewith and also for keeping my grave in decent order which shall be a duty imperatively incumbent on the Deacons for the time being of the said Church to perform."

If the trust fund exceeded the sum of Rs. 30,000, and this in the event has happened, he declared that as to all the balance thereof the trustees were to hold the same on the trust declared in respect of the sum of Rs. 30,000.

By his first codicil (22nd May 1901) the testator revoked a number of provisions in the Will, gave new directions with regard to the payment of the income, and provided that if Miss Eliza Humphreys should survive her sister, Miss Anne Humphreys, her annuity should on her death be paid to two Deacons of the Lower Circular Road Baptist Church to be applied by them in the manner mentioned in paragraph 17 of his Will and by clause 20 of this codicil he gave the balance of the income in the same terms.

By his second codicil, dated the 2nd March, 1903, the testator imposed certain conditions upon the gift made in favour of the Lower Circular Road Baptist Church, and provided that if the conditions should be broken,—

"Then, and in that case one half of the interest, dividends, etc., that I have set aside for the said Lower Circular Road Baptist Church shall be made over and

paid to the Pastor for the time being of the Howrah Baptist Church for the benefit of the said Church generally and the other half thereof to the Reverend Arthur Jewson's Faith Orphanage at present at No. 117, Dharamtalla Street (if then existing) or if not in existence to the Pastor of the Lal Bazar Baptist Church for the benefit of the said Church and of the poor of the Church."

His third and fourth codicils are not material for the purpose of this appeal.

The testator's wife predeceased him, and died on the 25th July 1907.

The Lower Circular Road Baptist Church did not comply with the conditions set out in the codicil and on the 17th February 1911 the Administrator-General of Bengal instituted a suit asking, among other things, what would be the destination of the funds in the event of the provisions in favour of the Circular Road Baptist Church being forfeited and whether the gift over in the second codicil would take effect or whether there would be an intestacy. To this suit the present respondents, Joseph Henry Jones, and Emma Adelaide Jones, were parties as representing the next of-kin of the testator and they contended in favour of the intestacy on the ground that the period in which the gift-over might take effect would be beyond the period in which vesting must occur.

The case was heard on the 16th July 1912,\* before Mr. Justice Chaudhri. He decided that the Baptist Church had not conformed to the conditions, and he held that the gift over to the other charities was valid. He then dealt with the contention which he said was strenuously urged on behalf of the next of-kin that the whole gift to the Baptist Church and other charities failed for the reasons already mentioned. He carefully examined the authorities and held that the contention was unsound. He concluded this part of his judgment in these words:—

"The vesting in this case is immediate, but the Lower Circular Road Baptist Church is debarred because certain conditions cannot be fulfilled by them."

He then continued:—

"I also hold there is no intestacy as to

\* See *Administrator-General of Bengal v. Hughes*, 21 Ind. Cas. 163; 40 C. 192[Ed].

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the surplus income or any part of it during the lifetime of Eliza Humphreys."

Finally, he dealt with the question as to whether a gift of income, without more, was a gift of corpus, and he stated that that question did not then arise as Miss Eliza Humphreys was still alive, but he stated definitely that the question would arise upon her death. In the same way he dealt with the contention that the Lower Circular Road Baptist Church might finally comply with the conditions, and that also was left over. The decree that was drawn up contained an express declaration that the gift over in the 2th clause of the second codicil was valid, and concluded by a provision in these words—

"And this Court doth not think fit at present to determine the destination of the income of the said Residuary Trust Funds or of the corpus thereof or the rights of parties therein and thereto respectively after the death of the said Eliza Humphreys and doth defer the determination of the said questions until after the death of the said Eliza Humphreys"—

and liberty to apply was reserved.

Miss Eliza Humphreys died on the 10th April 1917 and on the 8th September 1917, the Administrator-General of Bengal presented a petition for the further construction of the Will and codicils.

Upon the hearing the respondents, representing the next-of-kin, contended that the reservation in the decree enabled them to re-raise all the questions that had formerly been discussed. They urged that the gift of the surplus income during the life of Miss Eliza Humphreys must be treated as distinct from the gift after her death and that as to the former no question as to a perpetuity could possibly arise, and that such question was consequently one of the matters that was left over for subsequent decision.

The learned Judge held that this matter had already been definitely settled and, in addition, gave reasons why he adhered to his former opinion. This was, in fact, superfluous. The question as to the perpetuity had been definitely and properly before him on the former hearing, and was, in fact, decided without any reservation, as is made plain by the terms of the judgment itself, which

show that the determination of the dispute as to the perpetuity was the foundation of the whole judgment and that the questions left over were those to which attention has been directed and which themselves are abundant to explain the meaning of the passage in the decree on which reliance is placed. It is not, and indeed it cannot be disputed that, if that be the case, the matter has been finally settled between the parties, for the mere fact that the decision was given in an administration suit does not affect its finality [see *Peareth v. Marriott* (2)]. The Court of Appeal, however, took a different view, and regarding the question as still open decided it against the appellant, but the error in their judgment is due to the fact that they regarded the question as completely governed by section 11 of the Code of Civil Procedure. That section prevents the re-trial of issues that have been directly and substantially in issue in a former suit between the same parties, and this question obviously arises in the same and not in a former suit, but it does not appear that the learned Judge's attention was called to the decision of this Board in *Ram Kirpal Shukul v. Rup Kuari* (1) which clearly shows that the plea of *res judicata* still remains apart from the limited provisions of the Code, and it is that plea which the respondents have to meet in the present case. In the words of Sir Barnes Peacock, at (page 41\*)—

"The binding force of such a judgment in such a case as the present depends not upon section 13, Act X of 1877, (now replaced by section 11 of the Code of Civil Procedure) but upon general principles of law. If it were not binding there would be no end to litigation."

Their Lordships are, therefore, of opinion that the appellant in this case is right, and that this appeal must be allowed. They have accordingly humbly advised His Majesty to this effect and also that the appellant should receive his costs here and in the Court of Appeal out of the estate; the Administrator-General and the fourth respondent also to have their costs in the Court of Appeal out of the estate, and the order of the Judge in the Court of

(2) (1883) 22 Ch. D. 182; 48 L. T. 170; 52 L. J. Ch. 221; W. R. 68.

\*Page of 11 L. A.—[Ed.]



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first instance as to costs to remain undisturbed.

*Appeal allowed.*

Solicitors for the Appellant.—Messrs. Gush, Phillips, Walters and Williams.

Solicitors for Respondent No. 1.—Messrs. Orr, Dignam and Co.

Solicitors for Respondent No. 4.—Messrs. Watkins and Hunter.

### MADRAS HIGH COURT.

CIVIL APPEAL No. 126 OF 1919.

March 3, 1920.

Present:—Justice Sir Abdur Rahim, Kr., and Mr. Justice Moore.

P. SHUNMUGHA VELAYUDHAM  
CHETTY—PLAINTIFF—APPELLANT

*versus*

KOYAPPA CHETTIAR AND OTHERS

DEFENDANTS—RESPONDENTS.

*Hindu Law—Presumptive reversioner, position of—Estoppel against claim to property alienated when reversioner himself was party to transaction—Suit for possession—Cause of action, accrual of.*

A Hindu female, whether a widow or a daughter, can make a valid and binding alienation for necessity and can also surrender her estate by renouncing it in favour of the nearest reversioner. [p. 636, col. 2]

Under the Limitation Act the right of suit for possession accrues to a Hindu reversioner on the date of the death of the Hindu female [p. 636, col. 2]

A presumptive reversioner, whose interest in an estate is nothing better than a *spes successionis* cannot deal with such an interest so as to pass any title to a transferee, but if he joins in an alienation of the estate and has the full benefit of the transaction, he is estopped, when the reversion falls to him, from claiming the same property on the ground that at the time of the alienation he could not pass any title in the property. [p. 637, cols. 1 & 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in Original Suit No. 11 of 1917.

Mr. T. V. Venkataramier, for the Appellant.

Mr. T. R. Venkatarama Sastriar, for the Respondents.

**JUDGMENT.**—The plaintiff (appellant) purchased two houses, Items Nos. 1 and 2 in schedule B attached to the plaint, from the 1st and 2nd defendants who are reversioners to the estate of one Sabapathy Chettiar. The deed of purchase is Exhibit A, dated 27th November 1914. The 3rd defendant purchased Item No. 1 under Exhibit XI (a) on the 20th December 1913 from one Munusamy Mudali who had bought the property from one Marimuthu Chetty, his sister Thangachiammal and Sivakami, the widow of one Pakkiriswamy Chetty, under Exhibit XI in 1908. Marimuthu and Pakkiriswamy derived their title under a deed of gift or settlement, Exhibit VIII, dated 1901 from one Karuthan. Defendants Nos. 4, 5, 9 and 10 are interested in Item No. 1 along with the 3rd defendant, Item No. 2 is in the possession of the 6th defendant the widow of one Muthusawami Chetty, her son, the 7th defendant and a lessee, the 8th defendant. Sixth defendant's husband, Muthuswami Chetti, had bought this property under Exhibit XIII (a) on the 28th September 1882 for Rs. 562 from one Nilambal.

First defendant, Rayappa Chetty, and Karuthan alias Muthayan Chetty are grand-sons by two daughters of Sabapathy Chettiar. Neelambal, who died in 1882, was the third daughter of Sabapathy Chetty. Sabapathy Chetti had left two other daughters, Meenakshi and Visalakshi. Meenakshi died in 1890. Visalakshi, who was the survivor of the five sisters, died on 5th February 1909. The property in dispute along with another house was first inherited by Sivakami, the widow of Sabapathy Chetty. When she died in 1899 there were only three daughters then living, Meenakshi, Visalakshi and Neelambal, the mothers of Rayappa Chetty and Karuthan having predeceased their mother Neelambal, the 2nd defendant's mother, had another son called Veerappan, who died in 1905. At the time of Visalakshi's death the only surviving grand-sons (daughter's sons) of Sabapathy were defendants Nos. 1 and 2. These are the material facts in regard to the history of the family.

In 1869, soon after the death of Sivakami, a suit was instituted by her eldest daughter Meenakshi against her sisters, Visalakshi and Neelambal, and the sons of her other two deceased sisters, Karuthan alias Muthayan,

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the 1st defendant, Rayappan, and his brother, Kanagasabai, for partition of her share. By the decree in that suit she got 1/5th share in three houses including the two houses involved in this suit. The decree apparently gave her an absolute right to a 1/5th share in the family properties. Then the parties by the documents Exhibit III series, dated 26th April 1873, effected a partition of the properties. Meenakshi, Payappan, his brother, and Karuthan got one house, Item No. 1; Neelambal got another house, Item No. 2; the third going to Visalakshi. The next transaction in order of date was a partition in the family of Karuthan and Rayappan, who were the sons, as we have already stated, of two sisters. In 1874 Karuthan instituted a suit for partition to which Meenakshi was a party and obtained a decree for 1/3rd share in Item No. 1. It appears that Meenakshi sold her 1/3rd share in that item to Karuthan in the same year. Afterwards, in 1875, there was a further arrangement in Karuthan's family by which Karuthan got Item No. 1 solely to himself, the 1st defendant, Rayappan, and his brother, Kanagasabai, having transferred their 1/3rd share to him and Karuthan having already obtained by purchase the 1/3rd share of Meenakshi. Thereafter, in 1901, Karuthan who possessed the entire rights in Item No. 1 made a gift of it to or settled it by Exhibit VIII on his wife's brothers and cousins, Marimuthu and Pakkiriswami, as already stated, through whom the 3rd defendant derived his title. The second item having fallen under the arrangement evidenced by Exhibit III series to Nilambal, she transferred it to the husband of the 6th defendant, as above mentioned, in 1882. Visalakshi died in 1909 and upon her death the 1st and 2nd defendants, the only surviving grand-sons, daughter's sons, of Sabapathy Chettiar succeeded to the estate as reversioners, and the plaintiff having purchased their rights instituted this suit to recover these houses.

The suit has been dismissed, firstly, on the ground of limitation. On that point the Subordinate Judge has clearly erred and Mr. Venkatarama Sastriar, who appeared for the respondent, has hardly made an attempt to support the judgment on this ground. Whatever the law might have been on that point under the Act of 1859, under

the present Limitation Act, the right of suit for possession accrues to the reversioner on the date of the death of the Hindu female. Visalakshi having died in 1909, the suit which was instituted in 1917 was within 12 years as allowed by law and it is difficult to see how it could be held to be barred. All that the alienees from the females would be entitled to is to enjoy the property during the lifetime of the females but on the death of the females, the estate vests in the reversioner and he becomes entitled to the property unless it can be shown that the alienation made by the female is binding on the reversioner. The law is settled that a Hindu female, whether a widow or a daughter, can make a valid and binding alienation for necessity or can surrender her estate by renouncing it in favour of the nearest reversioner. None of the alienations in question have been attempted to be supported as a surrender; they could not be so supported as they were not of the entire estate.

The main ground on which the 3rd and 6th defendants have sought to support their title is estoppel as against the 1st and 2nd defendants, vendors of the plaintiff. We may say, so far as the 2nd defendant's share is concerned, that he was not even born at the date of the various transactions which have been recited above and there could be no estoppel as against him. The question has to be considered with reference to the share of the 1st defendant, Rayappa Chetty.

We will deal first with Item No. 1. The 1st defendant was a party to Exhibit II and to the suit of 1869 by which Meenakshi obtained a 1/5th share. Exhibit III series are deeds of partition. Exhibit V (a) is a judgment in the suit between Karuthan and the members of the family, 1st defendant being a party to the suit. Exhibit VI is a deed of partition by which Rayappa Chetti, the 1st defendant Kanagasabai and Karuthan Chetty divided their family properties and under which Karuthan became solely entitled to Item No. 1. He then made a settlement on the persons who sold Item No. 1 to the vendor of the 3rd defendant. The question of law is, whether the 1st defendant, having been a party to all these transactions, can now, when the reversion has fallen to him, turn round and claim the same property against the person

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who derived title under those transactions. It is not contended before us that, if the 1st defendant is estopped the plaintiff would not also be estopped. There seems to be only one decision which is strictly in point and that is a ruling in *Venkata Row v. Tuljaram Row* (1). That bears out the case of estoppel against the 1st defendant. It was strenuously contended that, before the death of the last surviving female Visalakshi, the 1st defendant had no vested interest in the properties but merely a contingency expectant on the death of Visalakshi which is nothing more than a  *spes successiois*, and it is well-settled that a presumptive reversioner whose interest is nothing better than a  *spes successiois* cannot deal with such an interest so as to pass any title to transferee. The decisions in *Rup Narain v. Gopal Devi* (2), *Gur Narayan v. Sheo Lal Singh* (3) and the judgments of this Court in *Dhoorjeti Subbayya v. Dhoorjeti Venkayya* (4), *Jaganada Raju v. Sri Rajah Prasada Rao* (5) establish this proposition. The ruling most relied on by the appellant is *Bahadur Singh v. Mohar Singh* (6). But there the plaintiffs were not parties to the arrangement made between the widow and the ancestors of the plaintiffs, the then presumptive reversioners. Their Lordships point out that there could be no estoppel against the plaintiffs who claimed in their own right as heirs of the last male owner when the succession opened simply because some of the persons through whom they traced their descent had been parties to the arrangement relied upon by the alienee. The ruling in *Rup Narain v. Gopal Devi* (2) is also distinguishable. It was held there that the father of the person against whom the principle of estoppel was sought to be applied did not assent to the conveyance of more than a widow's

life-interest, and therefore, no question of estoppel could arise. It is further pointed out by the Judicial Committee that the provision in the document for devolution of the property after the death of the widow contrary to the rules of succession and inheritance was illegal and would not be binding. The doctrine of estoppel as laid down in the Evidence Act is a rule of pleading based upon a man's conduct who by his representation, made to a third party, has induced the latter to alter his position; such a person cannot turn round and plead that he is not bound by his own representation. The mere fact that the presumptive reversioner has no vested interest in the estate which he can effectively deal with does not prevent the application of the rule of estoppel, if he has by his conduct induced another person to alter his position, and the 1st defendant, having had the full benefit of the transaction under which the 3rd defendant derived his title, cannot now claim the same property saying that at the time of those transactions he could not pass any title in the property. The 1st defendant purported to deal with 3rd of Item No. 1, and it is with respect to that that he would be estopped from denying the title of the 3rd defendant.

It was also argued by Mr. Venkatarama Sastri that, under the Hindu Law, of Inheritance as understood at the time of the transactions in question, the three sisters and their nephews were justified in thinking that the nephews had also a share in the inheritance and that all of them were entitled to the property in absolute right. It was undoubtedly upon that basis that they proceeded to partition the property and deal with it. But it is difficult to understand how that can make any difference as to the real title to the property. We have not been referred to any authority to support his contention that if a Hindu female deals with the estate of her husband as if it was her *Stridhanam* that would give a good title to her alienees.

Another question was argued that the purchase of the plaintiff was champertous and, therefore, the suit ought to be dismissed. All that need be said with regard to this argument is, that there is no authority to support the proposition. The case referred to in *Chedambaram Chetti v. Ranga Kristna*

(1) 88 Ind. Cas. 270; (1917) M. W. N. 20; 5 L. W. 482.

(2) 8 Ind. Cas. 382; 36 O. 780; 13 C. W. N. 920; 6 A. L. J. 567; 10 O. L. J. 68; 5 M. L. T. 423; 11 Bom. L. R. 833; 93 P. R. 1109; 146 P. W. R. 1009; 68 P. L. R. 1910; 36 I. A. 103; 19 M. L. J. 645 (P. O.).

(3) 49 Ind. Cas. 1; 36 M. L. J. 68; 17 A. L. J. 66; 9 L. W. 336; 1 U. P. L. R. (P. C.) 1; 46 O. 566; 23 C. W. N. 521; 12 Bur. L. T. 122; 46 I. A. 1 (P. C.).

(4) 30 M. 201; 2 M. L. T. 184.

(5) 29 Ind. Cas. 241; 39 M. 554; 17 M. L. T. 413; 28 M. L. J. 650; (1915) M. W. N. 626.

(6) 24 A. 94; 29 I. A. 1; 6 C. W. N. 169; 4 Bom. L. R. 223; 12 M. L. J. 56; 8 Sar. P. J. 152 (P. C.).



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*Muttuvira Puchaya Nair* (7) has no bearing on the facts of this case. There a stranger to a family tried to intervene in a certain litigation among the members of that family and to prevent a compromise being arrived at on the ground that he had advanced money to one of the litigants and was, therefore, interested in preventing the compromise. Their Lordships of the Privy Council point out that the transaction on which the plaintiff relied was an extortionate and unconscionable one and they considered that it was against public policy for such a person to intervene in a family dispute, the interest alleged by him being that he had advanced money to one of the litigants and wanted, on that ground, to carry on the litigation.

The only other question to be considered with reference to this item is, whether the 3rd defendant is entitled to the value of the improvements alleged to have been effected by him on this property. There can be no doubt, upon the evidence, that he has actually improved the property. He has built two shops which now fetch a rental of Rs. 61 while previous rent of the house was Rs. 19. As regards the value of the improvements the evidence undoubtedly is not as satisfactory and definite as one might desire. But no sufficient grounds have been made out for questioning the finding of the Subordinate Judge on this point which is based on the valuation made by the Commissioner appointed for the purpose. The finding is that Rs. 3,000 is the value of the improvements. It was argued by Mr. Venkatarama Aiyar that before these improvements were made by the 3rd defendant, his client gave notice of the purchase to the 3rd defendant and warned him not to make any construction or alteration in the premises. He has produced, in support of this allegation, a postal receipt for a letter purporting to have been sent to 3rd defendant. We do not know what the contents of the letter itself are, and we are unable to say that the Subordinate Judge was not right, under the circumstances, in not admitting in evidence a private copy of the alleged notice which the plaintiff wanted to produce at a late stage of the case.

As regards the oral evidence, it has been read to us and commented upon by the

Pleaders on both sides; but we see no reason to differ from the Subordinate Judge who finds that he was unable to act upon this evidence.

As regards the 2nd item, the 1st defendant had nothing to do with the sale by Neelambal who got this property under Exhibit III series to the husband of the 6th defendant. But it is contended that the 1st defendant was a party to the partition under which Neelambal got this house and the 1st defendant and other persons got Item No. 1 and, therefore, it must be taken that he enabled Neelambal to make the disposition under which the 6th defendant claimed. But Neelambal got the house in her own right and we think that it would be going too far to hold that, under the circumstances of the case, estoppel operates against the 1st defendant so far as this item is concerned. As regards the 2nd defendant, as already mentioned, he was not born at the time of this transaction and there can be no question of any estoppel against him.

As regards both Items Nos. 1 and 2, an alternative argument was put forward that the alienation was made for necessity. In so far as Item No. 1 is concerned, there is really no evidence worth the name on which the case of necessity could be said to be made out. As regards Item No. 2 there is evidence of a general character that Neelambal was a poor woman earning a precarious livelihood by trading in oil. She borrowed Rs. 150 on a mortgage of this property for the purpose of this business and afterwards sold this and received the balance in cash, Rs. 200, or so, from the vendee, Muthuswamy Chettiar, for the purpose, it is alleged, of the same business. The evidence of the 1st defendant is not borne out by the recitals in the document; and 1st defendant, having regard to his conduct with reference to the properties in dispute, is not a man on whose testimony we should be justified in placing any reliance. Neelambal's husband was living at the time. There is really no definite evidence that he was unable to support her and that she was under the necessity to sell this property. It was sold for Rs. 562, a fairly substantial sum in those days. We are not satisfied that necessity has been proved. It is not necessary for us to consider whether a Hindu daughter is entitled to dispose of the inheritance derived from her

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father's estate of which she is in possession for the purpose of her own maintenance. That a married daughter is not entitled to maintenance from her father's estate has been laid down by Mr. Justice Ranade in *Bai Mangal v. Bai Rukhmini* (8). This decision is quoted with approval in the latest edition of Mayne's Hindu Law, at page 621, although in an earlier edition the learned author has stated the law in different terms, as pointed out in the judgment in *Bai Mangal v. Bai Rukhmini* (8). There is a decision of the Calcutta High Court in *Lala Gunpat Lall v. Musammatt Toorun Koonwar* (9) where it is laid down without discussion of any authority that the maintenance of grand-sons by daughters is a necessary purpose under the Hindu Law. Mr. Venkatarama Sastriar argued that even though a married daughter has no right to maintenance from her father's estate in the hands of his heir, it does not necessarily follow that when the estate has vested in her as an heir she cannot deal with it for the purposes of her own maintenance. The exact point is bare of authority though it would seem to follow from the fact that she is not entitled to maintenance from her father's estate, that she would have no right to deal with it for any such purpose when the estate has vested in her as an heir. We do not wish to express a final opinion on the question as, upon the facts, it does not arise for decision.

The decree of the Subordinate Judge will be modified. The plaintiff will have a decree for two-thirds of Item No. 1 and the whole of Item No. 2, subject to payment of two-thirds of Rs. 3,000, i.e., Rs. 2,000 as compensation to the 3rd defendant with respect to Item No. 1. Item No. 1 will have to be partitioned in the proportion mentioned above between the plaintiff and the 3rd defendant by the final decree. The final decree will also provide for mesne profits on the properties decreed to the plaintiff. Costs in proportion.

M. C. P.

*Decree modified.*

(8) 23 B. 291; 12 Ind. Dec. (N. S.) 193.

(9) 16 W. R. 62.

## MADRAS HIGH COURT.

APPEAL No. 376 of 1919.

September 2, 1920.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Hughes.

G. CHAKRAPANY CHETTIAR—

DEFENDANT—APPELLANT

versus

KAMALAVALLI AMMAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXVII—  
Suit on promissory-note—Application for leave to defend—  
Court doubting sincerity of defence—Procedure.

Where in a suit on a promissory-note instituted under Order XXXVII of the Civil Procedure Code, the defendant applies for leave to appear and defend, but the Court doubts the sincerity of the defence as disclosed in the affidavits filed with the application, the proper procedure is to grant leave to defend on condition of the defendant paying into Court the amount claimed. [p. 640, col 1]

Appeal against the decree of the Court of the Subordinate Judge, Kumbakonam, in Original Suit No. 59 of 1919.

FACTS appear from the judgment.

The Hon'ble Mr. K. Srinivasa Aiyangar, (Advocate-General), with him Mr. S. Aravamudu Aiyangar, for the Appellants.—The Court erred in refusing leave to defend altogether. Under rule 3 of Order XXXVII, Civil Procedure Code, leave may be granted on the defendant disclosing sufficient grounds by an affidavit. The suit is on a pro-note executed by the defendant to his wife in settlement of her maintenance-decree. It cannot be said that the defendants' affidavits disclosed no pretence for a defence. The summary procedure under Order XXXVII is taken from Order XIV, rule 1 of the Supreme Court Rules in England. Rule 3 is similar to the corresponding rule in the Bills of Exchange Act. The object of the rule is that the defendant cannot claim the right as a matter of course. In *Agra and Masterman's Bank v. Leighton* (1), the object of the rule is laid down. Where there is no pretence for a defence leave should not be granted. Where there is a real, though not a good defence and if the Court doubts it, leave should be ordered on terms of the defendant's paying the money into Court.

Messrs. T. Rangachariar, S. Srinivasa Aiyangar and V. Ramaswamy Aiyangar, for the Respondent.—The granting of leave is in the discretion of Court on sufficient  
(1) (1866) 2 Ex. 56; 4 H. & C. 656; 36 L. J. Ex. 33; 143 R. R. 825.

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reasons being shown that the defendant should be permitted to defend the suit. The Court was not satisfied, on the affidavits, that there was any true defence and it was entitled to reject the defendant's application.

**JUDGMENT.**—This is an appeal from a decree in a suit on a promissory note instituted under Order XLXVII of the Code of the Civil Procedure, in which leave to defend has been refused. Rule 3 of that Order requires the Court to give the defendant leave to appear and defend the suit upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration or such other facts as the Court may deem sufficient to support the application. This is paraphrased in the summons to be served on the defendant under rule 2 (1), Form No. 4 of Appendix B as follows:

"Leave to appear may be obtained on an application to the Court supported by affidavit...showing that there is a defence to the suit on the merits, or that it is reasonable that you should be allowed to appear in the suit," which would make the scope of the suit like that of the well-known Order XIV, rule 1 of the Supreme Court Rules. The language of rule 3 is taken from the Bills of Exchange Act, V of 1866, which was interpreted by Phear, J., in *Vonlintzgy v. Narayan Singh* (2), where he applied the rule laid down by Bramwell, Baron, in *Agra and Masterman's bank v. Leighton* (1), with reference to the corresponding section in England. The intention was, the learned Baron observed, "that, where there was no pretence for a defence, the parties sued should not be allowed to defend, and the holder should have judgment as of course; but that if the defendant had a real, I do not say good, defence, he should have leave to appear and set it up. As cases, however, sometimes occur where an apparently real defence is shown, but its sincerity is doubtful, there the defendant is let in to defend only on the terms of bringing the money into Court." The present suit was brought on a promissory-note for Rs. 17,000 given by the defendant to his wife in settlement of a suit brought by her for separate maintenance. We cannot say that the affidavits show that there is no pretence for a de-

fence, and we think, that, instead of refusing leave to defend, the Subordinate Judge should have given leave to defend on condition of payment of the amount claimed into Court.

We accordingly direct that, on the payment of the amount claimed into Subordinate Judge's Court being certified to this Court within 6 weeks, the decree be set aside and the suit remanded for disposal according to law. Costs to abide, and in default of payment, this appeal do stand dismissed with costs.

M. C. P.

*Appeal allowed:  
Case remanded.*

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1507  
OF 1918.

July 14, 1920.

Present:—Mr. Justice Das and  
Mr. Justice Adami.

SIB SARAN SHAH—PLAINTIFF—  
APPELLANT

versus

RAMESWAR DE alias BABU LAL DE  
AND OTHERS—DEFENDANTS—  
RESPONDENTS.

*Regulation III of 1872, s. 25—Record of Rights,  
entry in whether can be challenged on ground of fraud.*

An entry in the Record of Rights prepared under section 25 of Regulation III of 1872 can be challenged on the ground of fraud. [p. 641, cols. 1 & 2.]

Appeal against the decision of the District Judge, Dumka, dated the 11th September 1918, affirming that of the Subordinate Judge, Deoghar, dated the 6th June 1918.

Messrs. N. O. Sinha and N. Oh. Ghosh, for the Appellant.

Mr. Rajendra Prosad, for the Respondents.

**JUDGMENT.**

ADAMI, J.—The defendants in the suit out of which the second appeal arises had mortgaged a part of their *mal-raiyati* interest of *Mouza Roudih* to one Golab Marwari. Golab Marwari obtained a mort.



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gage decree and in execution of that decree, the plaintiff purchased the property at the auction sale and proceeded to take possession. The defendants, however, resisted the plaintiff's attempt to take possession of plots Nos. 2, 8 and 11, contending that they were the exclusive owners of the plots and were entered as such in the Record of Rights. The plaintiff then instituted a suit to recover possession of these plots.

With regard to plot No. 11, there is no contest, the plaintiff having given no claim to it. The mortgage of the properties was executed on 24th July 1903. The Settlement Record was finally published on the 14th June 1904 and the suit was instituted on the 6th January 1909. The Subordinate Judge found that the allegation made in the plaint that the entries in the Record of Rights were obtained by fraud of the defendants mortgagors, was not proved; he dismissed the plaintiff's suit.

On appeal the learned District Judge found that the entries in the Record of Rights were, under section 25 of the Regulation I.I of 1872, conclusive and that no evidence could be given to controvert them. He also found that the plaintiff purchaser should have examined the Record of Rights before his purchase and if he had done so, would have found that the plots in question would not pass by the sale. With regard to the allegation of fraud, he has stated that it is very doubtful if, in view of the wording of section 25, Regulation III of 1872, a suit could be brought to set aside the entry on the ground of fraud. He has not considered any evidence there may be on the record with regard to the allegation of fraud.

It is contended that the lower Appellate Court should have considered and come to a finding on the question of the alleged fraud, while, on the other hand, the learned Vakil for the respondents contends that under sections 25 and 11 of the Regulation no suit lies to set aside an entry in the Record of Rights framed under the Regulation and that such entries have the force of a Civil Court decree. It is argued that the general law as to the competency of a suit to set aside a decree on the ground of fraud will not apply to an entry in the Record of Rights under the Regulation. In my opinion, this contention cannot be

upheld. Proof of fraud is sufficient to nullify a decree or order whether under the Civil Procedure Code or otherwise, and if the plaintiff in the present suit succeeds in proving that the entry was obtained by fraud he will be entitled to have the decree declared null. The record should, I think, be remanded to the lower Appellate Court to consider the evidence on the record with regard to the allegation made in the plaint as to fraud, and if it is found that fraud in securing the entries in the Settlement Record is proved, the plaintiff's suit should be decreed.

The ground on which the learned District Judge mainly dismissed the plaintiff's suit, namely, that the principle of *caveat emptor* must be applied, cannot properly be raised in this case. The mortgage was executed, and these plots were included in it before the Settlement Record was published and what the plaintiff purchased was the property of the mortgagor as it stood at the time the mortgage-bond was executed.

I would set aside the judgment of the lower Appellate Court and direct that after considering the evidence on the record as mentioned above the District Judge should decide the suit according to law.

The appellant is entitled to costs in this Court.

The costs in the Court below will abide the result.

DAB, J.—I agree.

*Appeal allowed. Case remanded.*

# COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

PETITION No. 7 of 1918.

October 26, 1918.

Present:—Sir H. Lovett, S. M., and  
Mr. Ferard, J. M.

DEPUTY COMMISSIONER, HARDOI,  
AS MANAGED BY THE COURT OF WARDS,  
KHAJURAHA ESTATE—PLAINTIFF—  
APPELLANT

vs  
SUB

PURAI—DEFENDANT—RESPONDENT

Oudh Rent Act (XXII of 1896), s. 30-II—Section,  
of—“Successors”, meaning of,

DEPUTY COMMISSIONER, HARDOI v. PURAI.

The wording of section 107-H of the Oudh Rent Act should be interpreted as it stands. The word "successors" in the section includes not only an heir, but a transferee also, and a Court is not competent to limit the meaning of the word to successors by right of inheritance only. [p. 643, col. 1.]

Third appeal from the order of the Commissioner, Lucknow Division, dated the 21st February 1918.

### JUDGMENT.

FERARD, J. M.—(October 25, 1918.)—This is a third appeal in a case under section 108 (5-A), Oudh Rent Act. The Court of Wards, Khajurabra Estate, is plaintiff-appellant. Purai, son of Mangli, rent free grantee, is defendant respondent. The original grantee was Durga Shukul who admittedly dates back to 1864, more than 50 years before the present suit, and the only point for determination in this appeal is, whether the Commissioner has decided in accordance with law that there have been two successors to the original grantee within the meaning of section 107-H, Oudh Rent Act. A third appeal is allowed on a point of law only under section 107-K, Oudh Rent Act, read with section 213, Land Revenue Act. The facts as found are that Durga Shukul, original grantee, transferred this plot of rent-free land to Mangli Dube, his sister's son. His sister had married Ambar Dube. There was no question of succession by inheritance here.—Durga had a son, his sister's son had no right of inheritance under Hindu Law; it was just a transfer by the original grantee to an outside member of the family with no pretence to any reversionary right in the future. The latter, Mangli, by private arrangement, transferred it to his brother, Atta, who was succeeded by his widow. Her name was on the record from 1301 to 1307 when the present defendant-respondent, Purai, son of Mangli and nephew of Atta, came in. His name was maintained in the papers after some litigation, under the Land Revenue Act, ending with Commissioner's second appellate order of the 2nd August 1915. There seems practical consonance of opinion between Counsel that the holding by Atta's widow should be regarded as a continuation of Atta's holding and not a separate succession within the meaning of section 107-H, owing to the limitation inherent in the right of a Hindu widow and I, therefore, accept this for the

purposes of this case. So the position is that, between Durga Shukul, original grantee, and Purai Dube, present rent free holder, there have been two holders of the grant, first Mangli and then Mangli's brother, Atta, who both held by transfer and not by inheritance. It has come to Purai, respondent, by inheritance from his uncle Atta.

The two first Courts held that the word "successor," as used in section 107 H, means a successor by inheritance and does not cover a transferee. The Commissioner in second appeal has held, as I understand his judgment, that it does cover it in cases where the land-holder sees a transferee entered in the papers and in occupation of the holding and leaves him there over a long time of years. He implicitly accepts the transferee as rent-free grantee in succession to his predecessor. Proof of specific grant in their case, it may be argued, is not necessary any more than in the case of the original grantee, as held in Revenue Law Journal (Jacob's), Volume III, page 100.

I think the Commissioner's view is correct. Appellant's Counsel quotes two decisions of the Board of Revenue which, he thinks, point to the contrary, viz., (1) Petition No. 32 of 1913-14, Bara Banki District, *Ram Singh v. Bisheshar Dayal* (1), this is, however, not to the point, as it merely held that, when two brothers had equal right to inherit their father's rent-free holding, both were the first successors to their father though one brother alone occupied it till he died when the other brother took it on;—and (2) Petition No. 73 of 1913-14, Fyzabad District, *Shah Hayat Ahmad v. Badri Pande* (2). This is more to the point but does not quite cover the facts of the present case, and I do not gather that the meaning of the term "successors" in section-107-H was argued at any great length. The decision is an unselected one, of a single member of the Board.

The point has been dealt with at some length by the Hon'ble High Court in a case which is alluded to in the Deputy Commissioner's judgment in the present case, viz., in *Sunder Singh v. Collector of Shahjahanpur* (3). The learned Judges had before them

(1) 33 Ind. Cas. 163; 2 O. L. J. 711.

(2) 33 Ind. Cas. 286; 2 O. L. J. 718.

(3) 11 Ind. Cas. 514; 8 A. L. J. 539; 33 A. 558.

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section 158 of the Agra Tenancy Act, but the condition of 50 years and two successors to the original grantee is the same in that section as in section 107.H of the Oudh Rent Act. The learned Judges pronounced very strongly that the wording of the section is to be interpreted as it stands, and the word 'successors' is wide enough to include not only an heir but a transferee also. They were not competent, it was held, to limit the meaning to successors by right of inheritance only.

I would follow this ruling of the Hon'ble Allahabad High Court as sound. It closes the door to any attempt on the part of land-holders wishing to get rid of a rent-free grantee to travel back into the past and take up some technical flaw of title in one or other of the intermediate holders. The Deputy Commissioner has suggested that a practical objection to the finding of the Hon'ble High Court is, that the holder of the grant for the time being could defeat a contemplated resumption by making a sudden transfer, but surely the land-holder should counter this by immediate action to have the transfer declared invalid. If he does not do so, by contesting mutation or otherwise, and leaves the transferee in peaceful enjoyment of the rent-free grant, he should not be allowed afterwards to hark back and urge that the transferee was not a successor within the meaning of section 107.H. On the above view, I would, in the present case, hold that there have been two successors to the grant, viz., Mangli and Atta, between the original holder, Durga, and the present holder, the respondent Purai. I would, therefore, dismiss the appeal with costs to respondent.

LOVET, S. M.—(October 26, 1918).—I agree. Incidentally, I may note that a third appeal is not allowable merely on a point of law. Under section 107.K, Oudh Rent Act, read with section 213, Land Revenue Act, but only if the decision of the Court below is "opposed to some specified law or usage having the force of law." I note this, as I have pointed out the distinction in various cases which have come before me on third appeal.

*Appeal dismissed.*

ALLAHABAD HIGH COURT.  
SECOND CIVIL APPEAL No. 967 OF 1917.  
June 2, 1920.

Present :—Mr. Justice Ryves and  
Mr. Justice Gokul Prasad.  
CHHABRAJI KUAR—DEFENDANT—  
APPELLANT

versus

GANGA SINGH—PLAINTIFF—RESPONDENT.

*Agra Tenancy Act (II of 1901), s. 164 (2)—Profits, suit for—Decree, form of—Appeal, second—Negligence or misconduct of Lambardar—Question of law.*

Where a plaintiff claims, under section 164 (2) of the Agra Tenancy Act, on the basis of gross rental for his share of the profits for any given year, he cannot also be given a decree for arrears of past years, collected in the year in question. If clause (2) of section 164 is not applicable, he is entitled to a decree on the basis of actual collections made in that year, whether in payment of the demand for that year, or as arrears from former years but collected in that year. But he cannot be given a decree both on the basis of the gross rental and the actual collections. [p. 644, col. 2.]

The question whether the acts or omissions of a Lambardar amount to negligence or misconduct under section 164 of the Agra Tenancy Act, is one of law and the High Court is not bound by a finding on that question, in second appeal. [p. 646, col. 2.]

Second appeal from a decree of the District Judge, Cawnpore.

Mr. Kailas Nath Katju, for the Appellant  
Messrs. Satya Chandra Mukerji and Pearl Lal Banerji, for the Respondent.

JUDGMENT.—This appeal arises out of a suit under section 164 of the N.W. P. Tenancy Act of 1901.

Thakur Ganga Singh (plaintiff-respondent) sued *Musammam Chhabraji Kunwar, Lambardar*, (defendant-appellant), for his share of the profits of the village for the years 1321 and 1322 *Fasli*. In his plaint he stated that the village was well irrigated and that the tenants were well-to-do; and, without alleging any specific misconduct or negligence on the part of the *Lambardar*, (except in one particular which has been abandoned), claimed to be paid a sum of Rs. 2,200, which included interest, on the basis of the gross rental. He went on, however, to state in paragraph 4 of his plaint that, "in the years in question the defendant *Lambardar* realised a considerable amount on account of arrears for the past years and the plaintiff is entitled to get the profits on the said amount, according to his own share."



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The relief sought was (a) a decree for Rs. 2,400, principal and interest, and (b) "a decree for the amount which is found due in addition to the amount claimed may also be passed in his favour and an additional Court-fee charged."

To the plaint was annexed an account showing what was due for the two years in suit, 1321 and 1322 *Fasli*. It is, therefore, clear that the suit was mainly concerned with the profits of these two years. Court fees were paid only for the profits of these two years, and the accounts filed with the plaint referred exclusively to them. No details were furnished as to collections made for years before 1321 *Fasli*. The main defence was that there was no negligence or misconduct and that plaintiff was only entitled to a decree on the basis of actual collections.

The Trial Court held that the *Lambardar* defendant had been guilty of misconduct, and gave a decree for the two years in suit on the gross rental, and also a further sum for the years 1318, 1319 and 1320 for arrears which he found had been recovered by the defendant in the years in suit. In all, he passed a decree for Rs. 3,190 30 with costs and interest in favour of the plaintiff. On appeal the District Judge upheld this decree. Hence this second appeal.

Two main grounds have been argued:—

(1) That the decree should have been passed either on the basis of the gross rental for the two years in suit, or on the basis of actual collections during those two years, which would, of course, include collections of arrears of rent due in previous years, but that it was wrong to give a decree for the gross rental *plus* such arrears.

(2) That misconduct or negligence had not been established and that, therefore, the decree should be passed according to the actual collections.

It has been held, certainly since the decision in *Naut Kishore v. Ram Ratan* (1), that the divisible profits for any agricultural year mean, ordinarily, the net balance remaining in the hands of the *Lambardar* after deducting the land revenue, cesses, village expenses and *Lambardari* dues from his total realisations made during the year in question, whether on account of the demand of the year itself or on account of the demand of

previous years. If a plaintiff claims under section 164, clause (2), on the basis of gross rental for his share of the profits of any given year, he cannot also get a decree for arrears of past years, collected in the year in question; because, to hold otherwise, might be to evade the law of limitation. Indeed, it was admitted by the learned Vakil for the respondents at a late stage of the argument, that as the suit was filed on the 20th November 1915, the arrears for 1318 and 1319 as such were certainly time-barred and probably most of the arrears of 1320.

This is evident from the limitation for suits under section 164 set out in the 4th Schedule, No. 16, appended to the Act. The limitation is three years, and the time from which limitation begins to run, is when the share of the profits becomes due.

We think, therefore, that the plaintiff is entitled to a decree either on the gross rental of the two years in suit only, if clause (2) of section 164 is applicable, or on the basis of actual collections made in those two years, whether in payment of the demand of those years, or as arrears due from former years but collected in those two years.

This was the view adopted in *Sham Lal v. Raj Bahadur*\*, by a Divisional Bench

\*The judgment in *Sham Lal v. Raj Bahadur*, S. A. No. 162 of 1915, decided on the 27th June 1917 by Piggott and Ryves, JJ., is as follows:—

This was a suit by two plaintiffs against a *Lambardar* for profits. The claim was decreed in part by the Court of first instance. There was an appeal and a cross appeal to the Court of the District Judge, with the result that the sum decreed in favour of the plaintiffs was slightly increased. We have now before us an appeal by the defendant *Lambardar* and cross-objections filed by the plaintiffs. We dispose of the defendant's appeal first. The plaintiffs are brothers; but it is found that they are not living jointly. They are, therefore, presumably owners in severalty of their recorded shares. On this state of facts the contention has been based that a single suit by the two plaintiffs would not lie. There is no real force in this contention under the provisions of the Tenancy Act itself, and in any case the contention is sufficiently met by Order I, rule 1 of the Code of Civil Procedure. The plaintiffs were entitled to join in bringing a single suit.

The second point argued before us is that there has been some error or miscalculation in the decree of the Court of first instance in the matter of costs. The point was not taken before the lower Appellate Court, and we are not satisfied that it is any business of ours to go into the question whether the decree of the first Court in the matter of cost is or

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of this Court of which one of us was a member. We see no reason to doubt that decision. We have, however, been pressed with the decision in *Ram Dayal v. Seth Janki Prasad*, S. A. No. 943 of 1906 decided on the 3rd January 1907, by Sanley, O. J., and Barkitt, J. which, it is argued, lays down the contrary. That decision, however, it seems to me, is based on the particular facts of that case, and has no general application. There a co-sharer assigned her share of the profits for

two years only, i. e., 1307 and 1308, to the plaintiff. The plaintiff sued the *Lambardar* for the profits of those two years, on the basis of gross rental under section 164 (2). The matter was referred to arbitration. The arbitrator awarded profits for the two years on the basis of actual collec-

is not strictly in accordance with the judgment. At any rate, we are not satisfied that any mistake to the detriment of the defendant-appellant was made in that Court.

The third point argued was one of some little difficulty. It appears that there were two tenant holdings in the *Mahal* in suit the rent of which was not collected during the years in suit, and as a matter of fact the land lay fallow. The lower Appellate Court has, nevertheless, come to the conclusion that there is a fair inference that the *Lambardar* was guilty of negligence in not realising this rent during the years in suit. We shall have to point out presently, in connection with the cross-objections of the plaintiffs, the consequences which, in our opinion follow from the fact that the decree of the Court below in favour of the plaintiffs has been based upon the gross recorded rental demand on account of each of the years in suit. On the whole, we are of opinion that, though this question of the two uncultivated holdings is a very arguable one, sufficient cause has not been made out for interference on our part in second appeal with the findings of the District Judge.

The only other point to be considered in connection with the defendants' appeal is that the Courts below have estimated the rent of the *sir* land at Rs. 25 per annum. It is contended that, as a matter of fact, the land in question was let out on lease during the years in suit at an annual rental of Rs. 50 only. This question has been considered in both the Courts below, and there is a finding that the rent of the *sir* land during the years in suit was Rs. 12½ per annum. We are not prepared to say that this finding rests upon no evidence; so far, therefore, as the defendant's appeal is concerned, it fails and we dismiss it accordingly with costs including fees in this Court on the higher scale.

In the cross objections by the plaintiffs a point is taken at the outset which has some general importance. The suit as brought is on account of the plaintiffs' share of the divisible profits for the years 1307 and 1308. At the commencement of this period there were arrears of rent amounting to Rs. 57.12.3 due from tenants on account of the years 1305, 1306 and 1307. During the year in suit a portion of those arrears was realised, amounting in all to Rs. 20.12.2. In the Court of the Assistant Collector the argument was apparently limited to the question whether the plaintiffs could claim in this suit their share of those realisations on account of the rental demand for

years anterior to those in suit. Dealing with this question as a pure question of law, the Assistant Collector held that the collections on account of rental demand of previous years, if made within the years in suit, were liable to be taken into account in the total of collections made during those years for the purpose of ascertaining the divisible profits. For this finding the Assistant Collector referred to the authority of the case of *Nand Kishore v. Ram Ratan* (1) and there can be no question as to the correctness of this principle, in the case of a decree for profits passed on the basis of actual collections. However, the Assistant Collector went on to consider further whether the defendant *Lambardar* was not liable under the provisions of section 164, clause (1) of the Tenancy Act, No. 11 of 1901, to give an account of profits due on account of sums which had remained uncollected owing to negligence or misconduct on his part, and came to the conclusion that, upon the evidence before him, the only satisfactory method of adjusting the account for profits between the parties was to hold the defendant *Lambardar* liable to account for profits on the basis of gross annual rental. It is evident that, having come to that conclusion, the Assistant Collector no longer regarded the question of the realisations made during the years in suit on account of the arrears of 1305-1306 F. as of any consequence. He worked out his decree on the basis of the gross rental demand for each of the years in suit on account of the said years. When the plaintiffs presented their appeal to the Court of the District Judge, it would almost seem as if they had not considered the decree of the Court below, or appreciated the basis on which it proceeded. Their argument to the District Judge seems to have been based upon the assumption that they had been allowed their proportionate share out of the realisations of Rs. 240.12.2 already referred to. What they claimed was that they should have been allowed their share out of the gross outstanding demand on account of the arrears due at the beginning of the period for which the suit was brought. This contention the learned District Judge has dealt with in a carefully reasoned portion of his judgment and has repelled it. It is now contended before us that the plaintiffs should have been allowed one of the two things, either their share of the sum of Rs. 240.12.2 actually realised during the years in suit, or their share of the outstanding demand of Rs. 57.12.3. We are not prepared to accede to either of these contentions. Divisible profits of the agricultural year 1306 F. mean ordinarily the net balance remaining in the hands of the *Lambardar* after deducting the land revenue, cesses, village expenses, and *Lambardar's* dues from his total realisations made during the year, whatever be the amount of the demand of the year if set off on

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tions, and gave an award for such amount as had been collected; and declared that the plaintiff should recover in the future any arrears for those two years from the *Lambardar* if he realised them. The plaintiff then brought a suit to recover the balance of the arrears for 1307 and 1308 subsequently collected by the *Lambardar*. The suit was brought within three years of the date when the *Lambardar* realised them, and this Court held that he was entitled to a decree under the award, although the co-sharer herself could not have recovered them in an ordinary suit for profits for the year when the transferee

brought the suit. That was altogether a special case. The arrears for 1307 and 1308 were, as it were, ear-marked as payable to the transferee and could be recovered by suit within three years of their realisation. It now remains to see whether the Courts below were right in applying clause (2) of section 164.

It is argued that in second appeal we cannot go behind the finding that there was misconduct or negligence on the *Lambardar's* part within the meaning of section 164, because it is a finding of fact. We do not think it is purely a finding of fact. What the Trial Court finds is that the *Lambardar* did or omitted to do certain things, and if the lower Appellate Court has come to the same conclusion, we are bound to hold that those things were done or that those omissions were made, but whether they amounted to negligence or misconduct within the meaning of the section is an inference of law. Now here the Trial

account of the demand of previous years. If, however, the plaintiffs desire to invoke the provisions of section 164, clause (2), of the Tenancy Act, they cannot do more than claim an account on the gross rental demand for the year 1315 F., itself. To hold otherwise would be, as the learned District Judge has pointed out, to evade the law of limitation and go beyond the intention of section 164 of the Tenancy Act. The very utmost which a *Lambardar* can be required to do is to account to his co-sharers for profits on the basis of the total recorded rental demand of a given year. This contention on behalf of the plaintiffs, therefore, fails.

In one or two minor points, however, we are of opinion that the plaintiffs have reasons on their side. The first Court allowed the defendant to deduct, on account of his expenses of management during the year in suit, a total sum of Rs. 228 plus Rs. 45 or Rs. 273 in all on account of the expenses of certain litigation in which one Abdul Qayum was plaintiff and the parties to the present suit were jointly impleaded as defendants. The documentary evidence on this record as to the circumstances and result of this litigation is scanty; but so far as it goes it affords no basis for the contention that the expenses incurred by the defendant in this litigation were incurred by him in his representative capacity as *Lambardar*. In fact we would go so far as to say that there is no evidence on this point and that the documentary evidence shows the precise contrary. The suit brought by Abdul Qayum was not against Sham Lal as *Lambardar* of a *Mahal*, but against Sham Lal and his two nephews, the present plaintiffs, as the owners of the land about which the suit was brought. An appeal to the Court of the District Judge was lodged by Sham Lal alone. It is quite possible that Sham Lal, having satisfied Abdul Qayum's decree for costs, has now a valid claim for contribution against the present plaintiffs in respect of some portion of the costs paid by him; but it seems to us quite impossible, upon the evidence on the record, to treat those costs as forming any part of the *Lambardar's* expenses of management; still less so as expenses of management on account of the years now in suit, seeing that the entire litigation with Abdul Qayum was completed

in the month of February 1906—two years before the period now in suit. In two other matters of detail the decree of the lower Appellate Court is not quite just to the present plaintiffs. By an obvious oversight the learned Judge has allowed the plaintiffs 3rd only out of a certain item of Rs. 40 whereas their share was 2th and they should have been allowed Rs. 67-8-0. He has also omitted to notice that interest from the date of the Assistant Collector's decree ought to run upon the sum of Rs. 245-8-6 awarded as costs to the plaintiffs by the decree of that Court. The learned Judge probably intended that interest should run upon this amount; but he has not made it clear in his decree and we think we ought to supply the omission. The result is as follows:—There will be, first of all, an addition of Rs. 7-8-0 to the sum decreed in favour of the plaintiffs. Then there will be a further addition of 2th of Rs. 273 (or Rs. 204-12-0) due to our expunging from the account of expenses the sum allowed to the *Lambardar* in connection with Abdul Qayum's suit. These sums will be added to the amount decreed by the learned Judge and the interest account must be proportionately increased, both prior to the institution of the suit and *pendente lite*. We leave undisturbed the orders of the Court below as to costs. As regards the costs of this Court, we have already ordered that the defendant shall pay all costs of his appeal. With regard to the cross-objections taken by the plaintiffs, parties will pay and receive costs in proportion to their failure and success. The decree must be prepared accordingly. Costs in this Court will include fees on the higher scale.

Decree modified.



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Court based its finding of misconduct and negligence on three main grounds; (1) the actual collection in 1321 was very small compared with the demand. The demand was Rs. 5,718-12-9 and the amount actually collected in that year was Rs. 2,091-4-6. If that stood alone the Trial Court might have drawn an adverse inference from it, but he has overlooked the fact, that the actual collection was more than the demand it was Rs. 6,014-13-2, that is to say, arrears for former years to a large amount had been recovered. It is quite probable that the comparatively small amount realised in 1321 was owing to the large realisations of past arrears, and would have been made good in the future.

Then the Court finds, (2) that the *Lambardar* makes collections all the year round and, (3) instituted more than seventy suits to recover arrears. From this the Court infers that he was negligent in his duties; we infer exactly the opposite.

However, we need not press the matter further, because the learned Vakil for the plaintiff has frankly admitted that the decree should be on actual collections, having regard to our decision on the first ground of appeal.

That being so, it is admitted that this appeal must succeed in part. We have come to the conclusion that the plaintiff is entitled to Rs. 870 3-0 for 1321 *Fasli* together with interest at 12 per cent. from the 8th of June 1914, up to the date of suit and thereafter at 6 per cent. up to the date of realisation, and he is further entitled to Rs. 394-7-11 together with interest at 12 per cent. from the 27th of June, 1915, up to the date of suit and thereafter at 6 per cent. up to the date of realisation. The office will prepare an account on the basis of this order. The parties will receive and pay costs in proportion to failure and success in all Courts. The costs in the lower Appellate Court and in this Court will be calculated on the value of the appeals and the extent to which either party has succeeded or failed. The decrees of the two lower Courts are set aside and a decree as indicated above will be substituted for them.

*Order modified.*

## ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 42 OF 1920.

July 12, 1920.

*Present:*—Mr. Daniels, A. J. C.

UMRAO SINGH AND ANOTHER—DEFENDANTS  
Nos. 1 AND 2—APPELLANTS

*versus*

GAYA PRASAD SINGH AND OTHERS—  
PLAINTIFFS, AND MAHABIR SINGH—  
DEFENDANT No. 3—RESPONDENT.

*Hindu Law—Joint family—Antecedent debt, nature of—Alienation—Transaction, when should be upheld.*

In order to render a debt antecedent there must not only be priority in time but real dissociation in fact from the mortgage sought to be enforced. Where, therefore, a person borrows money on a mortgage a little more than a fortnight after a prior mortgage there is not that dissociation which would render the latter a debt which was properly antecedent. [p. 648, col. 2.]

In order to validate an alienation either by sale or mortgage, two elements are necessary, namely, first, that the purpose for which the money was obtained is a purpose necessary by the law, and, second, that there is a pressure on the estate, sufficient to render the alienation necessary. [p. 649, col. 2.]

Where, if only that amount had been borrowed which the Court finds for legal necessity or antecedent debt, it would still have been necessary to execute the mortgage in suit, the transaction should be upheld. If not, it should be set aside on condition of the creditor being re-paid with interest the amount which he has validly advanced. [p. 650, col. 1.]

Appeal against the decree of the Subordinate Judge, Gonda, dated the 23rd December 1919, upholding the decree of the Munsif, Utraula, dated 10th September 1919.

Mr. Basudeo Lal, for the Appellants.

Mr. Aditya Prasad, for Respondents Nos. 1 to 3.

**JUDGMENT.**—This second appeal arises out of a suit for possession of 1-anna share in *Patti Sheo Dat, Mausā Bambhni*, by setting aside a usufructuary mortgage for Rs. 999 executed on 24th February 1903 by Mahabir Singh, respondent No. 4, who is the father of the plaintiffs, in favour of two persons who are now represented by the appellants for a term of thirty years. The property in suit was the joint family property, and the plaintiffs' case was based on the allegation that the mortgage was neither for legal necessity nor antecedent

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debt. The consideration was made up of three items:—

	Rs.
(1) Left with the mortgagees for payment to Beohu Singh in redemption of a prior mortgage, dated 14th May 1899 (The amount actually paid was Rs. 599)	600
(2) Left with the mortgagees for payment to Sanmukh Singh in redemption of a prior mortgage, dated 9th February 1903	300
(3) Received in cash before execution	99
Total	999

The first item is not in dispute. The Courts below have found that it was for redemption of a mortgage executed before the birth of the plaintiffs and that they were, therefore, not entitled to challenge it. The third item also is not seriously disputed. It was not antecedent debt and the appellants' Counsel was unable to contend that any legal necessity was shown for it. The two issues in second appeal are:—

(1) Whether the item of Rs. 300 was borrowed for payment of antecedent debt within the meaning of the Privy Council ruling in *Sahu Ram Chandra v. Bhup Singh* (1)?

(2) What is the nature of the decree which should be passed when it is found that the consideration for the mortgage consisted partly of items binding on the sons and partly of items which are not so binding?

The decree actually given by the lower Court is one for possession of the share in dispute on payment of Rs. 599 by the plaintiffs to the defendants-appellants. The contention of the latter is, that they should have been allowed to retain possession for the full term of the mortgage in lieu of the amount which has been found to be binding on the property.

It was argued by the appellant that the finding on the first issue would depend on whether this Court held that antecedent debt within the meaning of the Privy Council ruling could include a debt secured by a mortgage. That point has just now been decided in *Bharat Singh v. Narsuti Singh* (2). We have held, affirming the ruling previously laid down in *Rammun Lal v. Ram Gopal* (3), that a mortgage-debt might be antecedent debt provided there was also a personal liability to repay. The respondent rightly contends that this decision does not affect the issue in this case. Whatever the view may be taken of the Privy Council judgment in *Sahu Ram Chandra v. Bhup Singh* (1), it does lay down most emphatically that, in order to render a debt antecedent there must not only be priority in time but real dissociation in fact from the mortgage sought to be enforced. If a man borrows money on a mortgage on the 7th February and then on 2nd of the same month executes another mortgage in order to redeem the first the Court is justified in inferring that there was no real dissociation in fact, and that the debt was not properly antecedent. This is the finding at which both the lower Courts arrived in this case, and the only reason urged for my disregarding it is that the mortgage of 7th February was in favour of the different mortgagees. Where the second mortgage was executed a little more than a fortnight after the first I do not regard it as sufficient to establish real dissociation in fact to set aside the finding of the Courts below. I, therefore, uphold the lower Courts' finding in regard to this item.

On these findings of facts I am asked to dismiss the suit and relegate the plaintiffs to the right of redemption at the end of thirty years on payment of Rs. 599 found to be binding on the estate. The argument is that, if any part of the mortgage is found to be for legal necessity, the whole should be upheld. The ruling of the learned Judicial Commissioner in *Gya Din v. Triloki Nath Singh* (4) is cited in support of this contention. That was a case of a

(1) 39 Ind. Cas. 280; 44 I. A. 126; 21 O. W. N. 698; 1 P. L. W. 571; A. L. J. 437; 19 Bom. L. R. 48; 26 C. L. J. 13; 3 M. L. J. 14; 1917 O. W. N. 439; 22 M. L. T. 22; 6 L. W. 218; 39 A. 437 (P. O.).

(2) 60 Ind. Cas. 127; 7 O. L. J. 439; 28 O. C. 241.  
(3) 7 Ind. Cas. 98; 21 O. C. 27; 5 O. L. J. 623.  
(4) 22 Ind. Cas. 281; 16 O. C. 283.

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mortgage for fifty years by a Hindu widow for a sum of Rs. 500 of which Rs. 675 was for legal necessity. The learned Judicial Commissioner said:

"It has been suggested that it was not competent to the widow to make a mortgage for so long a period but if she might sell the property outright for legal necessity she could surely make a mortgage even for 50 years. As for the argument that a finding to the effect that only Rs. 675 were taken for legal necessity does not involve the conclusion that there was a necessity to borrow Rs. 500 on a fifty years' mortgage it is sufficient to say that the Courts uphold transactions of this nature to the extent to which necessity is proved and that the length of the period of the mortgage does not affect the question. As I have already said, if a sale of the estate can be justified then so can any other form of transfer which falls short of a sale."

There is another case of *Bharath Singh v. Murnu Singh* (5) not contained in the author's reports, but printed at page 151 of Volume V 1, of the Oudh Law Journal, in which a mortgage by a Hindu widow for Rs. 2,500 of which Rs. 2,154 were for legal necessity was upheld. The Court remarked at the conclusion of its judgment:—

"The propriety of the terms on which the loan was taken cannot be considered till a suit is filed by the plaintiffs for the redemption of that mortgage, which is binding on them to the extent of Rs. 2,154. As observed by their Lordships of the Privy Council in *Girdhar Lal v. Kantoo Lal* (6), where the entire consideration, with the exception of a small portion, is shown to have been taken for legal necessity, the vendee cannot be deprived of the benefit of his purchase. In *Burayad Husain v. Mata Din Singh* (7) and *Gur Sahai v. Girahar Lal* (8) a similar view was taken. The court below has directed the vendee or his legal representatives to pay to the plaintiffs a sum of Rs. 218 1-1 with interest at 1 per cent. per mensem to recoup them for the portion of the consideration for which no legal

necessity was found to have been proved. In the case of a mortgage no such question arises, because it is open to the plaintiffs to sue for redemption on payment of the amount for which they may be held liable. If the mortgage contains onerous terms the propriety of those terms can be challenged when the suit for redemption is brought."

This remark does seem to lend some colour to the argument put forward, but two things may be observed. First, in both the cases referred to above the transaction was one which the Court would have upheld had it been a sale. Secondly, in the latter of the two cases the mortgage was made in 1858 and the widow had died before the suit was brought, so it was open to the reversioners to bring a redemption suit at once. I lay no stress on the further distinction that in both these cases the mortgage was made by a Hindu widow because except that an alienation by her is valid for her lifetime the principles by which the Courts are guided in upholding or setting aside the transaction would appear to be the same.

It is not clear that in the case first cited Mr Lindsay intended to make a distinction between a mortgage and a sale. If it was intended to make any distinction in the second case the remark was obiter. I do not think that the learned Judges intended to lay down, or that any Court would lay down, that if the father of a joint family executed a mortgage for 30 years for Rs. 1,000 of which only Rs. 50 were for legal necessity it would be bound to uphold the transaction and relegate the sons to a suit for redemption at the end of this period. On the other hand, if Rs. 950 out of the Rs. 1,000 were for legal necessity it is equally certain that the transaction would be upheld. Two elements are necessary to validate an alienation either by sale or mortgage. The first element is that the purpose for which money was obtained must be a purpose recognised by the law. The second element is that there must be a pressure on the estate sufficient to render the alienation necessary. I need only refer to the well-known passage in the judgment of the Privy Council in *Hunoomanpersaud Pandey v. Musumet Babooee Munraj Aonweres* (9), which runs:—

"(1) M. I. A. 393 at p. 423; 18 W. R. 81n; Sevestre 15 n; 2 Suth P. C. J. 29; 1 Sar. P. O. J. 552; 19 E. R. 147.

(5) 56 Ind. Cas. 291; 7 O. L. J. 151; 2 U. P. L. R. (J. C.) 92.

(6) 1 L. A. 321; 14 B. L. R. 187 (P. C.); 22 W. R. 56; 3 Far. P. C. J. 200.

(7) 38 Ind. Cas. 57; 19 O. C. 122; 2 O. L. J. 212.

(8) 5 Ind. Cas. 75; 2 O. C. 84 at p. 10; 1 U. P. L. R. (J. C.) 54; 6 O. L. J. 411.



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"Where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

To take a simple example, the payment of land revenue is sufficient to constitute legal necessity but it cannot be contended that a Hindu father would be entitled to mortgage his estate every time that land revenue fell due for payment. The test in each case would be this. If only that amount had been borrowed which the Court finds to be for legal necessity or antecedent debt would it have been necessary to execute the mortgage in dispute? If so, the transaction should be upheld. If not, it should be set aside on condition of the creditor being re-paid with interest the amount which he has validly advanced. It has been held in many cases that a high rate of interest on the loan must be justified by legal necessity. It appears to me that similar justification is required to validate a very long term or any other conditions in a mortgage, which, having regard to the nature of the security, are exceptionally onerous.

In this case only Rs. 599 out of Rs. 999, i.e., 3/5ths of the entire sum borrowed has been found to be binding on the estate. Under these circumstances, the lower Court was justified in setting aside the transaction.

I vary the lower Court's decree by allowing the appellants simple interest at 6 per cent. per annum from the date of the mortgage in suit till payment, in addition to the Rs. 599 allowed by the Courts below. In other respects, the appeal is dismissed. As the respondents have been substantially successful they will be allowed their costs of the appeal.

*Appeal dismissed.*

# MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 293 OF 1919.

March 26, 1920.

Present:—Justice Sir William Ayling, Kt.,  
and Mr. Justice Coutts-Trotter.

TANGUTOORI KODANDARAMAYYA—  
DEPENDANT No. 2—APPELLANT

versus

TANGUTOORI RAMALINGAYYA

AND ANOTHER—PLAINTIFF AND DEFENDANT

No. 3, LEGAL REPRESENTATIVE OF

DEPENDANT No. 1—RESPONDENTS.

*Madras Hereditary Village Offices Act (III of 1895), ss. 13, 21—Newly created village office, appointment to, suit respecting—Jurisdiction of Civil Court—Limitation for suit—Terminus a quo.*

A Civil Court has jurisdiction to entertain a suit respecting an appointment to a newly created village office. It is only where jurisdiction is conferred on a Revenue Court by section 13 of the Madras Hereditary Village Offices Act, that section 21 bars the jurisdiction of a Civil Court. [p. 652, col. 1.]

The starting point of limitation for such a suit is the date of the publication of the Collector's notice. [p. 652, col. 1.]

Second appeal against the decree of the Court of the Additional Temporary Subordinate Judge, Guntur, in Appeal Suit No. 127 of 1917, preferred against the decree of the Court of the District Munsif, Ongole, in Original Suit No. 137 of 1916.

FACTS appear from the judgment.

Mr. A. Krishnaswamy Aiyar (with him Mr. B. Somiah), for the Appellant.—The suit is not cognizable by the Civil Court. Its jurisdiction is barred by section 21 of Madras Act III of 1895. The claim or right in respect of a Karnam's office is covered by the opening words of the section. It would be meaningless to confer jurisdiction on Civil Courts in respect of newly created offices while older offices are exempted from such jurisdiction.

Messrs. T. Prakasam and O. Sambasiva Row, for the Respondents.—It is only where jurisdiction is conferred on Revenue Courts under section 13 that Civil Courts' jurisdiction is taken away under section 21. See *Kesiram Narasimhulu v. Narasimhulu Patnaidu* (1) and *Maroul Seetharam Naidu v. Doddi Hami Naidu* (2), *Krishnaswami Naidu v. Akhulammal Atergal* (3). This is

(1) 30 M. 126; 1 M. L. J. 881; 16 M. L. J. 514.

(2) 5 Ind. Cas. 137; 33 M. 206; 7 M. L. T. 181; 20 M. L. J. 91.

(3) 50 Ind. Cas. 185; 9 L. W. 30; 24 M. L. T. 489; (1919) M. W. N. 29.

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not a case in which the plaintiff has a right of suit under section 13. That section specifies claims under section 10, clauses (2) and (3) or section 11 (2) and (3) or section 12. An office newly created in consequence of the grouping of villages is not within the section. Those sections lay the principles to be followed in filling a vacancy to an existing hereditary office.

## JUDGMENT.

AYLING, J.—First respondent in this case was appointed *Karnam* of the grouped village of Vallur in the Venkatagiri Zemin-dari by the Sub-Divisional Officer under section 15 (3) of Act II of 1894. He sued for a declaration that he was the legally appointed *Karnam* and for an injunction restraining first defendant (the proprietor of the estate) and second defendant (the person appointed as *Karnam* by the first defendant) from interfering with his tenure of office. The District Munsif decreed the suit as prayed for. The Subordinate Judge set aside the injunction but confirmed the declaration.

In second appeal Mr. Krishnasawmy Aiyar has argued, (1) that plaintiff not being in possession of the office his suit is not maintainable under section 42, Specific Relief Act; (2) that the jurisdiction of the Civil Courts is barred by section 21 of Madras Act III of 1895.

The first objection may be summarily disposed of. The Subordinate Judge finds that at the date of suit plaintiff was in possession of the office; and his finding must be accepted. We may remark that most of the evidence to which Mr. Krishnasawmy Aiyar wished to refer us relates to proceedings after its institution.

The objection to the jurisdiction calls for more serious consideration. Section 21 of Madras Act III of 1895 runs thus:—"No Civil Court shall have authority to take into consideration or decide any claim to succeed to any of the offices specified in section 3 or any question as to the rate or amount of the emoluments of any such office or, except as provided in proviso (ii) to sub section (1) of section 13, any claim to recover the emoluments of any such office: Provided that if, in any suit instituted under this Act the defendant has pleaded before the Collector that a Revenue Court has no jurisdiction to entertain the suit,

on the ground that no emoluments, as defined in this Act, appertain to the office in respect of which the suit is brought and if on appeal preferred from the decree in such suit, the appellate authority has decided adversely to such plea, the defendant may, within six months from the date of the appellate decree, institute a suit in a Civil Court to set aside such appellate decree on the said ground and on that ground only."

The opening words with which we are concerned are no doubt of a very general character, and it is quite possible to interpret them as barring the jurisdiction of the Civil Courts to try any suit brought to establish a claim to any of the offices specified in section 3, which would include the *Karnam's* office with which we are concerned. A much narrower interpretation has, however, been adopted in two reported cases of this Court, that of a Full Bench in *Kesiram Narasimhulu v. Narasimhulu Patnaidu* (1) and of a Division Bench in *Manoulu Seetharam Naidu v. Doddi Rami Naidu* (2). The Court in each case held that section 21 only took away the jurisdiction of the Civil Courts in cases in which jurisdiction was conferred on Revenue Courts by section 13 of the same Act. The dictum in the Full Bench case may be impugned as *obiter*, but this cannot be said of the decision in *Manoulu Seetharam Naidu v. Doddi Rami Naidu* (2), all that can be urged against the latter is that another line of reasoning might be suggested to support the decision, which, however, was not what the learned Judges relied on.

I do not feel at liberty to refuse to follow these decisions which have, moreover, been followed by Sadasiva Aiyar, J., in a recent case *Krishnaswami Naidu v. Akkulammal Avergal* (3).

We have, therefore, to see whether plaintiff had a right of suit in a Revenue Court under section 13. I think it is clear that he had not. Section 13 only gives jurisdiction to the Revenue Courts to decide suits brought on the ground that the person suing "is entitled under sub-section (2) or (3) of section 10 of the Madras Proprietary Estates Village Services Act, 1894, or under sub section (2) or (3) of section 10 or sub-section (2) or (3) of section 11 or section 12 of this Act, as the case may be, to hold such office and to enjoy such emoluments."

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Now, the present suit cannot be brought under one of the sections or sub-sections specified. Section 10 of Act II of 184 is the only one which could be relied on, but sub-sections (2) and (3) thereof have no application to the present plaintiffs' claim to the office. They lay down the principles to be observed in filling a vacancy to an existing hereditary office. Where, as in the present case, a new office has been created in consequence of the grouping of two or more villages, that office has to be filled on different principles as laid down in the last sentence of section 15 (1). "Where the claims of more than one family have to be considered the determination of the next heir according to the general custom and rule of primogeniture is obviously impracticable and the proprietor (or Revenue Officer, as the case may be) is simply enjoined to select the best qualified persons from among the families of the last holders of the abolished offices."

It is quite true that the opening words of section 10 refer to section 9 which deals with appointments to newly created village offices such as the one in question but this makes no difference. The three sections (sections 9, 10 and 15) must in fact all be read together; and the general qualifications laid down in sub-section (1) of section 10 no doubt apply to appointments under section 15. But the principles to be observed in making selection between two or more qualified applicants are different, and the claim of the present plaintiff is not based on sub-sections (2) and (3).

That a suit should lie in a Civil Court regarding a newly created village office and its emoluments, whereas it would not lie in the case of an older office, is anomalous and may be the result of oversight in drafting; but I cannot see that it involves any injustice or real inconvenience and, however it may be, it seems to be the only proper interpretation of the two Acts. I hold that the jurisdiction of the Civil Court is not barred by section 21 of Madras Act III of 1895.

The only other point argued for appellant is that the six weeks time allowed by sub-section (3) of section 15 of Madras Act II of 1894 has been wrongly calculated. This contention must be disallowed. The time must be held to run from the date of publication of the Collector's notice (Exhibit XVII) which is 19th May 1913, and plaintiff's appoint-

ment by the Sub-Collector was only on 27th December 1913. I would dismiss the second appeal with costs and also the memorandum of objections, as I think the injunction sued for was rightly refused.

COURTS-TROTIER, J.—I agree.

M C P.

*Appeal dismissed;  
Memo of Objections dismissed.*

# PATNA HIGH COURT.

CIVIL REVISION No. 151 OF 1920.

December 14, 1920.

Present:—Mr. Justice Jwala Prasad.

BARHAM DEO RAI—DEFENDANT

—PETITIONER

versus

RAM KISHUN MAHTON—PLAINTIFF

—OPPOSITE PARTY.

*Stamp Act (II of 1897), ss. 12 (1), (2) (a), (b), (3), 25  
—Adhesive stamp not cancelled—Document, admissibility of, in evidence—Document inadmissible, plaintiff, whether can prove his case by other evidence.*

Where a document which ought to be stamped, bears an adhesive stamp the cancellation of which has not been effected as prescribed by section 12 (1), (2) (a), (b) and (3) of the Stamp Act, it is inadmissible in evidence under section 25 of the Act [p 653, col 1.]

In a suit upon a promissory note which is inadmissible in evidence, it is open to the plaintiff to prove his case by other evidence [p 654, col 1.]

Appeal from a decision of Small Cause Court Judge, Chupra, dated the 16th April 1920.

Mr. Shi eswar Dayal, for the Petitioner.

Mr. Hanuman Sahay, for the Opposite Party.

JUDGMENT.—This is an application under section 25 of the Small Cause Courts Act against the decision of the Small Cause Court Judge of Chupra, dated the 16th April 1920. By his decision the Judge decreed the plaintiff's claim for recovery of money said to have been lent by the plaintiff to the defendant. The loan was said to have been made on the 2nd Chait 1325 and a hand note was said to have been executed by the defendant bearing his thumb impression. The hand note was produced in Court.

The defendant denied the loan, disputed the genuineness of the hand note and also denied his thumb impression upon it. The thumb impression expert examined in this case proved that the impression was that of



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the defendant. The Court accepted that evidence and held that the hand note in question was genuine and was executed by the defendant.

As regards the actual loan having been given, the plaintiff examined three witnesses. The Court came to the following finding: "The fact that the defendant has borrowed has sufficiently been proved." Accordingly, the plaintiff's suit was decreed.

The principal point taken in revision on the basis of which the rule was issued was that the hand-note upon which the plaintiff's suit was brought, was not duly executed and was, therefore, inadmissible in evidence. The hand-note bears an adhesive stamp of one-anna but it was not cancelled by writing on or across it the name or initial of the executant of the bond in the manner prescribed by section 12 (1) (a) and (b) and (3). Clause (2) of section 12 enacts that, "any instrument bearing an adhesive stamp which has not been cancelled so that it cannot be used again, shall, so far as such stamp is concerned be deemed to be unstamped." The document in question will, therefore, be deemed to be unstamped. This is concluded by the authorities *Banarsi Prasad v. Fazal Ahmad* (1), *Chenbasapa v. L. Kishnan Ram* (2) and *Vernon Allen v. Meera Pulay* (3). The law is clear upon the point. The document in question was, therefore, inadmissible in evidence under section 35 of the Act which says that: "No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped." The document in question required one anna stamp and, therefore, no payment of penalty would make it admissible under the proviso to section 35. The learned Small Cause Court Judge was, therefore, wrong in admitting this document in evidence. The admission of an inadmissible evidence might be overruled by an Appellate or Revisional Court, but the statutory provision in the Stamp Law fetters the right of the higher Court to

question the right of a Subordinate Court to admit a document in evidence on the ground that it was either understamped or was not duly stamped, vide section 35 of the Act. The learned Vakil on behalf of the applicant contends with some force that section 35 which prevents the same Court or the Appellate or higher Court to question in such of the suit or proceeding, the admissibility of a document in evidence on the ground that it was not duly stamped, is inconsistent with section 35 which makes it imperative upon every Court in any proceeding not to receive a document in evidence for any purpose unless it was duly stamped. The anomaly, however grave it may be, I am unable to go against the letter of the law on the question of stamp. I must give effect to the law as it is. Section 35 enacts: "Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped." "At any stage" in the aforesaid section includes the stage of appeal. The Calcutta High Court has taken this view in two cases, *Sitaram v. Ram Prasad Ram* (4) and *Punchanand Dass Oh.achary v. Taranmoni Chowdhari* (5). The latter is a case which exactly applies to the present one. In that case the document in question was one which required an adhesive stamp of one-anna. The first Court illegally admitted the document in evidence on payment of penalty treating it as a bond. The Appellate Court held that the Munsif was wrong in admitting the document in evidence. The learned Judges, Field and O'Kinealy, J.J., held that the lower Appellate Court was precluded, by section 36 of the Stamp Act from questioning the admissibility of the document when it was already admitted by the first Court. Upon the law as it stands, I am bound to follow the aforesaid decisions. I would, therefore, reject the contention of the learned Vakil on the question.

There was, as observed above, evidence to prove the debt taken and the Court, in the passage quoted above from its judgment, has distinctly held that it was satisfactorily

(1) 28 A. 298; 3 A. L. J. 25; A. W. N. (1906) 9.

(2) 18 K. 869; 9 Ind. Dec. N. S. 754.

(3) (1887) 7 A. C. 174 at p. 172; 51 L. J. P. 50; 45 L. T. 435; 30 W. R. 304.

(4) 22 Ind. Cas. 853; 19 C. L. J. 87; 18 C. W. N. 697.

(5) 12 C. 54; 6 Ind. Dec. (N. S.) 44.

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proved that the defendant borrowed the money in question from the plaintiff. No doubt, the case appears to have been based upon the hand-note in the sense that it has been stated in the plaint that money was advanced and a hand note was executed and the cause of action was stated to have arisen on the date the hand-note was executed. Reading the plaint as a whole, there can be no doubt that the plaintiff wanted to recover the money that he paid. The hand-note was executed and was sought to be used only with a view to bind the defendant in order to afford evidence of the loan having been given. A large number of authorities have been placed before me; *Golip Chand v. Thakurani Mohokoom Kocree* (6), *Sheikh Akbar v. Sheikh Khan* (7), *Damodar Jagannath v. Atnaram Babaji* (8), *Balbhadar Prasad v. Maharaja of Betia* (9) and *Pramatha Nath v. Dwarka Nath Dey* (10) as well as the cases already referred to above. Upon a careful consideration of all these authorities, I am of opinion that it was open to the plaintiff to prove his case by other evidence which he has done even if the hand-note in question be held to be inadmissible in evidence. Taking any view of the case, the plaintiff's claim was rightly decreed.

The application must, therefore, be rejected. Hearing fee one gold mohur.

*Application rejected.*

(6) 3 C. 314; 2 C. L. R. 112n.; 2 Ind. Jur. 601; 1 Ind. Dec. (N. S.) 787.

(7) 7 C. 256; 8 C. L. R. 523; 3 Ind. Dec. (N. S.) 713.

(8) 12 B. 443; 6 Ind. Dec. (N. S.) 780.

(9) 9 A. 351; A. W. N. (1887) 49; 5 Ind. Dec. (N. S.) 668.

(10) 23 C. 851; 12 Ind. Dec. (N. S.) 565.

## ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 23 OF 1920.

July 12, 1920.

Present:—Mr. Daniele, A. J. C.

RAM NIDH AND OTHERS—DEFENDANTS

—APPELLANTS

*versus*

BALKARAN SINGH—PLAINTIFF AND

Mirza SADIQ HUSAIN—DEFENDANT

—RESPONDENTS.

Court Fees Act (VII of 1870), ss. 10 (ii), 12, 17—  
Suit for specific performance and possession—Court-fee

payable—Court-fee, deficiency of, order for payment of, form of.

Inasmuch as in a suit for specific performance of a contract of sale, and for possession of the property agreed to be sold, the relief for specific performance is the main relief and is not ancillary to the claim for possession, a separate Court-fee is, under section 17 of the Court Fees Act, payable on such relief both in the Original Court and the Court of Appeal. [p. 655, col. 1.]

Where in an appeal by the defendant it is discovered that there is a deficiency in the amount of Court-fees paid both on the plaint and the memorandum of appeal, the proper order is to direct the parties to make good the deficiency, and to direct that, in the event of non-compliance with such order, the suit or appeal or both do stand dismissed under section 10 (ii) read with section 12 of the Court Fees Act. [p. 655, col. 2.]

First appeal against the decree of the Subordinate Judge, Barabanki dated the 25th February 1920.

Meesra. A. P. Sen and Haidar Husain, for the Appellants.

Mr. Biseshwar Nath Srivastava, for Respondent No. 1.

JUDGMENT.—On this appeal coming up for hearing it appeared to me that the Court-fees paid in the lower Court and also on the memorandum of appeal to this Court were deficient. I have heard Counsel on the point, and I am still of the same opinion. The suit was for specific performance of a contract of sale and for possession of the land agreed to be sold. Court-fees were paid on the relief for possession only, instead of both reliefs under section 17 of the Court Fees Act. An objection on this ground was taken in the lower Court but apparently was not pressed and the lower Court overruled it, remarking that the relief for specific performance was ancillary to the claim for possession. With this remark I cannot agree. The prayer for specific performance is the main relief. Unless and until this is decreed the plaintiffs could not by any possibility obtain a decree for possession. Two rulings have been cited to me. The first is *Krishnasami v. Sundarappayyar* (1) which appears to be in favour of the view taken by me. The judgment is not very clear, but from the remark at the end that the decree is clearly irregular in directing that in default of payment of the deficiency in fees the prayer for possession alone would

(1) 19 M. 415; 5 M. L. J. 164; 6 Ind. Dec. (N. S.) 638.

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be disallowed instead of saying that the suit would be dismissed it would seem that the plaintiffs had paid Court fees on the relief for specific performance but had failed to pay them on the relief for possession—whereas they should have paid on both. The other case is an unreported case of the Calcutta High Court *Madan Mohan Singh v. Gaja Prasad Singh* (2)] and is somewhat in favour of the view taken by the learned Subordinate Judge. The main question was one of jurisdiction but the judgment holds that the suit was in substance one for possession and ought to be valued under section 7, clause (v) (b). With great respect, I cannot concur in this remark. The two reliefs, though they may be joined in one suit, are entirely distinct, and a separate Court-fee is chargeable on each of them.

There is a third case, not cited at the Bar, in which the Madras and the Calcutta decisions were considered. It is that of *Nihal Singh v. Sewa Ram* (3). This also was a suit for specific performance of a contract of sale and for possession. Court-fee was paid on the latter relief only. The Taxing Officer considered that a separate fee should have been paid on each relief, and referred to *Krishnasami v. Sundarappayyar* (1) in support of his view. Mr. Justice Tudball held that the real relief was that of specific performance and that in both reliefs the plaintiffs were merely seeking to force the vendor to do what he was bound to do under his contract, namely, to execute and register the sale-deed and to hand over possession of the property. He accordingly required them to deposit the difference between Rs. 26.4.0 already paid on the relief for possession and Rs. 170 payable on the relief for specific performance. This view was thus the exact opposite of that taken by the learned Subordinate Judge in this case. The learned Subordinate Judge thinks that the relief of specific performance is ancillary to that of possession. He held, on the contrary, that the relief of possession was included in that of specific performance.

If I found that it was part of the plaintiffs' case as stated in the plaint that the seller had contracted to deliver possession and that possession was asked for in performance of

the contract, I should be prepared to follow this ruling. I find that this is not the case. Defendants are said to have received Rs. 50 earnest-money and to have agreed to complete the sale within a month the plaintiffs paying the balance. There is no allegation of an agreement to put the plaintiffs in possession. No doubt, the law, as laid down in section 55 (f) of the Transfer of Property Act, imposes an obligation to put the buyer or his representative in possession, but it is a conditional obligation taking effect on the request of the latter and in favour either of the buyer himself or such other person he may direct. A claim to possession is not a necessary incident of a suit for specific performance of a contract of sale. The property may already be in possession of the vendee under some other title; or it may be in possession of a third person, such as a mortgagee; or the parties may have stipulated that possession should be deferred. In this case, therefore, I hold that a separate Court-fee is payable on each relief. There is, therefore, a deficiency of Rs. 465 both in the lower Court and in this Court. In the lower Court it is payable by the plaintiffs-respondents, and in this Court by the defendants-appellants.

I accordingly allow the parties one month within which to make up the deficiency of Rs. 465, respectively due from them. If the appellants fail to comply their appeal will be dismissed but the plaintiffs will not be allowed to execute their decree till they pay the additional amount due from them. A question arises as to the nature of the order to be passed in the event of the appellants complying with the order and the respondents failing to do so. Should it be an order under section 10 (ii) read with section 12 (ii) of the Court Fees Act directing that their suit be dismissed, or should it be an order merely preventing their executing any decree which may be passed in their favour till the Court fee is paid? The latter course has, I am told, been followed in several cases, and it has the support of a Full Bench ruling of the Allahabad High Court, *Mohan Lal v. Nand Nishore* (4), but it is open to the drawback that it leaves it open to the plaintiffs to wait and see whether a decree

(2) 11 Ind. Cas. 228; 14 C. L. J. 159.

(3) 85 Ind. Cas. 275; 88 A. 292; 14 A. L. J. 431.

(4) 28 A. 270 (F. B.); 2 A. L. J. 839; A. W. N. (1905) 280.



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is passed in their favour in appeal and to file or not file the Court-fees according to the result. The former course is more in accordance with the language of section 10 (ii) of the Court Fees Act and it was followed by the Judicial Commissioner in Second Civil Appeal No. 354 of 1912. In that case the learned Judicial Commissioner, by his order of 20th March 1914, directed that if the deficient Court fee in the Court below were not made good by the respondent the decree passed by the lower Appellate Court in his favour would be discharged. The same view has recently been taken by the Patna High Court in a case which is precisely on all fours with that now before me [*Brij Krishna Das v. Murli Rai* (5)].

I prefer to follow these two authorities in preference to the Allahabad ruling. If, therefore, the appellants make good the deficiency but the plaintiffs fail to do so the suit of the latter will be dismissed without costs and the appeal will be decreed with costs.

The case should be put down for final hearing at the earliest possible date after August 12th.

*Appeal decreed.*

(5) 56 Ind. Cas. 316; 4 P. L. J. 703.

### LAHORE HIGH COURT.

CIVIL REVISION PETITION NO 620 OF 1920.  
February 15, 1921.

Present :—Mr. Justice Abdul Raouf.  
MUHAMMAD HAYAT—DEFENDANT  
—PETITIONER

versus

GHULAM MUHAMMAD—PLAINTIFF  
—RESPONDENT

Civil Procedure Code (Act V of 1908), O XVI,  
r 1—Witnesses, application to summon—Court, duty  
of—Court, whether can refuse to summon witnesses.

It is the duty of a Court to summon the witnesses for whose attendance an application is duly made by a party. A Court cannot reject such an application on the ground that it has been made too late.

Petition, under section 2, of Act IX of 1887, for revision of the decree of the Munsif, First Class, exercising the powers of a Judge, Small Cause Court, Rawalpindi, dated the 16th June 1920.

Mr. Zafull Khan, for the Petitioner.  
Khwaja Feroz ud Din Ahnati, for the Respondent.

**JUDGMENT.**—The facts giving rise to this petition for revision are simple. The plaintiff came into Court claiming to be a son of Fazi Din, father of the defendant, and asked for a decree for half of Rs. 140 which the defendant had realised from the Post Office. The defendant denied that the plaintiff was the legitimate son of Fazi Din, his father. The suit was instituted on the 13th of May 1910; 22nd of May 1920 was fixed for the first hearing when issues were struck. 16th of June 1920 was the date fixed for taking evidence. On the 7th of June the defendant put in a list of witnesses whom he wanted to be summoned and asked the Court to summon them. The Court, however, refused to summon the witnesses on the ground that the time was too short. The case was then taken up on the 16th of June 1920 and was disposed of on such documentary evidence as was placed on the record on behalf of the plaintiff. Relying upon the documentary evidence put in by the plaintiff, the Court found in favour of the plaintiff and decreed his claim.

The defendant has come up in revision and it is contended on his behalf that the documents placed on the record were neither admitted by the defendant nor proved by evidence. It is further contended that the Court below has exercised jurisdiction wrongly in rejecting the petition for summoning the witnesses. There is force in this argument. In my opinion, it was the duty of the Court to have summoned the witnesses named by the defendant. The condition of the record shows that there has been practically no trial of the issues arising between the parties.

I set aside the judgment and decree of the Court below and remand the case for a re-trial under Order XLI, rule 23, Civil Procedure Code. Costs will abide the result. The Court will give to the parties sufficient opportunity to adduce such evidence as they may wish to produce.

*Case remanded.*

CHANDI MISSIR C. SHYAMA CHARAN GHOSH.

PATNA HIGH COURT.  
CRIMINAL MISCELLANEOUS CASE No. 53  
OF 1920.

November 16, 1920.

Present:—Justice Sir B. K. Mullick, Kt., and  
Mr. Justice Backnill.

CHANDI MISSIR—PETITIONER

versus

Rai SHYAMA CHARAN GHOSH AND  
OTHERS—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1878), s. 528—  
Application for transfer—Trying Magistrate subordinate to District Magistrate, whether ground for transfer.*

The mere fact that a Magistrate, in whose Court a case is pending trial, is in his executive capacity subordinate to the District Magistrate who has taken a strong view with regard to the merits of the case, is, by itself, not a sufficient ground for transferring the case, under section 528 of the Criminal Procedure Code, to some other Magistrate outside the district. [p 605, col 1.]

Application by the complainant for the transfer of his case from the file of the Sub-Divisional Officer, Chapra, on the main ground that the District Magistrate in his executive capacity had interfered and expressed strongly in favour of the accused at various stages of the enquiry before the Police, who had ultimately reported the case to be maliciously false.

Messrs. Yunus and P. C. Rai, for the Petitioner.

The Assistant Government Advocate, for the Opposite Party.

## JUDGMENT.

MULLICK, J.—This is an application by Chandi Missir, a Pleader, practising in the District of Chapra, for the transfer of a case from the file of the Sub-Divisional Officer of Chapra to the file of some other Magistrate outside that District. The petitioner on the 16th June last filed an information before the Police charging one Shyama Charan Ghosh and others with theft of timber, stone pillars and other property alleged to have belonged to a ward in whom the petitioner is interested, and whose property is being managed by Shyama Charan Ghosh under the direction of the Court of Wards. The information was duly recorded and investigated and a final report was submitted by the Police stating that it was maliciously false and that the informant should be prosecuted under the Penal Code for having maliciously laid a false

charge. Before the report of the Police reached the Sub-Divisional Magistrate the petitioner on the 28th June filed a complaint before him making various allegations against the Police as well as the District Magistrate. The Sub-Divisional Magistrate directed that the complaint should be considered on the 12th July along with the Police report. On the 2nd July, by which time the Police report seems to have reached the Sub-Divisional Magistrate, the date of hearing was, however, changed from 12th July to the 8th July. On this latter date the complainant was examined by the Sub-Divisional Magistrate and his statement was recorded in accordance with the provisions of section 200 of the Criminal Procedure Code. Not being satisfied that process should issue the Sub-Divisional Magistrate decided to hold an enquiry under section 202 of the Code and directed the complainant to file a list of witnesses. The complainant thereupon filed a list of 49 witnesses. The Sub-Divisional Magistrate thought that it was not necessary to examine so large a number at once and suggested to the complainant that he should submit the names of those witnesses who saw the accused actually removing the timber. This the complainant declined to do and finally, on the 27th July, which was the date fixed for hearing, he requested that proceedings should be stayed in order that he might move the High Court under section 526 of the Criminal Procedure Code for a transfer of the case. The proceedings were thereupon stayed and on the 12th August the petition out of which the present case arises was made to this Court.

In the body of this petition a number of allegations have been made against Mr. Luce, the District Magistrate. It is alleged that he sent for the officer who had recorded the first information and reprimanded him in the following words:—

“This is really a case against me. Would you venture to draw up a first information against me? You ought to have informed me beforehand. You did this in haste. I know Rai Sahab is an innocent man. This case is false”.

It is suggested that as the Rai Sahab, namely, the accused Shyama Charan Ghosh, is a favourite of the District Magistrate's and also his subordinate, being a manager of the Court of Wards, the District Magistrate is

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particularly interested in securing his discharge.

It is next suggested that the Deputy Magistrate being, in his executive capacity, subordinate to the District Magistrate, will be so influenced by the attitude of the District Magistrate that he will not do justice in the case.

The District Magistrate in his letter of reply has denied the allegations made in that part of the petition which sets out the grounds for the transfer of the case.

With regard to the allegations made in the body of the petition, he says that he has not considered it necessary to submit separate denials, but he is ready to make a reply to them if called upon by the Court to do so.

He has also forwarded to us a reply by the trying Magistrate and we have to consider, first of all, whether there is any substance in the main ground, namely, that the District Magistrate's conduct raises a reasonable apprehension that the trying Magistrate will not do his duty fairly and impartially.

In my opinion, there is no foundation whatsoever for any apprehension of this sort. The District Magistrate, as the head of the Police of the District, is competent to advise the Police in the performance of their duties, and in this case this is all that he appears to have done.

The learned Assistant Government Advocate denies that the District Magistrate used the particular words which he is alleged to have used, while Mr. Yunus demands that the denial should be on affidavit. If it had been necessary to come to a finding on this point I should have said that the petitioner's allegation had not been established, but assuming that the allegation is true, the question is, what effect, if any, the words will have on the trying Magistrate?

In my opinion, the mere fact that the trying Magistrate is in his executive capacity subordinate to the District Magistrate ought not to debar him from trying a case even though the District Magistrate may have taken a strong view with regard to the merits of that case. It has not been shown that the trying Magistrate is even aware of the District Magistrate's views, but even if he is I cannot agree that it is reasonable to fear that he will permit himself to be influenced by them in the discharge of his judicial duties. The Legislature having chosen to combine

executive and judicial functions in certain officers, we are bound, until the contrary is shown, to assume that the duties imposed will be rightly performed.

But it is contended that the trying Magistrate has already shown bias against the petitioner, *firstly*, in not recording the complaint in a sufficiently full manner; and, *secondly*, in not recording orders upon the various petitions filed before him either promptly or at all. Now, with regard to the first of these grounds, it seems to me that the Magistrate has recorded the substance of the complaint and that, if anything has been omitted, it will be easy for the complainant to make a supplementary statement during the enquiry which the Magistrate has decided to make.

With regard to the second ground, I do not think there is much substance in it, and I am quite satisfied that the Deputy Magistrate is in no way prejudiced or under the control of the District Magistrate.

The result, is that this application for transfer will be dismissed and the case will be sent back to the file of the Sub-Divisional Magistrate with a direction that he will proceed to hold the enquiry which he has decided to hold upon the petitioner's complying with the directions given by him.

BUCKNILL, J.—I agree.

*Application dismissed;  
Case sent back.*

## LAHORE HIGH COURT.

CRIMINAL REVISION No. 1142 OF 1920.

January 7, 1921.

Present:—Mr. Justice Wilberforce.

EMPEROR—PETITIONER

*versus*

BUDHA—ACCUSED—RESPONDENT.

*Punjab Excise Act (I of 1914), s. 51 (1)—Possession of illicit liquor—Sentence, deterrent, necessary.*

In convictions for manufacturing liquor contrary to law and being in possession of it, deterrent sentences are absolutely necessary. [p. 651, col. 1.]

1142 reported by Mr. Sessions Judge, Sialkot, with his No. 13-J of 10th August 1920.



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**FACTS.**—The facts of the case are contained in the following grounds for revision:—

**GROUND.**—This is one of seven cases from village Dipoke, in Tahsil Zafarwal of this district, (i. e., Sialkot) in which the accused were found in possession of *lahn*, or illicit liquor, when the raid was made on the village by the Revenue Assistant with the help of Police Officers on 3rd April 1920; and the fact that a large quantity of liquor was found, shows that extensive distillation was being carried on, and a deterrent sentence is, therefore, absolutely necessary.

There can be no doubt whatever as to the guilt of the accused, as the raid was carried out by a Magistrate and other officers of position.

The present Excise Act was passed evidently because the old law was not sufficiently deterrent; and, for the reasons given in *Emperor v. Sujan Singh* (1), a much severer sentence is called for.

Government has been put to heavy expense over these cases, including the rewards which are always granted, and the fines which have been imposed are not likely even to cover that expense.

The accused in this case was found in possession of 14 *seers* and 8 *chitaks* of *lahn*.

Sardar Bahadur Sardar Mehtab Singh,  
Public Prosecutor, for the Petitioner.

Lala Bishan Nath, for the Respondent.

**ORDER.**—The Sessions Judge of Sialkot has referred seven cases of conviction, under section 61 of the Excise Act, for the possession of a large amount of illicitly distilled liquor, owing to the inadequacy of the sentences awarded. In each of these cases the accused persons were sentenced to fines varying between Rs. 30 and Rs. 65. The Sessions Judge has referred to *Emperor v. Sujan Singh* (1) in which Sir Donald Johnstone held that in convictions for manufacturing liquor contrary to law and being in possession of it, deterrent sentences are absolutely necessary, and that this was also the intention of the Legislature when passing the new Excise Act. I agree with the Sessions Judge that the sentences awarded were ridiculously inadequate, and should enhance the sentences and award substantial

periods of imprisonment if the convictions had not taken place some seven months ago. In these circumstances, I do not think it necessary to award any period of imprisonment, but enhance the fine in each case to Rs. 200, or in default six months' rigorous imprisonment in all seven cases except that of Sundar and Faqir, two brothers, who were found jointly in possession. In their case I enhance the fine to Rs. 100 against each of the convicts, or in default three months' rigorous imprisonment.

*Fine enhanced.*

### PATNA HIGH COURT.

CRIMINAL REVISION No. 573 OF 1920.

January 7, 1921.

Present:—Mr. Justice Das and  
Mr. Justice Adami.

RAMESHWAR SINGH—PETITIONER

*versus*

EMPEROR—OPPOSITE-PARTY.

*Criminal Procedure Code (Act V of 1898), s. 342—  
Accused, examination of, before evidence for prosecution  
completed, effect of.*

The examination of an accused person before all the witnesses for the prosecution have been examined is illegal, as it contravenes the provisions of section 342 of the Criminal Procedure Code, and the illegality is sufficient to vitiate the trial. [p. 660, col. 1.]

Criminal revision against the order, dated the 2nd October 1920, of the Sessions Judge, Darbhanga, dismissing the appeal of the accused against his conviction and sentence by the Sub-Divisional Magistrate, Darbhanga, dated the 16th September 1920.

Mr. J. N. Maistro, for the Petitioner.

The Assistant Government Advocate, for the Crown.

**JUDGMENT.**—This application, in our view, is entitled to succeed on one point, namely, that the Trial Court has contravened the provisions of section 342 of the Criminal Procedure Code.

It appears that on the 28th July 1920, the complainant and two witnesses on behalf of the complainant were examined in chief. Charge was framed against the accused on that date and the accused was examined

(1) 35 Ind. Cas. 486; 19 P. R. 1916 Cr.; 41 P. W. R. 1916 Cr.; 144 P. L. R. 1916; 17 Cr. L. J. 310.

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under the provision of section 342 on the same day. On the 2nd August the complainant and his witnesses were cross-examined, and on the 13th September the Medical Officer was examined on behalf of the prosecution. It was urged before us, in the first place, that the Trial Court should have examined the accused not only after the examination-in-chief of the complainant and his two witnesses but after their cross-examination and re-examination; and, in any case, the Court should not have put any questions to the accused until all the witnesses, including the Medical Officer, had been examined in the case. It is, in our view, unnecessary to deal with the first question which is of some doubt and difficulty, but in view of the decision in the case of *Raghu Bhumij v. Emperor* (1), the conviction is liable to be set aside in view of the fact that the Trial Court put questions to the accused persons before the Doctor was examined. It was urged on behalf of the opposite party that the whole object of putting questions to the accused person is to enable him to explain any circumstances appearing in the evidence against him, and the Trial Court substantially performed its duty in putting questions to the accused persons after all the material witnesses for the prosecution had been examined. It was further urged that the medical evidence is purely formal evidence and as there is no circumstance in that evidence against the accused person, the Court was within its rights not to wait for that evidence. We do not think that this argument is admissible in view of the decision to which we have already referred. Apart from that, we cannot say, as a general rule, that medical evidence is always formal evidence and where the Legislature says definitely that the Court shall put questions to the accused person generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence, it is not an admissible argument that the Court may do so before all the prosecution witnesses have been examined. We would, therefore, set aside the conviction of the petitioner and direct that he be re-tried according to law.

*Order set aside.*

(1) 58 Ind. Cas. 49; 5 P. L. J. 460; 1 P. L. T. 241; 21 Cr. L. J. 705.

## LAHORE HIGH COURT.

CRIMINAL APPEAL No. 744 OF 1920.

JANUARY 6, 1921.

Present:—Sir Shadi Lal, K.C., Chief Justice,  
and Mr. Justice Wilberforce.

CHUNI LAL AND ANOTHER—APPELLANTS

*versus*

EMPEROR—RESPONDENT.

*Confession, when can be used against co-accused.*

The test as to whether the confession of an accused person can be used as against his co-accused is, whether the person making such confession could have been convicted on that confession of the crime with which he and his co-accused were charged. [p. 66, col. 2.]

Appeal from the order of the Sessions Judge, Jhelum, dated the 16th October 1920.

The Hon'ble Pandit Sheo Narain, R. B., for the Appellants.

Lala Jai Lal, R. B., Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—The two appellants in this case, Tara Chand and Chuni Lal, have been convicted of the murder of their sister, *Musammât Rakho*, on or about the 1st of May last, and have been sentenced to death subject to the confirmation of this Court. The Assessors were unanimous in finding them guilty of the murder. We have heard their appeal argued by Mr. Sheo Narain and the sentences of death are before us for confirmation. The facts as given for the prosecution briefly are that Tara Chand, who is a *Patwari* of Pindi Kalu, was living there with his three sisters, of whom *Musammât Rakho*, aged 13, was the eldest. His brother, Chuni Lal, who is an apprentice *Patwari*, used to live with him from time to time. The brothers had heard rumours regarding the character of their sister, and it is stated that they were also unable to afford the necessary money for effecting her marriage. They, therefore, decided to do away with her. Early in the morning they persuaded her to come out with them on the pretence that they were going to their own village, and when they had reached a well about a mile from their village, they made her dismount from her pony and Tara Chand proceeded to kill her with a *tola*. After doing so, her head was severed from the body and the latter was thrown into the well. The head was taken

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to a sand-hill about a mile away and buried there. The hatchet with which the murder was committed was thrown into a canal. There was no trace of the murder till the 10th of May when the body was found in the well and a report was made to the Police, but no clue was forthcoming. On the 20th of May Sultan Khan, *Lambardar*, informed the Police that he had heard that Tara Chand and others had killed *Mu-am-nat* Rakho. An investigation then commenced and Tara Chand took the Police first to the spot where the skull was buried, then to the canal where the *toki* had been thrown and, finally, he showed them some blood-stained earth near the well in which the corpse had been found. He first appeared willing to make a confession but changed his mind when brought up before a Magistrate.

His brother, Chuni Lal, was arrested on the 26th of May and made a confession before a Magistrate on the 28th. In this confession he stated the facts as described above. The head and the body were not capable of identification.

We have first to consider the confession of Chuni Lal. In this he stated the annoyance to himself and his brother at the immorality of their sister. He stated that Tara Chand proposed to do away with her, that he agreed, that they took her out on the early morning of the 1st of May on the pretext that they were going to their own village, that, when they had reached the well, Tara Chand killed her with a hatchet, and that they then both proceeded to conceal the body and the head. This confession was retracted before the Committing Magistrate and the Sessions Judge, and Mr. Shao Narain urges that, being a retracted confession, it should not be considered as against either of the appellants. He next urges that it cannot be taken in evidence against Tara Chand on the ground that Chuni Lal did not inculcate himself in the crime equally with his brother. Neither of these arguments appears to us to have any force. It is true that in several judgments it has been held that it is unsafe to base a conviction merely upon a retracted confession, but this proposition does not apply to the present case, as there are other strong circumstantial pieces of evidence inculcating both the appellants. As for the contention that the confession cannot be

used as against Tara Chand under the provisions of section 30 of the Evidence Act, we again do not agree with the learned Counsel. The test in such cases is, whether the person making such confession could have been convicted on that confession of the crime with which he and his co-accused were charged. In this case Chuni Lal clearly admitted a previous conspiracy to murder his sister; he also clearly admitted that on the day of the murder she was taken out under a false pretext by himself and his brother and finally he confessed that he was present while his brother actually killed the girl. As Mr. Jai Lal for the Crown points out, it was not necessary for both the brothers to commit the fatal assault, and, moreover, they appear to have had only one hatchet between them. We hold, therefore, that the confession of Chuni Lal can be taken in evidence against Tara Chand.

There is good circumstantial evidence which leaves no doubt as to the truth of Chuni Lal's confession. In the first place, there are two witnesses, Diwan Chand and Ladha Mal, who state that they saw the two brothers taking out the girl on or about the 1st of May after which she was not seen alive. There is next good evidence that Tara Chand when questioned about the disappearance of his sister gave a false account, namely, that she had gone off to her own village and died there. Moreover, neither of the brothers took any steps regarding the disappearance of their sister. Next, there is good evidence of the discovery of the skull, the hatchet and the blood-stained earth at the instance of Tara Chand. This evidence by itself is of great weight as against Tara Chand as, knowing the whereabouts of the skull, etc., he had no motive whatever, as might be the case with an ordinary stranger, to conceal his knowledge. It is impossible also to understand how he could have obtained his knowledge except by participating in the crime.

Mr. Shao Narain addressed other arguments to us regarding the prosecution case. In the first place, he pointed out that it was admitted that the body and skull had not been identified as of the murdered girl. This is correct, and was due to the decomposition which had set in. The point, however, is of small importance in the present case in the presence of the confession of Chuni



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Lal which we hold to be a true one and of the other evidence in the case. Regarding this confession, Mr. Sheo Narain brought it to our notice that Tara Chand also was brought before a Magistrate to confess but that it being explained to him that his confession would be used against him he withdrew. Counsel urges that if Chuni Lal had also been made to understand the result of his confession, he would also have refused to make a statement. It is clear, however, from the evidence of Sheikh Ali Muhammad, Magistrate, that all proper precautions were taken, that Chuni Lal was given a period of 15 or 20 minutes to think over his action after the departure of the Police and that he made his statement voluntarily.

We consider that there cannot be the slightest doubt that the two appellants conspired together to murder their sister and did so as has been found by the Sessions Judge. We, therefore, confirm their convictions for murder, and, being unable to find any extenuating circumstance in the case of Tara Chand, we confirm the sentence of death. In the case of Chuni Lal, however, we must take into consideration the fact that he is a youth and was probably led away by his elder brother, and in his case we alter the sentence to one of transportation for life.

Sentence altered.

PATNA HIGH COURT.  
CRIMINAL MISCELLANEOUS CASE No. 66  
OF 1920.

September 14, 1920.

Present:—Mr. Justice Jwala Prasad.  
SHIVADHIN SINGH—PETITIONER  
versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), ss. 284, 526*  
—Application for transfer—Error of judgment, whether  
ground for directing transfer—Assessors, choosing of—  
Objection, whether can be taken.

More errors of judgment, as,—refusing to summon a prosecution witness for cross-examination and insisting on his being summoned as a witness for the defence, or disallowing objections as to the fitness of a person to serve as an assessor, or per-

mitting the prosecution to examine a witness in chief on the substantive case of the prosecution after the defence has disclosed its case in the cross-examination of the witness,—are insufficient, in the absence of prejudice in the Judge, to direct a transfer of the case for trial by some other Court; in such circumstances as the foregoing, however, the accused is entitled to a trial *de novo*. [p. 665, col. 2.]

Section 284 of the Criminal Procedure Code empowers a Sessions Judge to choose such assessors as he thinks fit from the persons summoned to act as such and there is no express provision for objecting to the selection of an assessor. But there is no reason why an objection of presumed or actual partiality should not be allowed, particularly when it is urged at the time of the selection of the assessor. [p. 665, cols. 1 & 2]

Application for the transfer of a Sessions case pending in the Court of the Sessions Judge, Monghyr.

FACTS appear from the judgment.

Mr. S. N. Sahay (with him Babu J. N. Maitra), for the Petitioner.—The assessors chosen are both tenants of the Goenka Estate, whose Tahsildar was killed, and, therefore, the Court is not impartial. The opinion of the assessors is entitled to great weight and in case of conviction it will be difficult to induce the superior Court to take a different view—*see Queen v. Ram Dutt Ohowdhry* (1).

The prosecution tendered P. W. Bansilal for cross-examination and after he was cross-examined by the defence the learned Judge allowed the Public Prosecutor to examine this witness-in-chief. This is illegal and has seriously prejudiced the defence.

Mr. Manohar Lall (Assistant Government Advocate), for the Crown, reads section 284, Criminal Procedure Code. The assessors have to be chosen as the Judge thinks fit. But here the Judge considered the objection of the accused as to the partiality of the assessors and overruled them. The High Court cannot interfere with that decision. Compare section 279—even a decision by a Judge as to the objection to a Juror is final, in a case where the verdict of the Jury is binding on the Judge, *a fortiori* in trial by the aid of assessors, where their opinion is not binding on the Judge. The assessors chosen are respectable men and their being tenants of small areas of land in a large estate should be no disqualification. They must be presumed to give honest opinions.

(1) 23 W. R. 35 Cr.

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As to the objection to the examination-in-chief of witness Bansilal, reads section 138, Indian Evidence Act. The Judge can allow any question to be put in re examination, which is practically an examination-in-chief. The accused have not been prejudiced. They can cross-examine the witness if any new matter is introduced.

In any event, these are mere errors of procedure and cannot justify a transfer.

Mr. S. N. Sahay in reply.—I admit section 234 says that the assessors shall be chosen as the Judge thinks fit, but this section does not control section 526, Criminal Procedure Code. If the High Court is satisfied that the assessors are not impartial, then I am entitled to a transfer. The accused can have no confidence in such a tribunal.

JUDGMENT.—This is an application for transfer of a Sessions Trial pending in the Court of the Sessions Judge of Monghyr.

The petitioner, Shivadhin Singh, along with others was placed on his trial before the Sessions Judge of Monghyr for having committed riot in the course of which one Rajdhar Lal, Tahsildar of the Goenka Estate, was killed. There was, therefore, a charge also under section 304, Indian Penal Code.

The trial commenced on 27th August. The Civil Surgeon, as Superintendent of the Monghyr Jail, reported that one of the accused, Basha Tiar, was ill and was unable to attend the Court. The remaining accused applied for an adjournment of the case so that there might not be a separate trial and consequent double expense and harassment to them. This petition was rejected and the trial proceeded.

Six assessors were summoned for the day: (1) Baij Nath Mahto (2) Jamna Mahto, (3) Krishan Dayal Bhagat, (4) Mahadeo Choudhury, (5) Professor P. G. Dutt and (6) Ram Prasad Singh. Nos. 1 and 6 did not appear. Professor P. G. Dutt did not understand Hindi. Out of the remaining three assessors, the learned Sessions Judge selected Jamna Mahto and Krishna Dayal Bhagat. The accused objected to the selection of Jamna Mahto as an assessor on the ground that he was on intimate terms with Kedar Nath Goenka, proprietor of the

Goenka Estate, and master of the man who was killed, and that another assessor out of those present be selected. The learned Sessions Judge asked the assessor about this. He denied being intimate with Kedar Nath, but admitted that he was a tenant of the Estate. The learned Sessions Judge overruled the objection.

The petitioner then applied for postponement of the case to enable him to move the High Court for a transfer. This petition also was rejected with the observation "Shivadhin Singh has plenty of time to move the High Court before I reach the stage (if I ever reach it) of calling upon him for his defence."

The trial proceeded on. In the course of the trial the Public Prosecutor tendered a prosecution witness, Bansi Lal, for cross-examination. The witness was cross-examined on behalf of the accused. Instead of confining himself to questions arising out of the cross examination, the Public Prosecutor was permitted by the learned Sessions Judge to examine the witness *de novo* as a principal witness on behalf of the prosecution with leave to further cross-examination by the accused.

On the 4th of September the medical witness, Charu Chandra Sur, failed to attend though summoned by the Sessions Court. His evidence was admitted under section 509 of the Code of Criminal Procedure in spite of the objection by the accused that no opportunity was given to them to cross-examine the witness. The Court directed that the witness be summoned for the defence on the 13th September, but the accused refused to have him as their own witness.

The prosecution evidence closed on the 4th of September and the accused were called upon to enter on their defence.

The petitioner filed another petition impugning the impartiality of the second assessor Krishna Dayal Bhagat upon the ground that he was also a tenant of the Goenka Estate. It was further stated that both the assessors were putting up in the Dharamsala of Kedar Nath Goenka and were having communication with the opposite party.

The petitioner was granted time by the learned Sessions Judge to move this Court for a transfer of the case. The application

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was prepared on the 3rd September and was filed on the 6th. The allegations made in the petition of the 11th September before the learned Sessions Judge were subsequently set forth in a supplementary petition filed on the 11th September. On the aforesaid allegations the petitioner asks the Court to transfer the case from the file of the learned Sessions Judge.

The learned Sessions Judge has submitted a report upon the allegations made in the first petition for the transfer. No report could be had from him on the supplementary petition, as that was filed on the 11th September after the report of the Sessions Judge was transmitted. The learned Assistant Government Advocate was given a copy of the petition of the 11th September.

The allegations set forth in the first petition are almost admitted, except that the learned Sessions Judge could not verify the allegation as to the Assessor Krishna Dayal Bhagat being a tenant of the Guenka Estate, inasmuch as that witness was not present in Court having been summoned for the 13th of September, the date fixed in the case.

The principal allegations set forth in the second petition of the 11th September are borne out by the order-sheet and, therefore, do not require any further investigation.

The grounds urged for the transfer on behalf of the petitioner may be summarised as follows:—

(1) That the assessors are not impartial and are interested in the result of the case in favour of the prosecution, they being tenants of the Estate whose Tahsildar was killed. The constitution of the Court was, therefore, illegal and irregular.

(2) That the learned Sessions Judge committed grave irregularity in allowing the prosecution witness, Bansi Lal, to be examined-in-chief by the Public Prosecutor after he was cross-examined on behalf of the accused on being tendered by the Public Prosecutor. This has prejudiced the accused in the defence.

(3) That the learned Sessions Judge has illegally admitted the evidence of the medical witness, Charu Chandra Sar, under section 509 of the Code of Criminal Procedure without giving an opportunity to the accused to cross-examine him.

The consideration of the aforesaid grounds becomes immaterial in view of the fact

stated by the learned Sessions Judge in his letter of the 9th September 1920 that the defence have given a list of 50 witnesses and that it would not be possible for the learned Sessions Judge to finish the trial as he is about to go on leave on October 1st and the attempt of the accused to secure *de novo* trial will doubtless succeed. This apprehension was also felt by the learned Sessions Judge on the 27th August when he commenced the trial, for he noted in the order-sheet of that date when Shivadhin applied for time to move this Court for a transfer, that Shivadhin had ample time to move the High Court before he would ever reach the stage of calling upon him for his defence. This is also obvious from the third objection of the accused referred to above which must prevail for the Doctor will have to be cross examined by the accused. No doubt, section 509 of the Code permits the deposition of a medical witness taken in the Commitment Court to be given in evidence at the Sessions trial, but that is subject to the condition that the accused should have been given full opportunity to cross-examine the witness and the Court may, if it thinks fit, summon and examine such a witness as to the subject-matter of his deposition. In the present case the accused reserved the cross-examination of the witness in the Commitment Court which apparently was allowed and the witness was summoned by the Sessions Court to give evidence on behalf of the prosecution. Although, therefore, the accused had an opportunity of cross-examining the witness, they reserved it with the leave of the Magistrate for the Sessions Court. The Sessions Court also apparently confirmed this, inasmuch as it summoned the witness which would not have taken place if his evidence in the Commitment Court was to be accepted without any opportunity of cross-examination being given to the accused. Though, therefore, the evidence already recorded might have been rightly admitted under section 509, the accused had a right to cross-examine the witness and the Court was apparently in error in refusing to summon the witness when he did not attend on the 4th September and insisted upon his being called as a defence witness.

As to the second objection, namely, that Bansi Lal should have been allowed to be examined-in-chief by the Public Prosecutor,



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a reference may be made to section 133 of the Evidence Act which lays down the order in which the witness should be cross-examined and re-examined. After the cross-examination of the witness on behalf of the accused the re-examination would ordinarily be directed to the explanation of the matter referred to in the cross-examination. No doubt, a new matter may by the permission of the Court be introduced, with leave to the other side to cross-examine the witness upon that matter. But this cannot possibly entitle the prosecution to examine in-chief on the substantive case of the prosecution after the defence has disclosed its case in the cross-examination of the witness. The procedure adopted by the learned Sessions Judge was, therefore, irregular and prejudicial to the accused.

As to the first ground referred to above, namely, that the assessors were not properly selected, in spite of their having been challenged by the accused then and there, I think there is much substance in it. Great weight is attached to the opinion of the assessors and the accused is entitled to an impartial and unprejudiced opinion. In the case of *Queen v. Ram Dutt Chowdhry* (1) Jackson, J., in agreement with the opinion of Woodroffe, J., held that the assessors should be selected judicially and with great caution. The opinion of the assessors in that case was discarded upon that ground. The learned Judge himself is conscious of this principle when he says that he is always ready to listen to any reasonable objection to the selection of an assessor. The assessors in the particular case may not be intimate personally with the present proprietor Kedar Nath Goenka, it is admitted that the manager of the Estate, who is a relation of the proprietor, is naturally taking keen interest, as stated by the Judge, on behalf of the prosecution inasmuch as the Tahsildar of that Estate was killed in the riot. The assessors are the admitted tenants of the estate. This in itself is a sufficient ground for the accused to mistrust the impartiality of the assessors and the relationship of landlord and tenant, or of master and servant creates an incapacity in a person to sit as a Judge or an assessor in a case. No doubt, section 284 empowers the Judge to choose such assessors as he thinks fit from the persons summoned to act as such, and there is no express provision

for objecting to the selection of an assessor as is in the case of jurors under section 218 of the Code of Criminal Procedure. But there is no reason why an objection of presumed or actual partiality should not be allowed, particularly when it is urged at the time of the selection of the assessor. I am fully alive to the distinction made in the Code between the selection of the assessors and the jurors which is based upon the principle that the opinion of the jurors is final and binding upon the Judge, whereas that of the assessors is not. Yet, as observed above, the opinion of the assessors is of great value both to the Judge who tries the case and to the superior Courts. It is, therefore, necessary as an elementary principle that they should be above suspicion. The reason stated by the learned Sessions Judge why the third assessor, even if selected, would have been incapable of acting as such would apply with equal, if not greater, force to the other assessors selected by him. The learned Sessions Judge reports that he has now discovered that the third assessor, Mahadeo Chondhury, was a caste-man of the accused and hence it would have been a valid objection to his being appointed as an assessor. This connection is disputed by the defence. Accepting it to be correct, if it was a valid objection on behalf of the prosecution to Mahadeo Chondhury acting as an assessor, the fact that the other assessors were tenants of the Goenka Estate was still more objectionable from the accused's point of view.

There is, however, no prejudice in the mind of the learned Sessions Judge himself, who appears to have been compelled by the circumstances to select the assessors who were present on the date; nor is there any prejudice in him shown from some of the irregularities noticed above in the conduct of the trial. They were mere errors of judgment. It further appears that the learned Sessions Judge permitted the accused to cross-examine Bansi Lal after the examination by the Public Prosecutor and that he directed the medical witness to be summoned for the defence. I do not, therefore, think that a sufficient case has been made for taking the case out of the hands of the learned Sessions Judge and to transfer it to some other district. But I do think that the accused are entitled to be tried *de novo*

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after the selection of independent assessors, and, if the learned Sessions Judge will not be able to complete the trial, as it is apprehended on account of his going on leave on October 1st, the case will be tried *de novo* by his successor.

*Order accordingly.*

## LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 621 OF 1920.

December 23, 1920.

*Present:*—Mr. Justice Shadi Lal,

Chief Justice, and Mr. Justice Broadway.

KHANNOON RAM—CONVICT—PETITIONER

*versus*

EMPEROR—RESPONDENT.

*Penal Code (Act XLV of 1860), s. 451—House  
trespass by night with intent to commit adultery—  
Consent or connivance of husband—Presumption.*

A man who enters the house of another at night with intent to commit adultery with his wife is guilty of an offence under section 451 of the Penal Code, and if, in such a case, it is shown that the husband was at the time of the occurrence absent from the house in the legitimate pursuit of his occupation, it may safely be presumed that he neither consented to nor connived at any adultery or immorality on the part of his wife.

Petition, under section 439, Criminal Procedure Code, for revision of the order of the Sessions Judge, Multan, dated the 20th March 1920, affirming that of the Magistrate, First Class, Alipur, dated the 23rd February 1920.

Lala Har Gopal, for the Petitioner.

Mr. H. A. Herbert, Government Advocate,  
for the Respondent.

**JUDGMENT.**—Khan Noon Ram was tried on a charge under section 457, Indian Penal Code, it being alleged that, on the night between the 31st January 1920 and 1st February 1920, he had broken into the house of Ghulam Haider at Dadarwala and had stolen therefrom certain ornaments. Khan Noon Ram pleaded that he had gone to the house of Ghulam Haider on the night in question at the invitation of Musammât Phulo, the wife of the said Ghulam Haider, in order to have sexual intercourse with her. The Trial Court found that Khan Noon

Ram had gone to the house in question to visit Musammât Phulo, and held that, by so doing, he had committed an offence under section 451, Indian Penal Code, and convicted him accordingly. Khan Noon Ram then preferred an appeal to the Sessions Judge who, however, agreed with the Trial Court and maintained the conviction. Khan Noon Ram then preferred this petition under section 439 of the Criminal Procedure Code to this Court through Mr. Har Gopal.

The learned Vakil relied on *Brij Basi v. Queen-Empress* (1), and contended that before a conviction under section 451, Indian Penal Code, could be had, it was essential to prove that the husband of the woman had neither consented to nor connived at the adultery, the commission of which was the object of the visit.

It appears that the husband of the woman, Ghulam Haider, is a Havaladar Major, and when this occurrence took place was away on duty at the Dhond Cantonment. In these circumstances, we do not think it necessary to express any opinion as to the correctness or otherwise of the decision in *Brij Basi v. Queen-Empress* (1). In our opinion, in a case where it has been shown that the husband was absent in the legitimate pursuit of his occupation it may safely be presumed that such husband neither consented to nor connived at any adultery or immorality on the part of his wife. It seems obvious that he would be wholly ignorant of what was going on in his house and that, therefore, he could neither consent to nor connive at the same. We, therefore, see no reason to interfere with the conviction. With regard to the sentence, in the circumstances we consider that the period already undergone by the petitioner will suffice, and we accordingly reduce it to that period. Khan Noon Ram will be discharged from his bail.

*Order accordingly.*

(1) 19 A. 74; A. W. N. (1896) 178; 9 Ind. Dec. (N. S.) 49.

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## PATNA HIGH COURT.

CRIMINAL APPEAL No. 161 OF 1920.

August 25, 1920.

Present:—Mr. Justice Jwala Prasad.

HARDEO SINGH AND OTHERS—ACCUSED  
—APPELLANTS

versus

EMPEROR—RESPONDENT.

*Penal Code (Act XLV of 1860), ss. 149, 436, charges under, facts necessary to substantiate.*

In order to substantiate a charge of arson under section 436, read with section 149, of the Penal Code, it is necessary to find that either from the inception or at any stage of the occurrence the accused were actuated by the common motive to set fire to a house, or that they knew that such an offence would be committed in prosecution of the common object. Their mere presence, unless they did something to aid and assist the principal culprit, would not make them guilty. [p. 668, col. 1.]

Criminal appeal against the order of the Additional Sessions Judge, Saran, dated the 19th July 1920, in a trial with the aid of two Assessors.

Messrs. G. C. Pal and Ram Prasad, for the Appellants.

The Assistant Government Advocate, for the Crown.

**JUDGMENT.**—The petitioner No. 1, Hardeo Singh, has been convicted by the Additional Sessions Judge of Saran under section 436, and the other petitioners under section 436, read with section 149, Indian Penal Code. Hardeo has been sentenced to 4 years rigorous imprisonment under section 436, and the rest to 4 years' rigorous imprisonment under section 436, read with section 149. No separate sentence has been passed under section 147. The origin of the occurrence is said to be an indecent behaviour of the accused, Banarasi Bherihar, in having out jokes with one *Musammât Deokalia*, and assaulted her while she was scraping grass in a field on the morning of the 28th February. She complained of it to her cousin, Alam Dhunia, P. W. No. 1, who went to Banarasi for remonstrating with him. He found Banarasi and his father, Lal Behari, and the other three accused, Hardeo Singh, Isri Singh and Bishun Dayal Singh. Alam remonstrated. The accused did not like the remonstrance and abused and assaulted Alam. Alam came away. The accused then are said to have

gone to the house of Alam in the afternoon and found *Musammât Khedia*, sister of Alam, at the door feeding the cattle. Now, comes the real part of the occurrence which is stated by *Musammât Khedia* in the following words:—

"On a Saturday about 4 months ago, or a little over, in the afternoon I was at my door feeding my cattle. At that time Hardeo Singh, Bishundeo Singh, Isri Singh, Lal Behari Bherihar and Banarasi Bherihar came to my door. They were all armed with *lathis*. Hardeo asked me where Alam had gone. I said he had gone to the factory. Then Hardeo exclaimed "*Betichode kothi gelaye, set fire to his house.*" Then, he took a handful of straw from my bundle lying there and lighted it at the Bhushar close by. He then set fire to the south west corner of of our *palani*. The other four persons stood near with *lathis* in hand.....*Khobari*, *Walait*, *Jokhan Singh*, *Bhulai Jolha* were present when Hardeo asked me where Alam was. Hardeo asked me that much and nothing further. I told him that he had gone to *kothi* and I did not tell them anything further. This was the only conversation that passed between me and the accused. The accused had no talk with any of the four persons named above (*Khobari* and others) The four persons did not stop Hardeo. I did not tell Hardeo to desist. The four persons thought that Hardeo might not actually put the fire. The four persons first threw dust to put out the fire. They went to fetch water vessels but the *palani* was burnt down in the meantime. Many people came after. The five accused had run away immediately after the fire was set. The fire had not extended, say, beyond 1 and 2 cubits or so when they ran away. I did not particularly notice on which side Hardeo was facing when he set the fire; nor which side the other four were facing just at that time. The four persons aforesaid raised a *hulla* that Hardeo and the rest ran away setting the house on fire."

The learned Sessions Judge has accepted it, and I have no hesitation in agreeing with him. It is supported by reliable evidence and is corroborated by circumstances. It is not necessary, therefore, for me to enter into a detailed discussion of the evidence in the



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case, nor will it be profitable to answer in detail the criticisms of Mr. Pal impugning the probability of the story. I am not impressed with Mr. Pal's criticisms and I would, therefore, take the story of the prosecution to be true in the main.

The case against Hardeo Singh, no doubt, is definite and has been clearly established. The conviction under section 436 is accordingly unassailable and must be upheld.

As regards the other four accused, the evidence set forth above by *Musammât Khedia* falls short of bringing the charge home to them. The learned Sessions Judge has convicted them of rioting with the common object of committing the offence of arson under section 147 and also the offence of arson itself under section 436, read with section 149, of the Indian Penal Code, they themselves not having taken any direct part in setting fire to the house of the complainant. In order to substantiate the charges against the accused, it was necessary to find that, either from the inception or at any stage of the occurrence, they were actuated by the common motive to set fire to the house of the complainant or that they knew that such an offence would be committed in prosecution of the common object.

The learned Sessions Judge has devoted his entire judgment to the discussion of the assault on Daokalia, the subsequent remonstrance by Alam and to his house having been set fire to. He has repelled all suggestions made by the defence impugning the veracity or probability of all the incidents connected with the arson. The result of his deliberation has no doubt led to the conclusion to quote his own words "this case.....bears the stamp of truth." But there is not a single word in his judgment touching the part taken by any of the four accused, except Hardeo, in the incendiarism. He has not said that they came with Hardeo with the intention of setting fire to the house of the complainant nor that they in any way encouraged, aided or abetted him in his nefarious act. He has not given any data for his finding which he has recorded at the conclusion of his judgment in the following words:—"I am convinced that all the five accused persons formed themselves in an unlawful assembly and determined to commit arson." What was the motive of the accused until Hardeo exclaimed to set fire to the

house, is enveloped in mystery. All that we know is that the five accused persons came to the house of Alam, and their motive, if it is to be gathered from the first overt act of theirs, was simply to enquire as to where Alam was, for that was the first question put to Khedia by Hardeo. We do not definitely know for what purpose that enquiry was. It might be to punish him further for his insolence and impertinence in going to them and remonstrating against the misbehaviour of Banarasi and that they were not contented with the assault already dealt to him in the earlier part of the day. It might be, as suggested by the learned Assistant Government Advocate, that, somehow or other, they got scent of Alam's having gone to the factory to complain to Mr. Wintle of the ill treatment he had received at the hands of these persons and hence they went there to ascertain the truth. We shall never be able to find out what their real object was. Be that as it may. Certainly, their object was not to set fire for we do not find them having gone there prepared to set fire to the house. No material for setting the house on fire, nor even a match-stick was with them as usually is expected when one goes to set fire to the house of another.

The prosecution case is that they came, enquired of Alam, and when they learnt that he had gone to the factory, Hardeo was exasperated, for he took it as an insolent act on the part of Alam having gone to complain to Mr. Wintle against him. In the excitement of the moment, he suddenly exclaimed "set fire to the house." Whatever might have been their motive in accompanying Hardeo to the house of Alam either to punish him further than what they had done in the morning or to enquire of what he was doing there is certainly nothing to show that they participated in the motive that suddenly seized Hardeo, namely, to set fire to the house. That it was a sudden impulse of Hardeo himself is clear from the fact that he had not with him the accessories to carry into execution his incendiary intention, which certainly would have been the case, if he had come with the deliberate motive of setting fire to the house of the complainant. There is nothing to show that the companions of Hardeo, the appellants before us, in any way encouraged Hardeo or took part in it.

The act of Hardeo was so sudden that all

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present were stunned. Khobari, Walait Jokhan Singh, Bhulai Jolha were interested in stopping the nefarious act of Hardeo, remained at a distance standing where they were, and they did not realize that Hardeo was really serious in his exclamation. Why should not the same benefit be given to the companions of Hardeo. They, like the four persons of the complainant's side named above, might not have taken Hardeo to be serious in his intention. They did not in any way, not even by gesture, or said to have approved the action of Hardeo. All that they did, was to run away after the house was set fire to. This was not an unnatural conduct on their part as they were the companions of Hardeo. Even if they did not disapprove of the act of Hardeo or prevented him from carrying it out, they could not be held guilty of abetting the offense of setting fire to the house. They cannot be guilty by their mere presence unless they did something to aid and assist Hardeo in his act. The weighty words of Glover, J., in the case of *Khaijah Noorul Hossein v. O. Fabre Tonnerre* (1) would seem to exactly fit in with the facts of this case. The words are: "From anything to the contrary to be found in the evidence, Nurul Hossein might have been unable to interfere from want of time as well as from want of inclination." These persons have not been charged with the abetment of the offence; nor, as shown above, they could be convicted of abetment even if they were charged with it; far less then they can be convicted of having a criminal intent and a common object of setting fire to the house of the complainant along with Hardeo. Hardeo was only responsible for the act committed by him in the heat of the moment. They could not possibly know that he would set fire to the house. The case against the others is not proved. The assessors were doubtful as to whether the case is true or false. Their verdict will, therefore, be construed in favour of the accused as one of "not guilty" and the learned Sessions Judge ought to have given the benefit of that verdict to the accused, other than Hardeo. Disagreeing, therefore, with the view taken by the learned Sessions Judge, I set aside the convictions under all the heads of charges of the aforesaid four

persons, Isri Singh, Bisundep Singh, Lal Behari and Banarasi Bherihar. They will be acquitted and set at large.

The conviction and sentence of Hardeo are affirmed.

*Conviction of 4 accused set aside:  
Conviction of one affirmed.*

## LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 1397  
OF 1920.

January 14, 1921.

Present:—Mr. Justice Abdul Raouf.

HARNAM DAS *alias* HARNAM  
SINGH—PETITIONER

*versus*

EMPEORR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 110,  
proceedings under, when to be taken*

Proceedings under section 110 of the Criminal Procedure Code, are not intended to enable the Police to get a person sent to jail where sufficient evidence is not forthcoming to prosecute him for any specific offence. Such proceedings should be taken with great care and caution [p. 67C, col. 2.]

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Amritsar, dated the 5th June 1920, affirming that of the Magistrate, First Class, Amritsar, dated the 31st March 1920.

Messrs. Ganpat Rai and Badri Nath Kapur, for the Petitioner.

Mr. Mackay, for the Government Advocate, for the Respondent.

JUDGMENT.—Harnam Singh, petitioner, has been convicted under section 110, Criminal Procedure Code, and has been ordered to give security to the extent of Rs. 3,000, with two sureties in the like sum.

The evidence against him consisted of ten persons. The witness No. 1 is a Sub-Inspector of Police; witness No. 3 is also a Sub-Inspector of Police; Bodh Raj is also a Sub-Inspector of Police; witness No. 2, Kashmira Singh, is a Professor of the Khalsa College, Amritsar; witness No. 5, Sher Singh, is a *Zaildar*; Sushet Singh is a *Lambardar*; Said Ahmad is a Sub-Inspector of Police; Ajamal Singh is a *Zaildar*; Jawala Singh is a *Lambardar*; and Mihan Singh is a *Sufedposh*. Now

(1) 24 W. R. 26 at p. 28 Cr.

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the witnesses Nos. 10, 9, 8 and 7 practically say nothing which may establish a case under section 110. They all speak to the incident of a theft of buffaloes at the Khalsa College and in connection with that incident they say that they had heard that the buffaloes had been taken to the petitioner, Harnam Singh. They profess no personal knowledge and can swear nothing specific against the petitioner. The several Sub-Inspectors also depose to the theft incident at the Khalsa College and state in connection with it that they also heard that Harnam Singh had had reputation of being the receiver of stolen property. Karm Ilahi and Bodh Raj, witnesses Nos. 3 and 4, certainly speak as to certain other matters in connection with which it was rumoured that the petitioner was suspected as Receiver of stolen property. Only one witness has deposed to a case in which some stolen horses were recovered back through Harnam Singh on payment of *bhunga*.

The evidence of Professor Kashmira Singh has been mostly relied upon by both the Courts below in convicting Harnam Singh under section 110. I have carefully examined the evidence of the Professor and all that he stated was that a number of buffaloes were stolen from the dairy of the Khalsa College and that the dairy-men told him that servants of Harnam Singh had stolen them. The Professor also stated that he had heard rumours about Harnam Singh being a receiver of stolen property. Questioned as to the source of his knowledge he found himself unable to give any definite information. He could not name the persons from whom such information had been received by him.

The prosecution mostly depended upon the evidence of the Police witnesses. Even they were not able to make out a satisfactory case under section 110, Criminal Procedure Code. It has not been shown that Harnam Singh was ever convicted of theft or even tried for such an offence. It is not shown that any stolen property was ever recovered from his house. Is it possible upon this evidence to hold that he is a habitual offender and receiver of stolen property? It may be said that the witnesses Nos. 5, 6, 8, 9 and 10 being *Zaildars* and *Lambardars* are respectable and independent witnesses but what have they deposed? Their evidence

practically comes to nothing. On the other hand, a large number of witnesses were examined for the defence, including *Lambardars* and *Sufedposhes*. They were equally respectable and men of position. There is no reason why their evidence should not be accepted as against the evidence of the prosecution witnesses. This was not a case in which the Magistrate should have passed orders under section 110. If there was any truth in the allegation that a theft of buffaloes in the Khalsa College had been committed by the servants of Harnam Singh or by Harnam Singh himself, why were not these people prosecuted for committing theft? Proceedings under section 110 are to be taken with great care and caution. They are not intended to enable the Police to get a person sent to Jail where it cannot find sufficient evidence to prosecute him for any specific offence.

For the reasons given above, I allow this petition for revision and set aside the order passed under section 110, Criminal Procedure Code, against the petitioner. The security-bond, if already executed by the petitioner, shall be cancelled.

*Order set aside.*

### MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 539 OF 1919.

CRIMINAL REVISION PETITION No. 458 OF 1919.

July 30, 1920.

*Present* :—Mr. Justice Odgers.

ATHIMOOLAM PILLAI AND OTHERS

ACCUSED—PETITIONERS

*versus*

PALANIANDI AMBALAM

—COMPLAINANT—RESPONDENT.

*Penal Code (Act XLV of 1860), s. 430—Mischief—Damming water channel and diverting water—Wrongful loss—Offence—Revision—New point, whether can be taken.*

Accused, without any sort of right, dammed up the water of a supply channel, and opened a diverting channel; and were convicted of an offence under section 430 of the Penal Code :

*Held*, that the act of the accused showed an intention to cause wrongful loss, and that they had been rightly convicted.



## NEPAL BAGDI v. EMPEROR.

A point not urged in the lower Court, and not taken in the grounds of an application for revision, cannot be raised at the hearing of the application.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional First Class Magistrate, Devacotta, in Criminal Appeal No. 14 of 1919, preferred against the judgment of the Court of the Special Second Class Magistrate, Ramnad, in Calendar Case No. 11 of 1919.

Dr. S. Swaminathan, for the Petitioners.

Mr. A. Narasimha Aiyar, for the Public Prosecutor, for the Crown.

Messrs. R. Sadagopachariar and V. K. Venkatarama Aiyar, for the Complainant.

ORDER.—This is a dispute between neighbouring villagers. There is a supply channel (A2 and A5) flowing from the Terbogi "Kanmoi" to the Konjani "Kanmoi". The ryots of the Sathamangalam "Kanmoi" and the accused in this case are charged with damming A2—A5 at place B in the plan and clearing or making a channel B—B1 and thereby diverting the water flowing in (A2—A5) and so guilty under section 430 Indian Penal Code.

Dr. Swaminathan, for the accused (appellants) urges that the channel, A2—A5 is not a supply channel, *secondly*, that this is a matter for the Civil Courts, and, *thirdly*, that the elements of the offence of mischief are not present here.

There is no doubt that A2—A5 is a supply channel, that is found by both Courts and is also established by Exhibit A whereby the Konjani villagers were to enjoy the water flowing along A2—A5. The Exhibit is dated 9th March 1914 and in it the channel is called *Ku'aikal* (supply channel). There is no substance in the suggestion that this is a spurious document. It, therefore, seems to me that the petition on the point of claim of right in the petitioners fails.

As to the point that this is a civil dispute, the point is not taken in the ground of revision to this Court and it should have been urged below. The case has been carried to two Criminal Courts, and the acts done by the accused do, in my opinion, amount to an offence under the Indian Penal Code. I am, therefore, unable to say at this stage that the case

is one for the Civil Court alone.

As to the legal point, I think the accused here must be taken to have intended wrongful loss, they not only dammed up the channel A2—A5 but opened a diverting channel. In *Ramakrishna Chetti v. Palaniyandi Kudambar* (1), a case of this sort, it was held that the intention is properly held to be such, i. e., wrongful when the accused takes it (the water) without any sort of right.

This is further supported by the case reported as *Queen-Empress v. Jagannath Bhikaji Bhave* (2).

I am, therefore, unable to find any ground for interference in the present case, and the criminal revision case must be dismissed.

M. C. P.

*Petition dismissed.*

- (1) 1 M. 262 (F. B.); 1 Weir 502; 1 Ind. Dec. (N. S.) 174.  
(2) 10 B. 183; 5 Ind. Dec. (N. S.) 507.

CALCUTTA HIGH COURT.  
CRIMINAL REVISION No. 114 OF 1920.  
July 28, 1920.

Present:—Mr. Justice Chatterjea and  
Mr. Justice Canning.

NEPAL BAGDI—ACCUSED  
*versus*

EMPEROR—OPPOSITE PARTY.  
Criminal Procedure Code (Act V of 1898), s. 262  
—Summary trial of warrant cases—Procedure.

In summary trials under Chapter XXII of the Code of Criminal Procedure, the procedure prescribed for warrant cases should be followed in warrant cases, and in such a case the accused is entitled to have process issued for compelling the attendance of the prosecution witnesses for cross-examination.

Criminal reference made by the Sessions Judge, Bardwan.

FACTS appear from the judgment.

Babu Birlhusan Dutt, for the Petitioner:—  
This is a reference under section 438 of the Criminal Procedure Code by the Sessions Judge of Bardwan. He has recommended the setting aside of the conviction of the

**MEHR SINGH v. EMPEROR.**

petitioners under sections 457, 380 of the Indian Penal Code. The petitioner was tried summarily on the said charges. The evidence for the prosecution was given but the petitioner did not immediately thereafter cross-examine the witnesses for the prosecution. My point is, the Magistrate has overlooked the provisions of section 262, Criminal Procedure Code. Under that section a Magistrate is bound in a summary trial, to follow the procedure laid down for warrant cases if the case under trial be a warrant case. I am entitled to cross-examine the prosecution witnesses when I have entered my defence. I applied for processes for attendance of the prosecution witnesses. But this was refused and I was convicted. I submit this a clear violation of the provisions of section 262, Criminal Procedure Code. A fresh trial should be held before a different Magistrate as I do not expect a fair trial from the same Magistrate.

No one appeared for the Crown.

**JUDGMENT.**—This is reference by the learned Sessions Judge of Bardwan recommending that the conviction of the accused under section 457 read with section 380, Indian Penal Code, and the sentence of rigorous imprisonment for three months passed upon him be set aside on the ground that he was not allowed to summon witnesses for the prosecution to cross-examine them.

It appears that the witnesses for the prosecution were not cross-examined before the petitioner was called upon to enter upon his defence; he was tried summarily. But in trials under Chapter XXII, the procedure prescribed for warrant cases shall be followed in warrant cases. This was a warrant case. The accused, therefore, was entitled to have process issued for compelling the attendance of witnesses for the prosecution for cross-examination and he applied accordingly to the trying Magistrate. The application was refused and the accused convicted and sentenced as stated above.

The conviction and sentence passed upon him are accordingly set aside and we direct that the case be re-tried by some Magistrate other than the Magistrate who tried him.

The accused will continue on the same bail as before.

*Conviction set aside.*

**LAHORE HIGH COURT.**

**CRIMINAL REVISION PETITION CASE No. 1161 OF 1920.**

January 17, 1921.

*Present:*—Mr. Justice Wilberforce.

**MEHR SINGH AND ANOTHER—CONVICTS—**  
**PETITIONERS—**

*versus*

**EMPEROR—RESPONDENT.**

*Punjab Excise Act (I of 1914), s 81 (1) a)—Possession of illicit liquor by two brothers living jointly—Offence.*

Where illicit liquor is found in a house which is occupied by two brothers, the presumption is that the elder brother was in possession of the liquor.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Gujranwala, dated the 13th July 1920, affirming that of the Magistrate, First Class, Sheikhupura, dated the 15th June 1920.

Sardar Kharak Singh, for the Petitioners.

**JUDGMENT.**—The petitioners in this case, who are own brothers, have been convicted of being in possession of illicitly manufactured liquor and have been sentenced each to one year's rigorous imprisonment. I admitted Mehr Singh to bail as I considered that the decision could not be upheld as against him. Briefly, all the facts proved against him are that two bottles of illicit liquor were found in a house occupied by himself and his elder brother and that he pointed out some broken pieces of a pitcher in the field of another person. The latter point is of no importance, and, as to the former, the possession was presumably that of his brother against whom there is other evidence that he had been concerned in the manufacture. I accept the petition of Mehr Singh and order his acquittal.

As for Mehr Singh, the evidence against him is clear and was not criticised before me. He is, however, only 26 years of age and this is his first offence. He has already undergone some seven months' imprisonment and I reduce his sentence to the amount already undergone.

*Sentence reduced.*

RAJA RAM V. EMPEROR.

ODDH JUDICIAL COMMISSIONER'S  
COURT.

CRIMINAL REVISION No. 89 OF 1920.

July 23, 1920.

Present:—Mr. Daniels, A. J. C.

RAJA RAM AND ANOTHER—ACCUSED—  
APPLICANTS

versus

EMPEROR—COMPLAINANT—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 110—  
Charge, substantive, failure of—Accused, whether  
liable to be bound over in security—Suspicion, whether  
justification for order to give security.*

Where a substantive charge is made against a person, and that charge breaks down, it is improper for the Court to make use of section 110 of the Criminal Procedure Code and bind him over in security. [p. 673, col. 1.]

The mere fact that a person is suspected of particular crimes is no justification for demanding security from him. Evidence that a person had been suspected and named in a large number of cases extending over a considerable interval may, however, be very useful corroboration of general evidence of bad reputation. [p. 673, col. 2.]

Conversely, in a doubtful case the fact that a person has never been suspected of any offence may weaken the general evidence of reputation which is given against him. [p. 673, col. 2.]

Criminal revision against the order of the District Magistrate, Hardoi, dated the 7th June 1920, confirming the order of the Honorary Magistrate, First Class, Bilgram dated the 20th May 1920.

Mr. Mohammad Yusuf Ali, for the Applicants.

The Government Pleader, for the Crown.

**JUDGMENT.**—This is an application for revision by two persons, Raja Ram and Jodha Singh, who have been bound over under section 110, Criminal Procedure Code, by the order of a Magistrate of the First Class. An appeal was preferred from this order under section 406 of the Criminal Procedure Code to the District Magistrate who upheld it. Under such circumstances this Court will not ordinarily interfere, but the present case involves an important question of principle. That principle is, that Courts must not make use of section 110, Criminal Procedure Code, in order to secure the conviction of persons against whom a substantive charge has been made, but has broken down. A dacoity occurred in the village of Mundia Khera in February last. In that dacoity the applicants were suspected of being concerned & fact, they were named in a confession made

by one of the accused, named Asharfi. They were arrested on that charge, but the Police, believing that the evidence against them was insufficient to secure a conviction, sent them up under section 110, Criminal Procedure Code, instead. It is admitted that, prior to the occurrence of that dacoity, the Police had nothing against them. They were not under surveillance; no history sheet had been prepared of either of them; they had never been named in any report of crime as persons likely to have been concerned.

It is sometimes said that evidence that persons had been suspected of particular offences is no evidence of bad livelihood in cases under section 110, Criminal Procedure Code. This is true in this sense that no one could be bound over under that section merely because he had been suspected of particular crimes. Evidence that a person had been suspected and named in a large number of cases extending over a considerable interval may, however, be very useful corroboration of general evidence of bad reputation. A person known or reputed to be a habitual thief is a person on whom suspicion is likely to fall when thefts are found to be occurring. Conversely, in a doubtful case the fact that a person has never been suspected of any offence may weaken the general evidence of reputation which is given against him.

This being the state of facts, it was most important to ascertain whether the alleged bad reputation of the accused had existed before they were mentioned in connection with the dacoity case. I have examined the whole of the prosecution evidence. It is quite clear from a reading of the depositions that the fact of the accused having been mentioned in that case bulked largely in the minds of the witnesses, and it was certainly in some cases largely responsible for the evidence which they gave. The fact has also influenced the minds of both the Magistrates who have dealt with the case. The learned District Magistrate, in summing up his reasons for upholding the case of Raja Ram, gives it the first place. He says:—

"There is, in my opinion, sufficient evidence on the record to warrant the order of the Honorary Magistrate demanding sureties in this case. The villagers of their own and neighbouring villages are evidently fully convinced that the gang among whom Raja



## SAJAN LALL V. EMPEROR.

Ram was convicted (there seems to be some misprint here) were actually concerned in the February dacoity at Mundia Khara and there is further evidence of previous bad character on the part of the appellant."

I have examined the evidence particularly with a view to ascertaining how far back this evidence of previous bad character goes. Not more than three or four of the witnesses (apart from the Police Officers) were questioned on the subject at all. Not more than one or two of them have said that they had heard anything against these accused before the dacoity case, and at least two of them distinctly say that they had never heard anything prior to that time. One of the Police Officers examined declared that he had known Jodha Singh's reputation for a long time, but the fact that he had never made any report about him, or suggested the preparation of a history-sheet, or known any case in which the accused was suspected or his house searched, entirely discredits his testimony. It is safe to say that, but for the accused having been named by Ashraf Lal in the dacoity case, these proceedings would never have been thought of.

I accept the application for revision and set aside the orders of the Court below. The accused, if in Jail, will be released. The security, if furnished, will be discharged.

*Application accepted.*

## PATNA HIGH COURT.

CRIMINAL REVISION No. 527 OF 1920.

December 17, 1920.

Present:—Justice Sir B. K. Mullick, Kt., and  
Mr. Justice Bucknill.

SAJAN LALL BISWAS—ACCUSED—  
PETITIONER

*versus*

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), s. 471—Forged document tendered to Police during investigation, whether amounts to "use" of forged document.*

Where a person during the course of a Police Investigation tenders a forged document to the Investigating Officer, and thereby causes that officer to do something which he would otherwise not

have done, he is guilty of having used a forged document within the meaning of section 471 of the Penal Code. [p 675, cols. 1 & 4.]

Criminal revision against the order of the Sessions Judge, Purneah, dated the 28th September 1920, dismissing the appeal of the accused against his conviction and sentence by the Magistrate, First Class, Araria, dated the 31st July 1920.

FACTS appear fully from the judgment of Mullick, J. and from 55 Ind. Cas. 288.

Babu Gour Chandra Pal and Mr. Hasan Imam, for the Petitioner, after arguing on facts submitted that there is no 'User' within the meaning of section 471, Indian Penal Code—relies upon *Asimuddi v. Emperor* (1).

Mr. Manohar Lal (Assistant Government Advocate), for the Crown, was not called upon.

## JUDGMENT.

MULLICK, J.—The facts upon which the petitioner has been convicted of an offence under section 471, Indian Penal Code, are as follows: Mr. P. O. Lall was the proprietor of an estate within which one Janardan Prasad held a *patni* tenure. He brought the *patni* to sale for arrears of rent and purchased it himself on 15th March 1915 delivery of possession being taken the following October. When he attempted to take possession of certain lands in Mouzah Mohania, which lies within the *patni*, he was resisted by the petitioner, Sajan Lall, who claimed that he had a *raiya* interest therein which he had obtained from the *patnidar*, Janardan Prasad. The Zemindar then informed the Police that the dispute was likely to cause a breach of the peace and asked that action should be taken with a view to restraining the opposite party.

The Police held an investigation, and, in the course of that investigation, the petitioner filed a *taslimnama* alleged to have been executed by the *patnidar*, Janardan Prasad, in his favour in the year 1912 giving him a *raiya* settlement for the term of one year. The Police Officer sent this document, together with his report, to the Sub-Divisional Magistrate requesting that proceedings under section 145 of the Criminal Procedure Code should be taken against the Zemindar on the one side and Janardan Prasad, the petitioner,

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Sajan Lall, and one other person who claimed as an under *raiyat* on the other.

The Sub-Divisional Magistrate thereupon called upon both parties to prove their respective claims to possession, but when the case came to trial, the second party, that is to say, the petitioner's party, filed a petition withdrawing from the case and agreeing that the first party should be confirmed in possession.

After this, at the request of the first party, the Sub-Divisional Magistrate appears to have passed an order impounding the *taslimnama* and commenced an enquiry into its genuineness.

This took place in 1918. In 1919 a complaint was lodged before the Magistrate against the petitioner charging him with an offence under section 471, Indian Penal Code, in regard to the *taslimnama*. It was alleged that the petitioner, knowing that the document was a forged document, had used it dishonestly in the Police investigation.

It is necessary to explain that the delay in lodging the complaint was due to certain proceedings which took place in 1918 and 1919. It appears that the first party thought that their remedy was to ask for sanction to prosecute the petitioner; but after they had obtained sanction from the Sub-Divisional Magistrate, it was held by the High Court that no sanction was necessary and that the proper course was by complaint before the Sub-Divisional Magistrate. Upon the complaint being filed, the petitioner was put upon his trial and he was sentenced to rigorous imprisonment for one year. He appealed to the Sessions Judge without success, and he now applies to us to exercise our powers of revision in his favour.

The learned Sessions Judge in appeal finds that the *taslimnama* is a forgery and that it was filed before the Police Officer in order to establish the possession of the petitioner in the lands in dispute. It is quite clear that this finding cannot be attacked; but it is urged that the petitioner did not use a forged document within the meaning of section 471, Indian Penal Code. Now, although the petitioner may not have based a claim to present possession upon the document, it was clearly his intention by producing the document to make the Sub-Inspector believe that he was in possession and that he had in 1912 acquired a good title to the land. If the Investigat-

ing Officer had accepted the petitioner's version he would probably have asked the Magistrate to bind down the first party. The essential point is, whether the petitioner's intention was to get some advantage by filing the document which he would not have got if he had not filed it. Having regard to the circumstances, it was clearly his intention to make the Sub-Inspector believe that the document was evidence of present possession. Whether the petitioner's claim was well-founded and whether he had good grounds for hoping that he would succeed in deceiving the Sub-Inspector is immaterial. It is sufficient if the petitioner thought that the document would be useful to him, and that he would thereby get the Sub-Inspector to do something which he would not otherwise have done.

It is next urged that, even if the petitioner did file the document in order to gain some advantage, he did not in the first instance do so voluntarily. It is suggested that the Sub-Inspector practically compelled him to produce the document by asking both parties to prove their respective claims. There is no evidence that there was any compulsion and it was open to the petitioner, if he had any suspicion regarding the genuineness of the document, not to produce it before the Police Officer. He appears to have realised the position when the matter came before the Sub-Divisional Magistrate. It is significant that, immediately the case came on for hearing, the petitioner should have hastened to give up his claim and agreed to a declaration in favour of the first party.

Some argument was addressed to us as to the admissibility of a former statement made by the petitioner in a Criminal Court some years previously which was used in the present trial for the purpose of proving that the *taslimnama* was a forgery; but this objection was not pressed, and it is quite clear that the statement made by the petitioner on that occasion was legally admissible at his trial in the present case.

There is, finally, the question of sentence. Having regard to the fact that the petitioner may have acted under the influence of Jagan, his master, and that he withdrew his claim as soon as the case came before the Sub-Divisional Magistrate, we think that a sentence of six months' rigorous imprisonment will meet the ends of justice in this case.

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The conviction is maintained and the sentence is reduced accordingly.

BUCKNILL, J.—I agree.

*Sentence reduced.*

# **OUDH JUDICIAL COMMISSIONER'S COURT.**

CRIMINAL REVISION No. 94 OF 1920.

August 3, 1920.

Present:—Mr. Daniele, A. J. C.

LACHHMI NARAIN AND OTHERS—

ACCUSED—APPLICANTS

*versus*

EMPEROR, TEROGH BADRI NARAIN—  
COMPLAINANT.

*Criminal Procedure Code (Act V of 1898), s. 106—  
Security, power of Court of Appeal or Revision to demand,  
in case tried by Second or Third Class Magistrate.*

The fact that a case is tried by a Second or Third Class Magistrate, does not deprive a Court of Appeal or Revision of the power to demand security under section 106, of the Criminal Procedure Code.

Criminal revision against the order of the District Magistrate, Partabgarh, dated the 12th July 1920, modifying the order of the Magistrate, Second Class, Partabgarh, dated the 28th June 1920.

Mr. O. F. S. Oehme, for the Applicants.

The Government Pleader, for the Crown.

**JUDGMENT.**—This application in revision arises out of a case in which four persons waylaid the complainant on his way back from Court and attacked him with *lathis* and a hatchet inflicting grievous hurt. The first Court convicted one of them under section 325 and the remainder under section 323, Indian Penal Code. The Appellate Court altered the conviction under section 325 to one under section 323 and, in addition, required the applicants to furnish security under section 106, Criminal Procedure Code. The only substantial points taken in revision are directed against the illegality of this order. It is urged, first, that the lower Appellate Court has not come to a distinct finding that the

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offence involved a breach of the peace; and secondly, that as the case was originally tried by a Second Class Magistrate who could not have acted under section 106, therefore, the Appellate Court had no power to do so. As to the first point, there appears to me no doubt that the offence under section 323, in the circumstances in which it was committed in this case, did involve the breach of the peace. It was on the second point that I admitted the revision, on the strength of a ruling in *Baij Nath v. Emperor* (1) which supported the applicants. I find, however, that that decision has been overruled by a later Bench decision in *Bharat Singh v. Emperor* (2). In this latter case this Court has held that there is nothing in the language of section 106 which either suggests or implies that the powers of the Appellate Court or revisional authority should be controlled by those of the original Court. The result is that, even when the case was tried by a Magistrate of the Second or Third Class, a Court of Appeal or Revision has power to require security under section 106, Criminal Procedure Code. I accordingly reject the application.

*Application rejected.*

(1) 10 O. C. 287; 6 Cr. L. J. 302.

(2) 21 Ind. Cas. 384; 16 O. C. 251; 14 Cr. L. J. 592.

# **LAHORE HIGH COURT.**

CRIMINAL APPEAL No. 601 OF 1920.

January 15, 1921.

Present:—Mr. Justice Broadway.

HARNAMA alias HARNAM SINGH AND  
OTHERS—CONVICTS—APPELLANTS

*versus*

EMPEROR—RESPONDENT.

*Penal Code (Act XLV of 1860), s. 304—Intention to cause death—Three persons attacking fourth with lath  
—Criminal Procedure Code (Act V of 1898), s. 342—  
Examination of accused person—Written statement,  
whether sufficient—Procedure.*

Where three persons attack a fourth with *lathis*, the blows being directed at the head of that fourth,



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they must be fixed with the knowledge that they were likely to cause death. [p. 67, col. 1.]

A written statement of defence cannot be allowed to take the place of the examination of an accused person at the close of the case for the prosecution as required by section 342 of the Criminal Procedure Code. [p. 679, col. 1.]

Where however, a Magistrate asked an accused person whether he had anything to say in addition to his written statement :

*Held*, that although it would have been better for the Magistrate to have put definite questions to the accused, the procedure actually adopted by him was not so illegal as to vitiate the whole trial. [p. 679, col. 1.]

Appeal from the order of the Magistrate, First Class, with powers under section 30, Criminal Procedure Code, Ludhiana, dated the 31st August 1920.

Lala Ram Chand Manchanda, for the Appellants.

Kanwar Dalip Singh and Sheikh Niaz Ali, for the Government Advocate, for the Respondent.

**JUDGMENT.**—Harnama, Waryama and Jodha have been found guilty of having caused the death of one Jaimal Singh and, under section 304 (II), Indian Penal Code, have been sentenced as follows:—Harnama to seven years' rigorous imprisonment including three months' solitary confinement, Waryama and Jodha to five years' rigorous imprisonment each including three months' solitary confinement. They have preferred this appeal and on their behalf I have heard Mr. Ram Chand Manchanda, while the Crown has been represented by Mr. Dalip Singh.

The facts of the case are given in detail in the judgment of the Court below. Briefly stated, the story is that a singing *jalsa* had been going on at the village from the 14th to the 16th March 1920. On the evening of the 16th March Jaimal Singh, deceased, went to where the singing was going on after sunset with a lamp in one hand and a stick in the other. He is said to have been in a state of intoxication. He gave a rupee to the singers and then is said to have called out that anybody who spoke again would be the brother-in-law of a tailless bull. The three appellants are admittedly on very bad terms with the family of Jaimal Singh, notably with Harnam Singh (P. W. No. 11), an uncle of Jaimal Singh. It is said that they were present at this *jalsa* and on hearing this remark made by Jaimal Singh abused him. Jaimal Singh returned the abuse and an

altercation ensued which ended in the three appellants attacking Jaimal Singh with *lathis* striking him on the head and knocking him down.

This story is deposed to by Peshawara Singh (P. W. No. 1) who is a cousin of the deceased and.....who is supported in his statement by Battan Singh (P. W. No. 8), a second cousin of the deceased, and Bachittar Singh (P. W. No. 15) who is also a collateral of the deceased. The statements of Hamir Singh (P. W. No. 5) and Bhola Singh (P. W. No. 14) are also corroborative of Peshawara Singh's story. That Harnam Singh (P. W. No. 11) was on very bad terms with the appellants is beyond question, and undoubtedly the existence of this enmity necessitates a careful scrutiny of the evidence of the witnesses who are all related to the deceased, more especially as no report was made till the morning of the 18th. This delay is due to the fact that Harnam Singh himself was not in the village when the occurrence took place and did not return till the 17th. The deceased was lying in an unconscious state in Peshawara Singh's house and it was only on the morning of the 18th when it was thought that the matter was a serious one that it was considered expedient to make a report of the occurrence. The *Lambardars* of the village knew what had happened and they are to blame for not having made a report.

I have been taken through all the evidence on the record by Mr. Ram Chand, who has commented on the statements made by the witnesses, and has pointed out the fact that some of the prosecution witnesses have resiled from their statements and say that they know nothing about the occurrence. It seems to me clear that the whole of this unfortunate occurrence is due to the fact that both the appellants and the deceased were in a state of intoxication. At the same time, intoxication by itself is not an excuse in a case of this kind, although it may to some extent be taken into consideration in mitigation of the offence. After a careful consideration of all the evidence for the prosecution I have no doubt that the story told is substantially correct. There seems no doubt that Jaimal Singh went to where the *jalsa* was going on flushed with drink and that he said the words attributed to him. I equally have no doubt that the three appellants, being

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also flashed with drink, resented Jaimal Singh's remarks and abused him. Jaimal Singh returned the abuse and then the three appellants attacked him. Two of the appellants have also received slight injuries while Jaimal Singh's injury was chiefly on the head. According to the evidence, Harnama was the first one to strike the deceased on the head. There are, however, three distinct injuries described by the medical evidence on Jaimal Singh's head and when three persons set to work to beat a fourth with sticks the blows being directed at the head of that fourth, it seems to me that they must be fixed with the knowledge that they were likely to cause death. I have no doubt in my mind that the injuries to Jaimal Singh were caused by these three persons. Mr. Ram Chand took me partly through the evidence for the defence which, however, amounts to nothing. A large number of witnesses have come forward who profess to have been present at the *jalsa* and have witnessed the attack. They, however, say that they did not see the three appellants there. Individually, they all stood on one side, and it is said that the entire assembly fell on to Jaimal Singh causing him injuries from which he died, although not a single one of the witnesses is able to say who it was who joined in the attack.

It was next contended by Mr. Ram Chand Manchanda that, inasmuch as it was difficult to say which of the three appellants struck the blow which caused death, the conviction under section 304, Indian Penal Code, could not be sustained, and that at the most the offence committed by his clients fell within the purview of section 325, Indian Penal Code. In support of his contention he drew my attention to *Agra v. Emperor* (1), in which *Emperor v. Bhola Singh* (2) was followed. The Allahabad ruling proceeded on *Queen-Empress v. Luma Baidya* (3). Now, in these decisions it appears that only one blow was struck on the head and this to my mind very materially distinguishes these cases from the present one. The evidence in this case is to the effect that

Harnam Singh struck the first blow on the deceased's head and that the other appellants then followed their companion and struck the deceased on the head as well as on the arms and back and that it was not till 2 or 3 blows had been struck on the deceased's head that he fell. It is also in evidence that all the three appellants continued belabouring the deceased after he had fallen. According to the medical evidence, the skull was so extensively fractured that, in the opinion of the Civil Surgeon, P. W. No 13, at least two blows caused the injuries to the skull. As has been said above, when three persons set upon a fourth and belabour that fourth, all three inflicting injuries on the head of that fourth, they should, I think, be fixed with the knowledge that death would be a likely result of their action. In these circumstances, it seems to me that section 304, Indian Penal Code, applies in the case of all the appellants. In any event, I am unable to see that the offence could be one less than that of grievous hurt, and, having regard to all the circumstances, so far as the injuries themselves are concerned, there would be no occasion to interfere with the sentences inflicted. Before, however, definitely deciding this question I think it necessary to refer to another point raised by the learned Vakil for the appellants. It appears that on the close of the case for the prosecution, Counsel for the appellants stated that he wished to file in written statements on behalf of his clients. Time was accorded him for that purpose and after the written statements had been filed each of the appellants was asked whether he had anything further to say and replied in the negative, saying that he rested content with what he had said in his written statement. Mr. Ram Chand has contended that this was not a sufficient compliance with the provisions of section 342, Criminal Procedure Code, and that, it being incumbent on the Magistrate to examine each of the appellants on the close of the case for the prosecution, the whole trial was vitiated and that a re-trial should be ordered. In support of his contention he drew my attention to *King-Emperor v. Sterling* (4), *Deputy Legal Remembrancer, Lehar and Orissa v. Matukdhari*

(1) 27 Ind. Cas 883; 37 P. R. 1914 Cr.; 16 Cr. L. J. 208; 214 P. L. R. 1915.

(2) 2 A 282; A. W. N. (1907) 51 4 A L J. 107 5 Cr. L. J. 180.

(3) 19 M. 483; 1 Weir 298; 6 Ind. Dec. (N. S.) 1042.

(4) 1 P. R. 1908 Cr.; 4 P. W. R. 1908; 7 Cr. L. J. 274; 186 P. L. R. 1908.

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*Singh* (5) and *Emperor v. Harichandra Talcherkar* (6). I do not consider it necessary to discuss these rulings as, in my opinion, section 342, Criminal Procedure Code, is quite clear and clearly lays down that it is the duty of the Magistrate to examine a person being tried by him at the close of the case for the prosecution in order that the person under trial may be in a position to explain away the evidence against him. A written statement of defense cannot, I think, be allowed to take the place of an examination of the accused person, and in this view I am supported by *Emperor v. Ansuiya* (7). In the present case, however, the written statement filed by the appellants was not allowed to take the place of an examination under section 342, but each of the appellants was questioned as to whether he had anything farther to say. Although it would have been better for the Magistrate to have put definite questions to the appellants, I am unable to hold that the procedure actually adopted in this case was so illegal as to vitiate the whole trial.

Reverting now to the question of sentences. No doubt the offence committed by the appellants was a serious one, nevertheless it seems to me that the deceased brought the trouble on himself by his own actions. In a state of intoxication he used language which roused the anger of the appellants and led them to abuse him; he returned the abuse and the result above detailed followed. In these circumstances, it seems to me that the sentences are somewhat harsh. I am unable to see that the guilt of Harnam Singh is in any way greater than that of his companions, as, in my opinion, all three together assaulted the deceased.

I accordingly reduce the sentences of all the appellants to three years' rigorous imprisonment, including three months' solitary confinement.

*Sentence reduced.*

(5) 82 Ind. Cas. 137; 17 Cr. L. J. 9; 20 C. W. N. 128.

(6) 10 Bom. L. R. 201; 7 Cr. L. J. 194.

(7) A. W. N. (1908) 1.

## ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 151 of 1920.

June 4, 1920.

Present:—Mr. Lindsay, J. C., and  
Syed Wazir Hasan, A. J. C.

BARKAU SINGH AND OTHERS—ACCUSED—  
APPELLANTS

*versus*

EMPEROR—COMPLAINANT—RESPONDENT.

*Penal Code (Act XLV of 1860), ss. 147, 149, 204, 325—Unlawful assembly—Common intention to cause grievous hurt—Death caused—Members causing death not ascertainable—Liability of members—Offence.*

Where the members of an unlawful assembly animated with the common intention of causing grievous hurt, cause death and it is impossible to ascertain by which of the members of the assembly death was caused, but it is found that one of them was immediately responsible for one of the deaths caused, that member is guilty of the offences of rioting under section 147, and of culpable homicide under section 304, of the Penal Code, and the remainder are guilty of rioting and causing grievous hurt under section 325, read with section 149, of that Code. [p. 684, col. 2; p. 685, col. 1.]

Appeal against the order of the Sessions Judge, Hardoi, dated the 27th February 1920.

The Hon'ble Pandit Jagat Narain, Pandit Tej Narain and Babu Har Narain Das, for the Appellants.

The Government Pleader, for the Crown.

### JUDGMENT.

LINDSAY, J. C.—This appeal has arisen out of a trial which was held in the Court of the Sessions Judge of Hardoi in which fifty accused persons were charged with riot and murder said to have been committed on the 19th of October 1919, in a village called Karimnagar, in the Hardoi district.

Thirteen of the persons who were tried in the Court below were acquitted. Thirty-seven were convicted and we have to deal in this case with the appeals of these thirty-seven persons. One of them, Barkau Singh, has been found guilty of rioting and of murder and has been sentenced to death. The other appellants have been found guilty both on a charge of rioting (section 147, Indian Penal Code) and on a charge of culpable homicide (section 304 of the Indian Penal Code).

The history of the case as represented in the prosecution evidence is as follows. One Muza Ahmad Shah who was put on his trial in the Court below, but who was



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acquitted, is the superior proprietor of Karimnagar. A considerable area of land in this village is held by the members of a Thakur family in under-proprietary right. There is ample evidence on the record to show that for many years there has been constant quarrelling between these under-proprietors and the superior proprietor. We have both documentary and oral evidence to prove that the parties have been for a long time at enmity. It appears that some of these Thakur under-proprietors sold a portion of their under-proprietary rights to a brother of Mirza Ahmad Shah some time ago. Others of them made a mortgage with possession in favour of one Ram Prasad. The latter is said to have transferred his mortgagee rights by sale to the brother of Mirza Ahmad Shah and regarding this transfer there has been going on a dispute in the Revenue Courts about mutation. It would seem that, on the one hand, the Thakurs for some reason or other claimed that neither Ram Prasad nor his transferee was entitled to possession. On the other hand, the case for the transferee has been that Ram Prasad had possession of the lands and that he, too, was entitled to possession as usufructuary mortgagee. With regard to this transaction of mortgage it does not appear that the mortgagee is entitled to actual physical possession of the lands for some of them, at any rate, are cultivated by tenants. What appears is that the rent of these lands is realised by division of the produce and, therefore, the mortgagee's right would be a right to a share of the produce of the field by way of rent. It is quite clear from the evidence before us that it was the removal of the crops from some of these lands by the superior proprietor's servants which led immediately to this riot which resulted in the death of four persons.

Three of the persons who were killed in the course of the riot were Balwant Singh, Bishram Singh and Hemanahal Singh. These men belonged to the family of Thakurs which owns the under-proprietary rights just mentioned. Balwant Singh does not appear to have been residing in the village at the time of the riot. It is said that he is employed with a *taluqdar* in Ant, which is in the Sitapur district, but that he had come to Karimnagar on the 19th in order to remove certain cattle from the village.

The fourth who is said to have been killed was one Madho Singh. He belongs to another village and appears to have come to Karimnagar on the date in question to visit these Thakurs who live there. Although there is evidence to show that Madho Singh was actually killed in the course of the riot and that his body was seen immediately after, it is the fact that his dead body has never been recovered.

In addition to this dispute about the mortgagee rights, it is also proved that at the time this riot took place there was pending in the Criminal Courts at Hardoi a case under section 107 of the Code of Criminal Procedure in which the complainant was one Ram Din. He had applied to have Mirza Ahmad Shah, Barkau and other people connected with Mirza Ahmad Shah bound over to keep the peace. There seems to be little doubt that Ram Din was a protégé of the Thakurs. There is further evidence to show that, in the later part of 1918, there was litigation between the superior proprietor and these Thakur people about the right to plant trees and *sikh* grass. This case was disposed of by arbitration in the beginning of the year 1919.

Coming now to the 17th of October; it is said that on this day there was a quarrel between some of the *taluqdar's* people and these Thakurs in the village and that certain cattle belonging to the Thakurs were taken to the pound. This latter fact is proved by the evidence of the Pound Clerk and also by the production of certain receipts which show that cattle were taken to the pound on the 17th of October and were released on the 18th. There is further evidence, too, although the value of it is somewhat doubtful, to show that threats were issued to these Thakurs on the 17th of October which led them to send their womenfolk off to a village some little distance away. At all events, it is clear that both parties were worked up to a considerable degree of excitement by the 19th of October.

It is an admitted fact that on the afternoon of this day the *taluqdar's* people went to the Thakur's fields and cut down a *bara* crop. It was just after this that the riot took place but, as is usual in cases of this kind, the parties put forward different versions of what took place.

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The first information of the affair which was given to the Police is contained in a report, Exhibit 31, which is said to have been made at the Police Station about 8 o'clock on the evening of the 19th of October. This report was made by two men, Bhudhar and Bodil, who are appellants in the present case and who are servants of Mirza Ahmad Shah. It was mentioned in this report that on the 17th of October certain cattle belonging to Bismam Singh had grazed in the crops of Mirza Ahmad Shah and had been taken to the pound. The report then went on to say that, by way of revenge, the Thakurs had on the 19th brought some thirty or forty men from outlying villages to Karimnagar. It was alleged that this party had made a raid on the *taluqdar's kothar*, that the *taluqdar's* people defended themselves, and that in the course of the fight three men on the side of the Thakurs had been hurt. On the same evening it is proved that a telegram was sent from the Nimbar Railway Station by Jawahir Singh, a brother of the deceased, Balwant Singh. This telegram was sent to the Superintendent of Police at Hardoi and stated merely that Balwant had been murdered by Barkan Singh and that an attack had been made by fifty men.

On the next day, that is to say, the 20th of October, a report was made at the Police Station by the village Chaukidar, whose name is Ambar. According to the record of the report, it was made about noon but some evidence has been led for the purpose of showing that, as a matter of fact, it was not recorded till later. However, Ambar told the Police in this report that he had not been present in the village at the time the riot took place but that all the particulars he had discovered had been derived from the widow of one Zalim Brahman. So far as the report relates to what took place on the date in question it sets out that the *taluqdar's* people headed by Barkan Singh had gone to cut the *bajra* crop growing in the Thakurs' fields, and that some of the Thakurs had come out in order to prevent the crop being removed.

It was said that abuse was exchanged between the parties and that the Thakurs retreated to the door of a house belonging to Anant Bania (the map shows that Anant

Bania's house is just opposite the house of Zalim's widow). It is said that at this stage Barkan exhorted his men to kill the Thakurs, and that thereupon the *taluqdar's* people fell upon the Thakurs and began to beat them. It was distinctly stated that Barkan himself had a *lathi* in his hand and was using it and the names of several other persons belonging to the *taluqdar's* party were mentioned. The Chaukidar added that other people in the village had witnessed what took place but were afraid to speak about what they had seen.

The Police arrived in the village on the 20th. The dead bodies of Balwant Singh and Bismam Singh were recovered. Hemanth Singh, who was in a parlous condition, was sent off to the hospital where he died a day or two later. Before his death he was able to make a statement which was recorded by a First Class Magistrate and which has been brought on the record as Exhibit 18.

The result of the Police inquiry was that the fifty men who were charged in the Court below were sent up for trial. One of the principal witnesses put forward for the prosecution was an approver, named Jagannath. This man had been named to the Police as one of the persons who had been engaged on the side of the *taluqdar*. It is said that he surrendered himself to the District Magistrate on the 8th of November. He made a statement, which was recorded under section 164, Criminal Procedure Code, and he was afterwards given a pardon.

As might be expected the case came into Court under a different aspect from that disclosed in the preliminary reports and proceedings. The *taluqdar's* party have abandoned the case which was put forward in the report made by Bodil and Bhudhar. Their story is not that the Thakurs made an attack upon the *taluqdar's kothar* but that a fight took place at the time the *taluqdar's* people were removing the *bajra* crop from the fields to the *kothar*. In other words, the case which is put forward for the defence is more or less the same version which appears in the report which was made by Ambar, Chaukidar, on the strength of the information given to him by Zalim Singh's widow, Musammrat Bilasa.

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The Thakur party made no report except what is contained in the telegram sent by Jawahir Singh. The version which they gave in the Court below was that, on the 19th, the *taluqdar's* people had gone and removed the *bajra* crop by force. It was said that they did this without any interference on the part of the Thakurs. The Thakurs, it is said, were sitting about, close to where their family house is in the heart of the village. They were suddenly attacked by two parties of the *taluqdar's* people, one coming from the north and one from the south. The story is that they were completely overpowered, that they were severely beaten, that three of them were killed on the spot, and that the others received severe injuries, one of them, Hemanehal, dying a day or two afterwards in the hospital. It was further stated that the dead body of Madho Singh was dragged off and thrown into the *taluqdar's* *ko'har*. One essential part of the prosecution story was that the *taluqdar* himself, Mirza Ahmad Shah, was present inciting his people to kill the Thakurs. The witnesses all depose that Ahmad Shah stood on a piece of high ground and urged on his people to do the Thakurs to death.

This part of the prosecution case has been held by the Court below to be entirely false. The learned Judge in his judgment finds that Mirza Ahmad Shah was not present in the village at the time the riot took place and he describes the evidence to the contrary as being fabricated out of enmity for the purpose of getting Mirza Ahmad Shah into trouble. While rejecting the prosecution story so far as it inculpates Mirza Ahmad Shah, he has accepted it in other respects as being a substantially true account of what took place. He discarded the story put forward by the defence for the purpose of showing that there had been an altercation or fight between the parties at the time the *bajra* crop was being removed from the fields and he was led to the conclusion that, as a matter of fact, the Thakurs were surrounded and attacked while they were sitting in the neighbourhood of their own family house. The Judge was chiefly persuaded to this conclusion by the fact that the Thakur party were severely handled and sustained numerous injuries, while on the side of the *taluqdar's* party

the only evidence which was available on the point showed that nothing but trifling injuries had been inflicted. In fact, the only reliable evidence on this point is the medical evidence which shows that Bodil and Bhudhar the two servants who made the report at the *Thana* had received some injuries of a more or less trifling character. The result of the trial has already been indicated. Thirty-seven of the accused were convicted of rioting and one of them, Barkan Singh, was convicted in addition on a charge of murder and sentenced to death. The others have been convicted in addition to the charge of rioting on a charge of culpable homicide and have each been sentenced to ten years' rigorous imprisonment.

The learned Counsel who has appeared before us on behalf of all these appellants has not asked for the acquittal of any of the accused except two men Fateh Singh and Suleman against whom he says the evidence was insufficient. Counsel's argument has been that the version of the riot which is put forward for the prosecution was not correct, and that the true account of what took place was that which was put forward on behalf of the defence. In short, his argument has been that, in view of the state of feelings between the parties and particularly in view of what had taken place on the 17th of October, both parties were spoiling for a fight, that as soon as the *taluqdar's* people began to remove the *bajra* crop out of the fields the Thakur party made some show of resistance. A fight then took place which resulted in the defeat of the Thakur party who were inferior in numbers to their assailants. The learned Counsel has also informed us that he does not rest his case upon any right of private defence of life or property. He has conceded that even if it were possible to argue that there was such a right at the time the affray began the violence which was used by the *talukdar's* party was grossly in excess of the occasion and that, consequently, it would not be possible for him to argue that any acts done by his clients could be justified on the ground of self defence. The whole of the learned Counsel's argument has been directed to show that the story of a cold blooded, pre arranged attack upon the Thakurs is an invention. He has sought to prove that



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there was in fact a stand-up fight between the parties and he argues, therefore, that Barkau Singh ought not to be convicted of murder.

We have been referred to the evidence which was led on both sides and it is perfectly clear that neither side has given a true account of what happened on the 19th of October. We have it from the judgment of the Court below that the story for the prosecution is certainly untrue to a large extent for, as we have already mentioned, the lower Court has acquitted Mirza Ahmad Shah against whom every one of the prosecution witnesses deposed. We may further say that we are not inclined to attach much value to the statement of the approver, Jagannath. Apart from the fact that his statement was procured for the first time on the 8th of November, long after the Police were in possession of the rest of the evidence, it has been proved to us by a comparison of the statements made from time to time by this witness that he has not been consistent throughout. He has attempted to improve upon and embellish his original story and certainly no statement of his could be accepted without the strongest possible corroboration. When we come to look for corroboration of his story we have to rely upon the evidence of a number of witnesses most of whom are open to the suspicion of being partisans of the Thakurs. On the other hand, it is to be remembered that the story which is put forward on behalf of the accused in the Court below is not the story which was first presented in the Police report which was made on their behalf on the evening of the 19th of October.

The appellant's learned Counsel has asked us to accept as being the nearest approach to the truth the evidence of *Musammât Bilasa*, the widow of Zalim, whose name we have mentioned in an earlier portion of the judgment. She, it will be remembered, is the person from whom the Chankidar, Ambar, gathered the information which he recorded in the report made on the morning of the 20th of October. The learned Judge has disbelieved this woman's story and we have little doubt that the evidence she gave to the Court was not entirely true. In fact, some of it appears to us to be palpably false, particularly that portion of it in which she tried to exonerate Barkau Singh.

The Chankidar, Ambar, himself is a far from satisfactory witness and some of his statements appear to us to be difficult of acceptance. But we have no doubt in our minds that he is speaking the truth when he says that the details of the fight which he reported at the *Thana* were communicated to him by *Musammât Bilasa*. We are inclined to believe that this report contains the germs of truth and that, as a matter of fact, the riot which took place on the 19th of October in this village began outside the house of *Musammât Bilasa*. The defence would have us believe that the fight began and ended there. We are not prepared to accept this. On the other hand, the prosecution would have us believe that no fight took place at this spot. We refuse to accept this story either. We are convinced that the fight began at the house of *Musammât Bilasa* and that the Thakurs were driven by superior numbers back in the direction of their own house and that there in the open spaces around their house they were overpowered and beaten with the result that the four men were killed.

To begin with, this account of the affair seems to us to square best with the probabilities of the case. It is not to be doubted that the *taluqdar's* people had arranged to cut down the *bagra* crop on the 19th of October. It is also equally certain that the Thakur party had made some preparation for an encounter on that day. This fact is admitted by the learned Judge in his judgment. It seems quite certain that a number of outside friends of these Thakurs had been summoned to the village on the day in question. Of course, they pretend to have come on one or other kind of business, but it is difficult to believe that they had not been sent for in order to be ready for any emergency which might arise. For example, so far as we can see, the man Madho Singh who was killed had no business whatever in the village on that day. Similarly, one Gur Baksh, who is an outsider, does not seem to have had any occasion to visit the village. We need not discuss this matter in further detail. It is quite clear that a number of people had come in to join the Thakurs although it is also certain that the numbers of this party were inferior to those of the party collected on behalf of the *taluqdar*.

An examination of the map which has been

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exhibited in the case shows that the fields in which the *bajra* crop was growing are situated in the south-west extremity of the village. The map also shows that the house which is occupied by Zalim's widow, *Musammam Bilasa*, and opposite to which is the house known as the house of Anant Bania, is at the south-west corner of inhabited site. The family house of the Thakurs is well inside the village area to the north-east of the house of Zalim's widow and, having regard to the scale of the map, we should say that it cannot be less than a hundred-fifty yards distant. Probably, the distance is greater, for the above measurement is a measurement in a straight line. One of the principal witnesses for the prosecution was Newaz Singh. He is one of this Thakur family and was no doubt present at the time the riot took place for he received injuries. This man was asked in cross-examination if he knew the house in which Zalim's widow lived. His answer was that he did. He was also asked if he knew the house which had once been occupied by Anant Bania. His answer was that he did and he went on to say that Anant's house was "20 paces from where we were beaten." If this answer of his is to be literally accepted, it proves that the fight began close to the house occupied by Zalim's widow. We think this is an important piece of evidence which the learned Counsel for the appellants has properly laid stress on and it seems to us that the witness could not be making any mistake about the distance for, as we have said, the house which is occupied by his family is at least a hundred-fifty yards away.

We think, therefore, we are right in adopting the view to which we have given expression above, namely, that an altercation began between the Thakurs and the *taluqdar's* party as the latter were carrying the *bajra* back from the fields and that some resistance having been offered by the Thakurs a fight ensued which terminated eventually close to the family-house in which the Thakurs reside. It seems to us highly improbable that the Thakur party should have allowed the *bajra* crop to be removed without any remonstrance, and it is in the highest degree likely that as soon as they heard that the crop was being cut they went towards the spot. Having arrived in sight of the fields they probably saw that they were inferior in numbers and had no chance of making any forcible

resistance. They most probably then resorted to abuse and it was in this way the fight originated at the spot which was indicated in the first report made by Ambar, Chaukidar.

Having arrived at this conclusion, therefore, we proceed to consider what offences have been established against the various accused. Before doing so it is proper to refer shortly to the medical evidence which shows the manner in which Bisram, Balwant and Hemanchal were done to death. Bisram was an old man, aged 65. It is clear that he must have been very severely beaten. His skull was cracked and eight of his ribs were smashed in. Hemanchal was also an elderly man whose age is given as 55. He was of poor physique. The *post-mortem* evidence described him as being emaciated. He received a wound on the head and had very severe contusions on the back and two of his ribs were broken. Balwant Singh was the youngest of the men who were killed, his age being 45. He received three wounds on the head. He had a simple fracture of the left arm and a compound fracture of the right arm.

It is admitted in the judgment of the Court below that it is practically impossible to ascertain the various persons who struck each of these three men. There is a great deal of contradiction and considering the large numbers engaged in the fight it would be hopeless to expect any definite evidence on this point. In the case of the accused Barkan Singh, however, the witnesses are in agreement and say that he was the man who first attacked Balwant Singh and knocked him down. We may take it, therefore, as proved beyond all reasonable doubt that Barkan was one of the assailants of Balwant and, therefore, one of the persons immediately responsible for his death. As regards the other accused it would be impossible to say that any specific acts of violence directed against any particular person had been proved as against them. Their liability arises out of the fact that they were members of an unlawful assembly inspired by a common intention and we think that the common intention to be imputed to them, in the circumstances, was that indicated by the learned Judge of the Court below, namely, to give the Thakurs a severe beating. They were armed with *lathis* and consequently we may find as

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against them that the common intention was to cause grievous hurt. They must be taken to have known that at least they were likely to cause grievous hurt by using *lathis*.

Having regard, therefore, to the view we take of what took place at the time of the riot, we think it impossible to hold that Barkau is guilty of murder. There was, we believe, a fight between the parties in which the accused succeeded by reason of their superior numbers. In the course of that fight, for which no doubt the accused party had prepared, Barkau struck Balwant and is, therefore, responsible for Balwant's death. He must be found guilty not of murder but of culpable homicide. As regards the other accused the offence of which they are liable to be convicted, apart from the offence of rioting, is an offence under section 325 of the Indian Penal Code. They are guilty of this offence by the application of section 149 of the Indian Penal Code.

We have mentioned above that the learned Counsel for the appellants asked us to acquit two of the accused, namely, Fateh Singh and Suleman. The evidence against Fateh Singh consists of the statement of the approver, Jagannath, the statement of another witness, named Bandu, and the statement of Newaz Singh. The statement of the approver does not carry any weight with us. Bandu is a man who lives in a village called Jairajpur which is situated about two miles to the east of Karimnagar. This man deposed that on the morning of the 19th of October he had seen Barkau passing through his village in the direction of Karimnagar with a large body of men. He says he recognised some of these men and that one of them was Fateh Singh. This evidence would not be of any avail to the prosecution unless it were corroborated by some reliable testimony showing that Fateh Singh was afterwards seen in the riot at Karimnagar. The only evidence we have on this point is the statement of the witness Newaz Singh. It appears that after Fateh Singh's arrest he and a number of others were sent to the Jail where identification proceedings were held. Eight witnesses who professed to have been present at the riot were called in to identify one or other of these men. Only one of them, namely, Newaz Singh, picked out the accused Fateh Singh. Newaz Singh is a partisan

witness and we think it would be unsafe to accept his evidence as sufficient corroboration of the statement made by the approver. There is room for doubt in his case and we give him the benefit of the doubt and acquit him.

As regards the other accused, Suleman, however, the case is much stronger. He was identified not only by Newaz Singh but also by the two other witnesses, Bhimma Arakh and Bisram Singh of Pani Kanyan. None of these men knew Suleman before and the fact that all three were able to pick him out in the Jail seems to us to be very strong proof of his being present and of his having been concerned in the riot. We hold, therefore, that Suleman is not entitled to an acquittal.

The appeal is, therefore, allowed to this extent, namely, that we find that Barkau Singh is not guilty of murder. We uphold his conviction under section 147 and the sentence of two years' rigorous imprisonment which was passed upon him under that section. We acquit him of the charge of murder and find him guilty of the offence of culpable homicide, punishable under section 304 of the Indian Penal Code, and for this offence we sentence him to ten years' rigorous imprisonment. The sentences will run concurrently. We acquit Fateh Singh and direct that he be released. We maintain the convictions of the remaining accused appellants under section 147 and the sentences passed under that section. We alter their convictions under section 304 to convictions under section 325, read with section 149, of the Indian Penal Code and sentence each of them to seven years' rigorous imprisonment. These sentences will be concurrent with the sentence passed under section 147.

WAZIR HASAN, A. J. C.—Out of the somewhat confused mass of evidence two facts clearly emerge—

(1). Hostility between the *Zemindar* and the Thakur family, in particular relation to the Jagirbar fields.

(2). The two parties came into collision on the 19th of October 1919 and a fight ensued with consequences extremely disastrous to the Thakur party.

The arguments addressed to us by the learned Pleader for the appellants were



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mainly devoted to bringing those two points on the surface. As a result, we were asked to hold that the appellant No. 1, Barkan Singh, is not guilty of the offence of murder and that the other 30 appellants were not guilty of the offence of culpable homicide not amounting to murder. The learned Counsel frankly admitted that, on the facts unquestionably established, he could not ask the Court for a judgment of acquittal in favour of any of the appellants except Fateh Singh and Suleman.

The learned Judicial Commissioner has accepted the case presented before us on behalf of the appellants and has consequently altered the convictions and sentences of each of the appellants. I am in complete agreement with my learned colleague on all these points.

There is one part of the case, on which great emphasis was laid by the learned Pleader for the appellants and on that part I desire to record a few observations. In my judgment, the part attributed to the *zemindar*, Mirza Ahmad Shah, in the riot was the gravamen of the case for the prosecution. Every omission in the initial stages which had a tendency to exculpate the *zemindar* was assiduously filled up, though somewhat clumsily, by means of evidence furnishing circumstances to explain such omissions. I would refer to two prominent instances in this connection.

(1) In the evening of riot Jawahir Singh, a young member of the Thakur family, who escaped totally uninjured in the affray, managed to despatch a telegram from the Nimsar Railway Station to the Superintendent of Police at Hardoi. The telegram (Exhibit 27) is as follows:— "Balwant Singh murdered by Barkan Singh attacked 50 men." It will be noted that the telegram does not mention Mirza's name. To explain this omission one Pateshuri Prasad, a Sub-Inspector attached to the Criminal Investigation Department, was produced. The pith of his statement on this part of the case is that he had an interview with Jagannath Prasad, the telegraph clerk at Nimsar, on the 3rd November and that Jagannath Prasad had made a clean breast of his guilt of *suppressio veri* in transcribing and transmitting the message. Jagannath Prasad

deneis all this and it is, in my opinion, a palpable patching.

(2) The second instance is this. Ambar, Chackidar of the village Karimnagar, made his first report of the riot at the Police Station Beniganj, on the 20th October. The time given on the face of the report is 12 noon. This report again does not mention the name of Mirza Ahmad Shah. The explanation for this omission is presented before the Court through the lips of Mahadeo Prasad, a constable of the Beniganj Police Station, who wrote the report. It is admitted that Ehsan Ali, the Sub-Inspector in charge of the station, was away on that day at Girdharpur where he was engaged in investigating a dacoity case. The substance of the story given by the constable is that the Chackidar had in the first instance mentioned to him the name of the *zemindar* amongst others but he refrained from recording the report then because of certain directions which the Sub-Inspector had given to him to the effect that no report involving the *zemindar* should be written without previous intimation to him, that consequently Ambar was sent to Ehsan Ali, that Ambar returned to the *Thana* in the evening, and that it was then that the constable addressed himself to the most important and solemn task of reducing Ambar's report into writing. It is needless to say that Ambar in his second recitation dropped the name of the *zemindar* because Ehsan Ali had directed him to do so. Ambar, though in a halting manner, supports this story in the main.

To my mind, this is a very serious matter. If Ehsan Ali is guilty of all that is imputed to him in this story he is liable to be dealt with according to law; but if, on the other hand, he is not, then surely Ambar and the constable should not go scot-free.

Now, Ehsan Ali was produced by the prosecution as witness No. 29. If the story set out above had any grain of truth in it one would expect that the prosecution would ask him questions on that subject at least to help the Court in coming to a right conclusion, if not to give an opportunity to him to explain his conduct. Not a single question was, however, asked. This fact alone is sufficient, in my opinion, to

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condemn the whole story as a tissue of lies. It may be asked,—“Why Easan Ali did not arrest Mirza?” That question was put to Easan Ali and he has answered it. He says—“I did not arrest the Mirza because the Superintendent had said verbally that he, the Mirza, should not be arrested till he had looked into the case.” Mr. Young, the Superintendent of Police, states in his evidence as follows:—“I did not give him (Easan Ali) any special order about arrest. I said I would take action about the Mirza’s arrest myself..... I arrested him...on the 28th October 1920.” This statement of Mr. Young completely justifies the inaction of Easan Ali in the matter of Mirza’s arrest.

In the same connection, there is one more element in the case which remains for me to consider and that, in my opinion, is a thread running through the entire fabric of the case for the prosecution. Evidence was led to show that on the morning of the 13th of October when all the men of the Mirza’s party were assembled in his *kothar* he said: “Go and out the *bayra* of Biseram and Balwant. If they come then kill them. Do not be afraid of the Police. I shall arrange it all.” They all accordingly go to the fields and out the *bayra* in one of them: Barkau then said: “The Mirza’s opponents have not come here. Let us go and ask the Mirza. If he tells us we shall go and kill them at the door of their houses.” They return to the *kothar* and after they had some food and drink served to them under the Mirza’s order, Barkau said to the Mirza: “We are all ready to do what you tell us.” The Mirza then said: “Go and kill Biseram and Balwant at the door of their houses.” So they go and kill three members of the Thakur’s party then and there and leave a fourth one so severely hammered that he too died a day later. While this attack was going on with full force Mirza was shouting to his men from a short distance standing on a high ground near his own *kothar*. Now, that part of the story reproduced by me in the foregoing narrative, which is antecedent to the attack, rests entirely upon the statement of the approver, Jagannath. Surely that is too slender a foundation to base any finding upon and

the learned Sessions Judge has entirely rejected it. He has also held that “Mirza Ahmad Shah was not present at the scene of the riot even to the extent of standing at a distance and urging on his followers.” But the learned Sessions Judge does not stop there. He further finds: “In the circumstances, the evidence that has been produced is very far from convincing me that the Mirza was actually present in the village on the day when the riot took place. I do not think that his complicity is proved.” As a result of these findings, he naturally passes a judgment of acquittal in favour of Mirza Ahmad Shah. In this appeal I must accept these findings as proper and correct; but what is their effect on the whole case? In answering this question, I regret, I cannot persuade myself to come to an agreement with the learned Sessions Judge. His view of the subject may well be expressed in his own words. He says: “Very few witnesses in India tell the whole truth and nothing but the truth and the fact that part of a man’s story is false is no valid ground for discarding his whole statement.” As a broad proposition and where no grounds for discrimination exist, it may be accepted as fairly accurate. The maxim “*falsus in uno falsus in omnibus*” cannot be accepted as one of universal and indiscriminate application. But it is equally unsound to reject it in all cases. What then is the real test? If the *falsus unio* is merely a matter of unimportant detail—a fringe or embroidery to a story true in the main—it should obviously have no effect on the credibility of the testimony as a whole. But the case will, however, be different if one of the essential circumstances in the story is clearly unfounded. “The tendency of any mixture of error in testimony is to lessen the probability of the whole. This diminution is in many cases so small as not perceptibly to affect our belief. But where an essential circumstance in a story is evidently unfounded, it is to pull a stone out of an arch, the whole fabric must fall to the ground.” (Field’s Introduction to the Law of Evidence in British India.)

I am clearly of opinion that that part of the case which related to the proof of Mirza’s complicity was an essential part

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of the case for the prosecution, and if that was, according to the judgment of the learned Sessions Judge, clearly unfounded, the whole case fell to the ground. The conviction, therefore, of the appellant No. 1 under section 302 and of the other appellants under section 304 of the Indian Penal Code cannot be upheld.

As noted above, I concur in the order passed by the learned Judicial Commissioner as regards every one of the appellants.

*Appeal mostly allowed.*

# LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 465  
OF 1920.

January 19, 1921.

Present :—Mr. Justice Scott-Smith,  
and Mr. Justice Leslie-Jones.

BHOLA NATH—COMPLAINANT—PETITIONER  
versus

MUNSHI—RESPONDENT.

*Workman's Breach of Contract Act (XIII of 1859),  
ss. 2, 3—Advance for marriage expenses, whether  
advance for work to be done,*

An advance for a workman's marriage expenses is a loan and not an advance within the meaning of the Workman's Breach of Contract Act. A payment, if it is to be regarded as an advance within the meaning of the Act, must be made in some way on account of work which the workman has contracted to perform.

Petition, under section 439 of Act V of 1898, for revision of the order of the Sessions Judge, Jullundur, dated the 3rd November 1919, confirming that of the Honorary Magistrate, First Class, Jullundur, dated the 28th August 1919.

Mr. Badrud Din Kureshi, for the Petitioner.

Mr. Mohsin Shah, for Sheikh Abdul Qadir, K. B., for the Respondent.

JUDGMENT.—This is a petition against the dismissal of a complaint brought under Act XIII of 1859. It was admitted to a Division Bench, because there appeared to be a conflict between a recently decided case, No. 1709 of 1919, and *Emperor v. Muhammad Din* (1).

The facts in the present case are that the petitioner advanced a sum of Rs. 150 to the respondent for the expenses of his marriage, a condition being made that the respondent should work in the petitioner's factory until the advance was paid off by deductions of Rs. 6 per mensem from his wages. No doubt the object of the petitioner was to bind the respondent to work for him, but we do not think that it can properly be said that there was an advance of money on account of any work which the petitioner had contracted to perform. In our opinion, the payment was a loan and we do not find ourselves in accord with the contention that the test whether there was an advance within the meaning of Act XIII of 1859, or a loan, depends on the terms as to re-payment. The payment, if it is to be regarded as an advance, must have been made in some way on account of work which the workman has contracted to perform, and when it is expressly stated, as here, that it was for the expenses of his marriage, it does not appear to us to come within the meaning of the Act.

The petition is dismissed.

*Petition dismissed.*

(1) 22 Ind Cas. 742; 23 P. R. 1918 Cr.; 96 P. L. R. 1914; 15 Cr. L. J. 166.



MOHAMMAD KAZIMUDDIN v. SABHA KHATUN.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 372  
OF 1919.

July 15, 1920.

Present:—Mr. Justice Tennon and  
Mr. Justice Nowbould.

MOHAMMAD KAZIMUDDIN  
CHOWDHURY—PLAINTIFF—APPELLANT  
versus

Sreenutty SOBHA KHATUN AND OTHERS—  
DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 134—Suit  
to recover, on behalf of trust, properties alienated—  
Limitation, terminus a quo.*

The period of limitation applicable to a suit to  
recover, on behalf of a trust, properties alienated by a  
*mutwalli* is prescribed by Article 134, Schedule I to  
the Limitation Act, and such period commences to  
run from the date of the alienation. [p. 650, cols. 1 & 2.]

Appeal against the decree of the Additional  
District Judge, Dacca, dated the 2nd December  
1918, affirming that of the Subordinate Judge,  
Fifth Court of that District, dated the 7th of  
September 1917.

FACTS appear from the judgment.

Dr. Sarat Chunder Basak (with him  
Babue Rajendra Chandra Guha and Brindaban  
Dutt), for the Appellant.—The conveyance  
executed by the *mutwalli* in favour of  
defendant No. 1 has really the effect of a  
transfer of the *mutwalliship* in the *wakf*  
properties. The transferee's possession of  
these properties should be regarded as  
possession on behalf of the trustee and not  
adverse to him. There can really be no  
distinction in this respect between the office  
of the *mutwalli* and the property of the  
endowment. See *Gnanasambanda Pandara  
Sannadhi v. Velu Pandaram* (1). The plaintiff's  
suit cannot, therefore, be barred by  
limitation. Refers also to *Rajah Vurmah  
Kunhi v. Ravi Vurmah Kunhi* (2) and *Radanath  
Doss v. Gisborne & Co.* (3). Again,  
the purchase by the defendant No. 1 must be  
in good faith, otherwise Article 134 of the  
Limitation Act could not apply. Refers to

(1) 23 M. 271 (P. C.); 2 Bom. L. R. 597; 4 C. W. N. 329; 27 I. A. 69; 10 M. L. J. 29; 7 Sar. P. C. J. 671; 8 Ind. Dec. (N. s.) 591.

(2) 1 M. 235 (P. C.); 1 Ind. Jur. 134; 4 I. A. 76; 3 Sar. P. C. J. 687; 3 Suth. P. C. J. 382; 1 Ind. Dec. (N. s.) 158.

(3) 14 M. L. A. 1; 15 W. R. P. C. 24; 6 B. L. R. 520; Suth. P. C. J. 397; 2 Sar. P. C. J. 636; 20 E. R. 637.

*Dirgpal Singh v. Kallu* (4), *Pandu v. Vithu* (5), *Ram Churn Tewary v. Protap Chandra Dutt Jha* (6).

Babu Upendralal Roy, for the Respondents.  
—The contention of my learned friend that  
the conveyance to the defendant No. 1 was a  
transfer of the trusteeship and that, therefore,  
her possession was on behalf of, and not  
adverse to, the trust, is opposed to the  
allegations in the plaint. Nor can it be  
suggested seriously that the *mutwalli* was  
competent to transfer the *mutwalliship* in  
this way. The possession of the defendant  
No. 1 was thus adverse to the trustee from  
the date of the transfer and continued to  
be so till the date of the present suit. The  
cases in *Rajah Vurmah Valia v. Ravi Vurmah  
Kunhi* (2) and *Gnanasambanda Pandara  
Sannadhi v. Velu Pandaram* (1) have no  
bearing to the question in debate and the  
decision in *Radanath Doss v. Gisborne &  
Co.* (3) is prior to the change in the law  
effected by the Limitation Act of 1871. As  
regards the applicability of Article 134 of  
the Schedule to the Limitation Act to the  
facts of the present case, I would only invite  
your Lordships' attention to the decision in  
*Rameshwar Malia v. Jiu Thakur* (7). Refers  
also to *Abhiram Goswami v. Shyama Oharan  
Nandi* (8), *Damodar Das v. Lakhan Das* (9)  
and *Iswar Shyam Chandi Jiu v. Ram Kanai  
Ghose* (10).

Dr. Sarat Chunder Basak replied.

JUDGMENT.—This appeal arises out of a  
suit brought by the plaintiff to recover posses-  
sion of certain *waqf* properties for the purposes  
of the trust. The properties in question were  
dedicated for religious purposes or made *waqf*  
as regards an 8-anna share by one Karim  
Kazi and as regards the remaining 8 anna  
share by the heirs and representatives of  
Amir Kazi—the brother of Karim Kazi. The

(4) 30 Ind. Cas. 956; 37 A. 660; 13 A. L. J. 945.

(5) 19 B. 140; 10 Ind. Dec. (N. s.) 95.

(6) 2 C. L. J. 448 at p. 456.

(7) 29 Ind. Cas. 337; 19 C. W. N. 1082; 43 C. 34.

(8) 4 Ind. Cas. 449; 36 C. 1003; 10 C. L. J. 284;  
6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14  
C. W. N. 1; 36 I. A. 148 (P. C.).

(9) 7 Ind. Cas. 240; 37 C. 885; 14 C. W. N. 889;  
7 A. L. J. 791; 12 Bom. L. R. 634; 12 C. L. J. 110; 8  
M. L. T. 145; 10 M. L. J. 624; (1910) M. W. N. 303; 37  
I. A. 147 (P. C.).

(10) 10 Ind. Cas. 683; 38 C. 526; 9 M. L. T. 448;  
15 C. W. N. 417; 8 A. L. J. 528; 13 Bom. L. R. 421; 14  
C. L. J. 238; (1911) 2 M. W. N. 281; 21 M. L. J. 1145;  
28 I. A. 76 (P. C.).

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*mutwalliship* descended to one Najibannissa who in February 1901 executed a conveyance of the properties in question in favour of one Sobha Khatun who is defendant-respondent No. 1 in these proceedings. The suit was instituted by the plaintiff Kazim-ud-Din, who is a descendant of one of the *waqifs*, in respect of the second *waqfnamah* on 21st April 1915 and both the Courts below held that it was barred by limitation.

Plaintiff is the appellant before us and his contention in this Court is, that the conveyance executed by Najibannissa should be regarded as merely a transfer of the trusteeship or *mutwalliship* and that her possession should be regarded as that of a *mutwalli* and, therefore, on behalf of, and not adverse to, the trustee. It is conceded, however, that Najibannissa was not competent in this way to transfer the *mutwalliship*; and the suggestion that from the date of her possession she acted on behalf of the trust is contrary to all the allegations in the plaint. Moreover, though in one passage in this conveyance it is stated that the transferee is to become a *mutwalli* in place of Najibannissa, at the same time the deed is one of absolute sale for valuable consideration of all the properties in question. The transferee's possession was adverse to Najibannissa and her successors as *mutwallis ab initio* and continued to be adverse from the date of the transfer until the date of suit. We have been referred on behalf of the appellant to the case reported in *Rajah Vurmah Valia v. Ravi Vurmah Kunhi* (2) which, however, does not deal with the question of limitation; to the case reported as *Gnanasambanda Pandara Sannadhi v. Velu Pandaram* (1), which was a case regarding an hereditary officer, and also to the case decided by their Lordships of the Judicial Committee in *Ratanath Doss v. Gisborne & Co.* (3). This last case, we may observe, is prior to the change in the law affected by the Limitation Act, IX of 1871; and, having considered the cases put before us on behalf of the respondent, namely, the cases decided by their Lordships of the Privy Council reported as *Abhiram Goswami v. Shyama Charan Nandi* (8), *Damodar Das v. Lakhan Das* (9) and *Iswar Shyam Chand Jiu v. Ram Kanai Ghose* (10), we can only come to the conclusion that in this case Article 134 of Schedule I to the present Limitation Act

applies and that the Courts below are right in holding that the present suit to recover on behalf of the trust the properties in question is barred by limitation. In this connection we may also refer to a case subsequent to the cases to which we have just referred decided by a Division Bench of this Court and reported as *Rameshwar Malia v. Jiu Thakur* (7).

In the view we take, this appeal must be dismissed with costs.

*Appeal dismissed.*

### ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 33 OF 1919.

March 23, 1920.

*Present* :—Mr. Stuart, A. J. C., and  
Pandit Kanhaiya Lal, A. J. C.

GIRDHARI LAL AND OTHERS—

PLAINTIFFS—APPELLANTS

*versus*

AHMAD MIRZA BEG AND ANOTHER—

DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 6—Assignment of arrears of profits claimed, whether within section.*

An assignment of the right to recover a share of the profits of an estate claimed by the assignor to be due to him, is not an assignment of a mere right to sue, but is an assignment of the arrears of profits claimed to be due, and as such is not covered by section 6 of the Transfer of Property Act. [p. 691, col. 1.]

Appeal against the decree of the Subordinate Judge, Sitapur, dated the 1st April 1919.

The Hon'ble Mr. Wazir Hasan and Mr. Prabhu Dyal Rastogi, for the Appellants.

Messrs. John Jackson and Haidar Husain, for Respondent No. 1.

**JUDGMENT.** The facts which have given rise to this appeal are somewhat regular. The Aurangabad estate belonged to Mohammad Ali Beg, who died childless on the 18th October 1908. On his death disputes arose between his sole surviving brother, Ahmad Mirza Beg, and his two nephews, Hamid Mirza Beg and Amir Mirza Beg,

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as to their rights in the estate. These disputes were settled by mutual agreement on the 12th July 1909. The effect of this agreement was that mutation of names was to be effected in respect of the estate in favour of all the three claimants and that, subject to the conditions laid down in the agreement, Ahmad Mirza Beg and after him, Hamid Mirza Beg and after the latter Amir Mirza Beg were to hold the office of *taluqdar* in succession without any power to transfer the property except in certain contingencies therein specified. The agreement contained a provision that, with the exception of the properties granted to each of those persons for their maintenance, the remainder of the estate was to be held by the *taluqdar* for the time-being, who was to pay the debts due by Mohammad Ali Beg from the profits thereof and that each of the three claimants would be entitled to divide the profits equally after those debts were satisfied.

In pursuance of that agreement, Ahmad Mirza Beg remained in collecting possession of the said property. The allegation of the plaintiffs, who are the assignees of Hamid Mirza Beg, is that Ahmad Mirza Beg did not pay the debts from the profits realised by him after 1910. They claim from Ahmad Mirza Beg a rendition of the accounts of the income and expenditure of the Aurangabad estate from the beginning of 1911 to the end of 1916, and further ask that a decree may be passed in their favour against Ahmad Mirza Beg for such amount as may be found due with interest thereon at 6 per cent. per annum. Amir Mirza Beg and the creditors of Mohammad Ali Beg have not been made parties to the suit. The Court below treated the assignment made by Hamid Mirza Beg in favour of the plaintiffs as inoperative under section 6 of the Transfer of Property Act (IV of 1882) and dismissed the claim.

The assignment purports to convey a right to recover Rs. 1,50,000 on account of the share of profits said to be due to Hamid Mirza Beg from Ahmad Mirza Beg. It is not an assignment of a mere right to sue but an assignment of the arrears of profits claimed by Hamid Mirza Beg to be due to him and as such it is not covered by section 6 of the Transfer of Property Act. Whether any profits are actually due to Hamid Mirza Beg cannot be determined until the accounts

are gone into and the rights of Hamid Mirza Beg and Amir Mirza Beg to receive the profits before the debts of Mohammad Ali Beg are satisfied. One of the creditors has, we understand, already got a Receiver appointed to take charge of the estate left by Mohammad Ali Beg in order that the decree for dower obtained by her might be satisfied out of the usufruct (Exhibit 14). Another creditor is, it is stated, proceeding to bring the property mortgaged with him to sale in execution of his decree. If the debts due to these creditors are otherwise satisfied, there may be some balance due to Hamid Mirza Beg on account of the profits of his share for the period in question; and that balance can properly form the subject of an assignment. The position of Ahmad Mirza Beg, Hamid Mirza Beg and Amir Mirza Beg is that of co-sharers; whose rights *inter se* are governed by the agreement of the 12th July 1909, and a right to enforce the agreement or to recover the profits claimable thereunder is, as pointed out in *Bharat Singh v. Binda Charan* (1), a necessary incident of such co-sharership. Whether the plaintiffs can recover the profits so long as the debts remain unpaid cannot be properly determined, till Amir Mirza Beg, the remaining party to the agreement, is impleaded and the accounts are taken.

The appeal is, therefore, allowed and the suit remanded to the Court below with a direction to reinstate it under its original number and to dispose of it, after making Amir Mirza Beg a party to the suit and making such amendments as may be consequential thereto, in the manner required by law. The costs here and hitherto will abide the event.

*Appeal allowed.*

(1) 47 Ind. Cas 634; 5 O. L. J. 398.



ALLAH DITTA & QAIM DIN.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1652 of 1920.

January 24, 1921.

Present :—Mr. Justice Chevis.

ALLAH DITTA AND OTHERS—

VENDEES—DEFENDANTS—APPELLANTS

versus

QAIM DIN—PRE-EMPTOR—PLAINTIFF

AND ANOTHER—VENDOR—

DEFENDANTS—RESPONDENTS.

*Pre-emption—Suit by several plaintiffs—Withdrawal of some plaintiffs, effect of.*

A pre-emptor does not lose his right if he joins with him a person who is entitled equally with himself to pre-empt, but who during the litigation, whether in the first Court or in the Appellate Court, gives up either gratuitously or for a consideration his right to pre-empt. In such a case the remaining plaintiff is entitled to carry on his claim alone. [p. 693, col. 1.]

Second appeal from the decree of the Additional Judge, Gujranwala, at Lahore, dated the 16th May 1920, varying that of the Senior Subordinate Judge, Gujranwala, dated the 17th June 1919.

Lala Ganga Ram, for the Appellants.

Mr. Badr ud-Din Kureshi, for the Plaintiff-Respondent.

**JUDGMENT.**—In this case four plaintiffs jointly sued to pre-empt, alleging relationship to the vendee. The first Court held that they had proved relationship and gave them jointly a decree for possession by pre-emption on condition of payment of Rs. 1,100 within two months. The vendee appealed to the District Judge, and, while the appeal was pending, the vendee compromised with three of the appellants who withdrew their claim. The remaining plaintiff refused to compromise, so the appeal was heard on the merits. The learned District Judge noted in his judgment that the best evidence of relationship is generally to be found in the Revenue Records but that there is force in the contention that it is impossible to produce these records as they had been destroyed in the disturbances of April 1919. The District Judge holds that the evidence as to relationship was as good as could be expected in the circumstances and that as there was no rebuttal, the relationship was sufficiently established. The District Judge, however, held that the decree could only be affirmed so far as the share of Qaim Din was concerned. The result apparently is that

Qaim Din is to get one-fourth only of the land on payment of one fourth of Rs. 1,100. The vendee appeals to this Court urging that the relationship has not been proved by any legal evidence and that when three of the plaintiffs had given up their claim, the claim of the fourth plaintiff should also have been dismissed, the four plaintiffs having sued jointly Qaim Din, plaintiff, has filed cross-objections, urging that he should get a full decree.

As regards the relationship, I note that there is no allegation in the grounds of appeal to this Court that the Revenue Records have not been destroyed. Counsel urges that there must be papers with the Patwari. No doubt, there probably are some papers with the Patwari, but it by no means follows that these papers would be sufficient to prove or disprove the alleged relationship. If, as a matter of fact, such papers could disprove the alleged relationship, I do not see why the defendant should not produce them. On the other hand, if they are sufficient to prove the alleged relationship, I take it that the plaintiffs would gladly have produced them. The probability then seems to be that any papers in the possession of the Patwari would be insufficient to decide the question one way or the other. Two witnesses produced by the plaintiffs and one produced by the defendant depose that the plaintiffs are collaterals of the vendor, though they do not profess to be able to give any details. A Mirasi has also been produced who puts forward a book in which the pedigree tree is given, showing Qaim Din and the other plaintiffs as being all collaterals of the vendors. Counsel urges that all this evidence is legally inadmissible. He refers to section 50 of the Evidence Act and also urges that the Mirasi being illiterate cannot read the book himself and further is unable to say who made the entries. The witnesses, however, do not merely give their opinion but profess to state their knowledge that the plaintiffs are collaterals of the vendor, and I do not think that section 50 of the Evidence Act is relevant to the present case. The evidence is no doubt scanty, but as a Court of second appeal, I cannot upset a finding of fact merely because of the scantiness of the evidence. The finding as to relationship will, therefore, stand.

DINESH CHANDRA SHAHA v. SAFER ALI MANDAL.

The remaining question is as to the effect on the suit of the withdrawal of their claim by three out of the four plaintiffs during the pendency of the appeal in the District Court. At the first hearing of this appeal I had to adjourn as appellant's Counsel had had no notice of the cross-objections. I have to-day heard him, and he urges that Quim Din can only execute the decree for his share, and that, as regards the buying out of the other three plaintiffs, the matter should be regarded as fresh sales with respect to which Quim Din can, if he likes, bring a fresh suit. I do not agree. The rulings of this Court (cited on Ellis's Law of Pre-emption, Third Edition, page 190) are that the right of a plaintiff-pre-emptor, is not lost if in a suit to enforce his rights he joins with him a stranger. Still less does he lose his rights, in my opinion, if he joins with him a person who is entitled equally with himself to pre-empt, but who during the litigation, whether in the first Court or in the Appellate Court, gives up either gratuitously or for a consideration his right to pre-empt. In such a case I consider the remaining plaintiff is entitled to carry on his claim alone.

I dismiss the appeal, and, accepting the cross-objections, I give Quim Din a decree for possession by pre-emption of all the land in suit on condition of payment of Rs. 1,100; this sum, less costs in all Courts and less any sum already paid in by Quim Din and still in deposit, to be paid into the first Court on or before 24th February 1921, or, in default this appeal will stand as accepted and the suit will stand dismissed with costs throughout.

*Appeal dismissed;  
Cross objections decreed.*

**CALCUTTA HIGH COURT.**  
**APPEAL FROM APPELLATE DECREE No. 19**  
**OF 1919.**

May 18, 1920.

*Present:*—Mr. Justice Newbould and  
Mr. Justice Buckland.

**DINESH CHANDRA SHAHA, MINOR**  
**HEIR OF LATE DEBNATH SHAHA, BY HIS**  
**ADOPTIVE MOTHER AND NEXT FRIEND,**  
**GOPESWARI DASIA AND OTHERS—**  
**PLAINTIFFS—APPELLANTS**

*versus*

**SAFER ALI MANDAL AND ANOTHER—**  
**DEFENDANTS—RESPONDENTS.**

*Interest, excessive rate of, whether recoverable.*

A mere finding that the rate of interest in a mortgage-bond is excessive is not sufficient reason for refusing the plaintiff interest at the rate embodied in the contract. [p. 694, col. 1.]

Appeal against the decree of the Additional District Judge, Pabna and Bogra, dated the 23rd of September 1918, affirming that of the Subordinate Judge, Bogra, dated the 19th of September 1916.

**FACTS** appear from the judgment.

Dr. Dwarkanath Mitter (with him Babus Manindranath Banerjee and Narain Chandra Kar), for the Plaintiffs-Appellants.—There has been no finding that there was any undue influence in getting the other side to agree to a higher rate of interest. The learned Judge says that the interest was excessive and so unconscionable. I submit that that is not the law. The Courts cannot protect people who enter into bargains and contracts with eyes wide open. There is absolutely no ground for interference. There is no question of Court's discretion, it is the contract that is to be taken into consideration. *Khagaram Das v. Ram Sankar Das Pramanik* (1), *Abdul Majid v. Ksheroke Chandra Lal* (2), *Chaliaphro v. Banga Behary Sen* (3), *Gopeswar Saha v. Jidab Chandra* (4) are bad law now. I submit the transaction not penal. Refers to *Bejoy Kumar Adhar v. Satish Chandra Ghose* (5).

(1) 27 Ind. Cas. 515; 19 C. W. N. 775; 42 C. 652; 21 C. L. J. 79.

(2) 29 Ind. Cas. 843; 19 C. W. N. 809; 42 C. 693.

(3) 31 Ind. Cas. 394; 20 C. W. N. 408; 22 C. L. J. 311.

(4) 32 Ind. Cas. 537; 20 C. W. N. 689; 22 C. L. J. 352; 43 C. 632.

(5) 56 Ind. Cas. 1007; 24 C. W. N. 4.

SANTHANATHAMMAL v. ISAKI SUPPAN ASARI.

Babu Dinesh Ohandra Roy, for the Respondent.—The law says that Courts should not grant relief if the rate of interest is hard and unconscionable. The learned Judge has found that the rate of interest is penal. Refers to *Krishna Oharan Barman v. Sanat Kumar Das* (6). In second appeal, we are bound by the findings of fact arrived at by the lower Appellate Court. The Courts below concurrently find that the stipulation for payment of interest is penal. Refers to section 74, Indian Contract Act, and also to Illustration (d) under that section.

Dr. D. N. Mitter was not called upon to reply.

### JUDGMENT.

NEWBOULD, J.—In this case the same point arises as arose in Appeal from Appellate Decree No. 2281 of 1918, which we have just decided. This is a suit on a mortgage-bond in which the plaintiffs have been granted a decree at a rate of interest less than the contractual rate because the Courts have held that rate to be excessive. In support of the decision of the lower Courts the learned Pleader for the respondents relied on the decision of a Bench of this Court in *Krishna Oharan Barman v. Sanat Kumar Das* (6). But since that decision there have been two decisions of the Privy Council in the cases of *Aziz Khan v. Duni Chand* (7) and *Balla Mal v. Akad Shah* (8) and there has also been a decision of this Court in *Bejoy Kumar Addya v. Satish Ohandra Ghose* (5). Having regard to these decisions, we think that a mere finding that the rate of interest in the bond is excessive is not sufficient reason for refusing the plaintiffs a decree at the rate of interest embodied in the contract. We accordingly decree this appeal, set aside the judgments and decrees of the lower Courts and grant the plaintiffs a decree for the full amount of their claim with costs in all the Courts.

BUCKLAND, J.—I concur.

*Appeal accepted.*

(6) 34 Ind. Cas. 109; 44 C. 162; 25 C. L. J. 24; 21 C. W. N. 740.

(7) 49 Ind. Cas. 933; 23 C. W. N. 120; 165 P. W. R. 1918; 101 P. R. 1918 (P. C.).

(8) 48 Ind. Cas. 1; 28 C. W. N. 233; 35 M. L. J. 614; 16 A. L. J. 905; 124 P. R. 1918; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.).

### MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 851 of 1919.

July 13, 1920.

Present:—Mr. Justice Sadasiva Aiyar  
and Mr. Justice Napier.

SANTHANATHAMMAL AND ANOTHER  
—PLAINTIFFS—APPELLANTS

versus

ISAKI SUPPAN ASARI, MINOR,  
BY HIS MOTHER AND GUARDIAN, SOUNDA-  
IRATHAMMAL, AND ANOTHER—DEFENDANTS  
—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 11, O. VII, rr. 11, 13—Rejection of plaint—Finding on question of law or fact given after a full trial on merits—Subsequent suit for same subject-matter on same cause of action—Res judicata.*

Where a Court passes an order rejecting a plaint after a full trial on the merits and recording a finding adversely to the plaintiff, a subsequent suit for the same subject-matter and based on the same cause of action will be barred as *res judicata*. [p. 696, col. 1.]

Under a *razinama* P. and D. had to pay in equal shares maintenance to M. annually P. paid the whole of the maintenance for two years and brought a suit to recover from D his share. The Appellate Court held that as the *razinama* did not contain any term giving P the right to sue D for contribution when the latter failed to pay his share, P had no legal right to recover and rejected the plaint as disclosing no cause of action. P. then brought the present suit on the same cause of action and for the same subject-matter:

*Held*, that the finding in the previous suit operated as *res judicata* to bar the present suit. [p. 696, col. 1.]

Second appeal against the decree of the District Court, Tinnevely, in Appeal Suit No. 294 of 1918, preferred against the decree of the Court of the District Munsif, Tinnevely, in Original Suit No. 168 of 1917.

FACTS appear from the judgment.

Mr. Muthiah Mudaliar, for the Appellants.—The order of the Appellate Court in the prior suit only purported to reject the plaint. That will not bar the institution of a first suit under Order VI, rule 13. Whatever may be the nature of the enquiry the final order is what has to be considered.

Messrs. P. N. Martandam and E. S. Ohithambaram, for the Respondents.—The order is not properly worded, but in effect it is a decree dismissing the suit on the merits. There has been an elaborate enquiry and a finding was also recorded that plaintiff was not entitled to contribution. That finding effectively operates as *res judicata* and bars



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a second suit. Under Order VII, rule 13, Civil Procedure Code, the rejection of a plaint on grounds mentioned in Order VII, rule 11, shall not of its own force bar a second suit. What has to be considered is not merely the form but the substance of the order in the prior suit.

#### JUDGMENT.

SADASIVA AIYAR, J.—The plaintiffs are the appellants. The plaintiffs and the defendants were bound under a *razinama* to pay in equal shares two *kottaks* of paddy as maintenance to the second defendant. In default the second defendant was entitled to take possession of a certain land which had then come to belong the plaintiffs alone though it had at a still earlier period belonged to the plaintiffs and first defendant jointly. The plaintiffs, in order to protect their interest in the land which was in danger of being taken out of their possession if the maintenance due to the second defendant was not paid in full, paid the whole of the maintenance due to the second defendant for the years 1914 and 1915 and then brought the suit (Original Suit No. 9 of 1916) for recovery of half of the amount they paid from the first defendant. That suit was decreed in the Court of first instance but the Appellate Court, on the 25th January 1917, pronounced the judgment, Exhibit H, in which it held that the plaintiffs had no legal right to recover the one-half from the first defendant because the *razinama* finally and solely determined the rights of the parties and the *razinama* did not contain a term giving the right to the plaintiffs to sue the defendant for contribution when the first defendant did not pay his half of the maintenance to the second defendant. Having pronounced such a judgment the decretal portion of that judgment ought to have been worded as one dismissing the suit. But the Appellate Court said in that portion of the judgment: "The appeal is allowed and the plaint rejected as disclosing no cause of action." On such a judgment either a decree dismissing the suit or a formal order rejecting the plaint (which order will have the force of a decree according to the definition of 'decree' in section 2 (2), Civil Procedure Code) ought to have been and must be presumed to have been made. The plaintiffs had the right to prefer an appeal

from such a decree or such an order (if an order was passed and not a decree). Instead of doing so, they presented the plaint in the present suit on the 11th April 1917 in which the principal prayer was the same demand for contribution from the first defendant of half the maintenance allowance paid by the plaintiffs for the years 1914 and 1915 for the second defendant.

In fact, the subject-matter of the two suits may be taken as identical. The lower Appellate Court has dismissed the suit as barred by *res judicata*. Mr. Muthiah Mudaliar for the plaintiffs (appellants) contends, on the strength of the language of Order VII, rule 13, that the rejection of the plaint by the lower Appellate Court in the former suit does not preclude the plaintiffs from bringing a fresh plaint in respect of the same cause of action and that implies that the present suit is not barred by *res judicata*. Order VII, rule 13, is carefully worded and says that "the rejection of the plaint on any of the grounds mentioned in Order VII, rule 11 shall not of its own force preclude the plaintiff from presenting a fresh plaint." Order VII, rule 11, mentions four grounds on which the Court is bound to reject the plaint. Two of them, namely, clauses (b) and (c) do not relate to the merits of the claim. Clause (a) is the case where the plaint does not disclose a cause of action and clause (d) is where the suit appears from the statement in the plaint to be barred by any law. Clause (d) evidently includes the case of a suit being barred by limitation. The prevailing practice is, if summons has been issued to the defendant and an issue has been settled on a question of limitation, to dismiss the suit if it is found to be barred by limitation and not merely to reject the plaint. The plaint is rejected if it is found to be barred by limitation only in cases where the case itself discovers that it is barred by limitation before filing and registering it under Order IV, rule 2. In such a case, the office brings the matter to the notice of the Judge, and if the Judge agrees with the ministerial officer he passes orders under Order VII, rule 11 (d), rejecting it. Even if it is held that the rejection of the plaint can be made after it is accepted and registered not only in cases

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falling under clauses (b) and (c) of Order VII, rule 11, (which are intended to protect the Government Revenue from Court-fees) but even when substantial questions of law affecting the rights of the parties in clauses (a) and (d) — may not only after the plaint is registered as a suit but even after issues are settled and parties are heard on such issue. I do not think it can be argued that the decision on any point so heard and determined is not *res judicata* under section 11 and that the failure of the suit by the rejection of the plaint in consequence of findings on material questions of law is not a final disposal of the suit falling within the doctrine of *res judicata*. In this case there was a finding in the former suit that the plaintiffs on the construction of the *razinamah* between the parties had no right to sue the defendant for one half of the maintenance amount which the plaintiffs might have paid to the second defendant to protect their interests in the land above referred to. Whether that finding is a finding on a question of fact or law, it is unnecessary to express a final opinion on, for the purpose of deciding this second appeal. But on that finding there was based the decision which disposed of the subject-matter of that suit, namely, the claim for half the amount paid for the maintenance to the second defendant for the years 1914 and 1915. The present suit is for the same subject-matter as in the former suit and the finding is, therefore, *res judicata*, namely, that the plaintiffs have no right to recover that subject-matter from the first defendant. The second appeal, therefore, fails and is dismissed with costs.

NAPIER, J.—I agree.

M. C. P.

*Appeal dismissed.*

## LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 3060 of 1916.

January 11, 1921.

Present :—Mr. Justice Scott-Smith and  
Mr. Justice Leslie Jones.NIL KANTH—PLAINTIFF—APPELLANT  
versus

JAI GOPAL—DEFENDANT—RESPONDENT.

*Hindu Law—Joint family—Separation of one  
member—Presumption—Re-union—Burden of proof.*

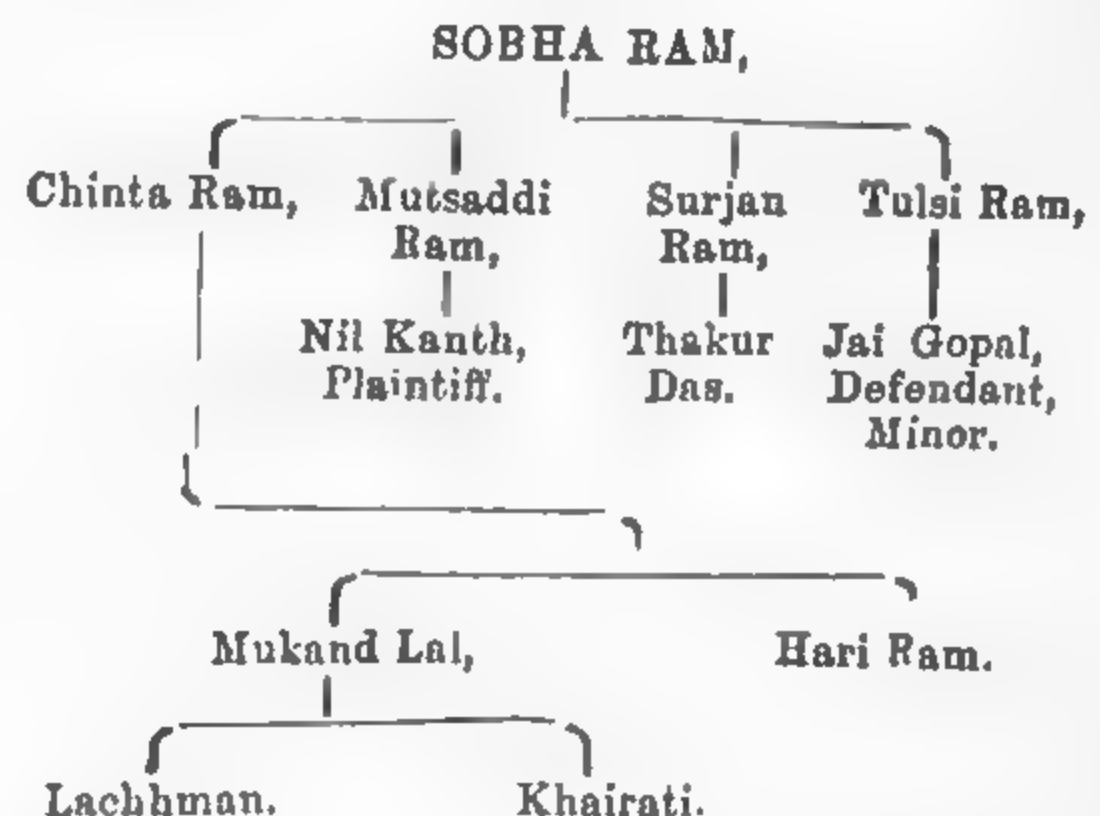
When one co-parcener in a Hindu family separates from the others there is no presumption that the latter remain united, and an agreement among them to remain united or to re-unite must be proved like any other fact by the person who alleges it. [p. 697, cols. 1 & 2.]

First appeal from the decree of the Subordinate Judge, First Class, Hoshiarpur, dated the 13th April 1916.

Mr. D. O. Balli and Lala Daulat Ram, for the Appellant.

Dr. G. O. Narang and Mr. Labh Singh, for the Respondent.

JUDGMENT.—The admitted pedigree-table of the parties is as follows :—



The family was originally a joint Hindu family. Sobha Ram died in 1869, and it is admitted by the plaintiff that his son, Chinta Ram, separated from the family before his father's death. After Sobha Ram's death Surjan Ram also separated, and it is alleged that Mutsaddi Ram and Tulsi Ram continued to be joint. According to the plaintiff his father and defendant's father, and after their deaths he and the defendant, constituted a joint Hindu family up to the date of the suit. The plaintiff brought this suit for joint possession of a half share in certain property detailed in the plaint which is in possession of the defendant, and for a

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declaration in regard to four other plots of landed property, to the effect that they were *waqf* in the name of the temple of Ragu Nathji. The defendant denied that the family remained joint after the partial separation admitted by the plaintiff, and pleaded that all the property in his possession belonged to him and that the property in plaintiff's possession belonged to the plaintiff. With respect to the property said to be *waqf*, he admitted that one plot of 241 *kanals*, 12 *marlas* of land was *waqf*, but he denied that the other three plots of 6 *kanals*, 17 *marlas*; 3 *kanals*, 9 *marlas* and 6 *kanals* respectively were *waqf*. He said that they belonged exclusively to himself. The lower Court has found that the family is not a joint one and that the plaintiff is not entitled to any share in the property in possession of the defendant. It dismissed the rest of the plaintiff's suit, but gave a decree declaring the plot of 241 *kanals*, 12 *marlas* of land to be the property of the temple. It directed the parties to bear their own costs. From this order the plaintiff has appealed and the defendant has filed cross-objections in regard to costs.

The case has been very elaborately argued before us by Counsel for the parties, but as we agree entirely with the conclusions of the lower Court, our judgment need not be long. Counsel for the appellant, in the first place, objected to the onus of the first issue having been laid upon the plaintiff. The issue was:—"Do the plaintiff and defendant form a joint Hindu family and is the plaintiff entitled to the joint possession of the property in dispute?" His contention is that the normal condition of every Hindu family is joint and that the burden to prove separation is on the person alleging it. In the present case, however, it is admitted that there was a partial separation even before Sobha Ram's death, when Ohinta Ram separated from the family. It is also admitted that there was a further separation after Sobha Ram's death when Surjan Ram separated, and the case of *Balabux v. Rukhmabai* (1) decided by the Privy Council is authority for the proposition that, when one co-parcener in a Hindu family separates from the others, there is no

presumption that the latter remain united and that the alleged agreement to remain united or to re-unite must be proved like any other fact. See also in this connection *Anandibai Ram Pai v. Hari Suba Pai* (2) and *Vaidyanath Aiyar v. Aiyasamy Aiyar* (3). It is clear, therefore, that in this case the initial onus lay upon the plaintiff to prove that he and the defendant were members of a joint Hindu family. It is further admitted in the plaint that in 1891 the parties separated their food and residence, and, having regard to this fact also, it is clear that the onus which lay on the plaintiff was a very heavy one. The main source of income to the family appears to have been a book of astrology according to which horoscopes used to be cast. It also appears that the members of the family used to go generally to other places where they visited their clients and earned money. This money used to be remitted to the members of the family who remained at home. Counsel has referred us to various bonds which have been executed in favour of the plaintiff or defendant in lieu of bonds which previously stood in the names of the defendant and the plaintiff respectively; for instance, a bond was executed in favour of the defendant in consideration of a bond which previously existed in favour of the plaintiff and *vice versa*. These are detailed in the judgment of the lower Court at pages 339 and 340 of the printed paper-book. We agree with the lower Court that these transactions do not at all prove that the parties were members of a joint Hindu family. They can easily be explained as the result of mutual trust and confidence by one party in the other. They can also be explained on the theory that the parties had a joint business of astrology and joint income therefrom. People are, however, frequently partners in a business without being members of a joint family. The hypothecation-deed (Exhibit P-8) printed at page 16 of the printed book, is relied upon by both parties. This deed is one in favour of Nil Kanth, plaintiff, for a consideration of Rs. 465. Out of the consideration Rs. 242 was undoubtedly contributed by Nil Kanth, and Rs. 162 out

(2) 10 Ind. Cas. 911; 35 B. 293 at p. 296; 13 Bom. L. R. 287.

(3) 1 Ind. Cas. 408; 32 M. 191; 5 M. L. T. 49; 19 M. L. J. 94.

(1) 80 C. 725 (P. C.); 80 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar. P. C. J. 470.



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of it was a debt due to Tulsi Ram, the father of the defendant. The mortgagors agreed to pay Rs. 34.12 as yearly interest to the mortgagee. On the 16th August 1908, i.e., about three years after the execution of this deed of hypothecation, two of the mortgagors executed a bond (Exhibit P-7), printed at page 18 of the paper-book, in favour of Nil Kanth for Rs. 100 on account of interest for three years due under this deed of hypothecation. Similarly, on the 28th June 1911 the same two mortgagors executed a bond (Exhibit P 6, page 20 of the paper-book) for Rs. 99 in favour of Tulsi Ram which sum of Rs. 99 included Rs. 69 on account of two years' interest on the same deed of hypothecation. These facts appear to us to indicate that both Nil Kanth and Tulsi Ram had a share in this deed of hypothecation and, therefore, on one occasion a bond was executed in favour of one of them for a sum due as interest, and on another occasion a bond was executed in favour of the other for what was subsequently so due. These facts are opposed to the idea of a joint Hindu family.

A good deal of oral evidence has been produced by both parties. The lower Court has shown that some of the plaintiff's witnesses are certainly unreliable. We have been taken through their evidence. In our opinion, it does not suffice to discharge the onus which lay heavily upon the plaintiff. Nil Kanth and his uncle, Tulsi Ram, were on good terms, and the mere fact that both used the same *Baithak* does not prove that they were members of a joint family. Again, the fact that one of them went on tour and remitted his earnings to the other by money-orders, or the fact that they paid *neondra* jointly, does not prove that they were co-parceners. These facts are quite sufficiently explained by the mutual trust and confidence which existed between them. On the defendant's side there are numerous facts which lead to the presumption that the parties were separate and not joint. These facts are twelve in number and have been tabulated in the judgment of the lower Court at pages 344 and 345 of the printed paper-book, and it is quite unnecessary for us to repeat them. The most important of them seems to us to be the separate acquisitions of various properties by each party and the fact that an account was kept by the

defendant's father of the sums spent by the plaintiff and that interest was charged to the latter on the balance due. This latter fact itself appears to us quite inconsistent with the theory of a joint Hindu family. In our opinion, the plaintiff has entirely failed to discharge the onus which lay upon him, and we do not understand why the lower Court ordered the parties to bear their own costs. What the lower Court has found is, that the plaintiff's claim is a false one and, under these circumstances, we see no reason why the ordinary rule should not be followed as to costs following the event. We, therefore, dismiss the appeal and accepting the cross-objections direct that the plaintiff should bear defendant's costs in both Courts.

*Appeal dismissed;  
Cross-objections decreed.*

### CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 769  
OF 1919.

August 5, 1920.

*Present* :—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice Sir Ernest  
Fletcher, Kt.

JANAKINATH SINGHA ROY—  
PLAINTIFF—APPELLANT

*versus*

HON'BLE SIR BEJOY CHAND MAHATAP,  
MAHARAJADHIRAJ BAHADUR OF BURDWAN  
—DEFENDANT—RESPONDENT.

*Limitation Act (IX of 1908), s. 14, Sch. I, Art. 62—  
Section 14, benefit of, when can be claimed—Suit to  
recover money paid as patni rent, when no patni in  
existence—Limitation.*

In order to obtain the benefit of section 14 of the Limitation Act, it is essential that the proceeding, the time spent in prosecuting which is sought to be excluded, should be between the contesting parties. [p. 692, col. 2.]

The period of limitation contained in Article 62 of Schedule I to the Limitation Act applies to a suit for the recovery of money paid as *patni* rent at a time where there was no consideration for the payment. [p. 700, col. 1.]

Appeal against the decree of the District Judge, Hooghly, dated the 17th of February 1919, reversing the decree of the Subordinate Judge, Second Court of that District, dated the 25th of January 1918.

JANAKINATH SINGHA ROY v. BEJOY CHAND MAHATAP.

FACTS appear from the judgment.

Babu Mohendranath Roy (with him Babu Sitaram Banerjee), for the Appellant.—In the first place, in calculating the period of limitation the time occupied by the proceeding for assessment of mesne profits should be excluded. Refers to section 14 of the Limitation Act. Refers also to *Prannath Roy Chowdry v. Rookea Begum* (1), *Rance Surno Moyee v. Shooshee Mookhee Burmonia* (2) and *Nrityamoni Dass v. Lakhon Chunder Sen* (3).

Secondly, the Article to the Schedule of the Limitation Act applicable to the present case is Article 97 and not Article 62.

Babu Bepin Behari Ghose (Jr.) (with him Babu Sarat Kumar Mitter), for the Respondent.—Section 14 of the Limitation Act is of no assistance to the appellant. The Privy Council cases really support my contention. The plaintiff's suit is for recovery of money received by the defendant. There was failure of consideration at the time the payment was made. Article 62 of the Limitation Act, therefore, applies. See *Hukum Chand Boid v. Pirthichand Lal Chowdhury* (4). See also *Raghumoni Authikary v. Nilmoni Singh Deo* (5), *Mahomed Wahib v. Mahomed Ameer* (6). Article 97 of the Limitation Act does not apply. Even if it does not apply, the plaintiff would be entitled to only three years from the date when the consideration failed, i.e., from the 2nd May 1912. Upon that view also, the suit is barred by limitation. See *Bejoy Chand Mahatab v. Tinkari Banerjee* (7).

Babu Mohendranath Roy replied.

#### JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal

by the plaintiff in a suit for recovery of money paid by him to the defendant as *patni* rent on the 14th October 1910.

It appears that the plaintiff purchased the *patni* at a sale held under Regulation VIII of 1819 on the 14th May 1908. The *patnidar* instituted a suit for cancellation of the sale, which was decreed on the 28th May 1910. The Zemindar-defendant thereupon preferred an appeal which was ultimately dismissed on the 2nd May 1912. In the interval, on the 14th October 1910, that is, after the Court of first instance had directed cancellation of the sale, the plaintiff paid rent to the defendant to prevent further sale under the Regulation. The present suit, which was instituted on the 14th February 1916, has been dismissed by the District Judge as barred by limitation. We are of opinion that this view cannot be successfully challenged.

The appellant has argued that he is entitled to a deduction of the time which was occupied by a proceeding for assessment of mesne profits as between himself and the original *patnidar* on the basis of the decree for cancellation of the sale. This contention cannot be upheld in view of the provisions of section 14 of the Limitation Act, which renders it essential that the proceedings should be between the contesting parties; here the Zemindar was not a party to the proceedings for assessment of mesne profits. Nor can it be suggested that there was, since the 14th October 1910, any period of time when the right of the plaintiff to institute the present suit was suspended by reason of circumstances over which he had no control so as to entitle him to invoke the aid of the rule recognised by the Judicial Committee in *Prannath Roy Chowdry v. Rookea Begum* (1), *Rance Surno Moyee v. Shooshee Mookhee Burmonia* (2), and *Nrityamoni Dass v. Lakhon Chunder Sen* (3). The question thus arises, which Article of the Limitation Act governs this matter. We are of opinion that Article 62 applies to the circumstances of the case.

Article 62 provides that a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use must be instituted within three years from the date

(1) 7 M. L. A. 323; 4 W. R. P. C. 87; 19 E. R. 331; 1 Suth. P. C. J. 367; 1 Sar. P. C. J. 642.

(2) 12 M. L. A. 244; 11 W. R. P. C. 5; 2 B. L. R. P. C. 10; 2 Suth. P. C. J. 173; 20 E. R. 331; 2 Sar. P. C. J. 424.

(3) 33 Ind. Cas. 452; 43 O. 660; 20 O. W. N. 522; 80 M. L. J. 529; (1916) 1 M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 24 C. L. J. 1; 20 M. L. T. 10 (P. C.).

(4) 50 Ind. Cas. 444; 23 O. W. N. 721; 17 A. L. J. 514; 36 M. L. J. 557; 21 Bom. L. R. 632; (1919) M. W. N. 258; 80 C. L. J. 71; 48 C. 670; 26 M. L. T. 131; 10 L. W. 416; 46 I. A. 52 (P. C.).

(5) 2 O. 393; 1 Ind. Dec. (N. S.) 541.

(6) 82 O. 527; 1 O. L. J. 167.

(7) 58 Ind. Cas. 741; 24 C. W. N. 617.

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when the money is received. It has been pointed out in the decision of the Judicial Committee in *Hukum Chand Boid v. Firthchand Lal Chowdhury* (4) that this Article is intended to apply to cases which in English Law are described as suits for "money had and received." The same view had been previously taken in numerous cases in this Court, amongst which may be mentioned *Raghunoni Audhikari v. Nilmoni Singh Deo* (5) and *Mahomed Wahib v. Mahomed Ameer* (6). The fact that there was a failure of consideration at the time the payment was made on the 14th October 1910, attracts the operation of the bar imposed by Article 62.

It has been suggested in the course of argument that Article 97 might apply to this case. That Article provides that suits for money paid upon an existing consideration which afterwards fails must be instituted within three years from the date of the failure. In the case before us, this Article does not apply, because, as we have just explained, at the time when the money was paid there was no consideration. But even if we held that the validity of the *patni* sale was finally decided only on the 2nd May 1912, as the result of the appeal by the Zemindar, still, the plaintiff would be entitled under Article 97 to sue only within three years from the 2nd May 1912. As he did not institute the suit until the 14th February 1916, even upon that view it would be barred by limitation. [*Bejoy Chand Mahatab v. Tinkari Banerjee* (7)].

The result is that the decree of the District Judge is confirmed and this appeal dismissed with costs.

FLETCHER, J.—I agree.

*Appeal dismissed.*

## MADRAS HIGH COURT.

SECOND CIVIL APPEALS Nos. 2123 TO 2126 AND 2123 TO 2140 OF 1918.

April 22, 1920.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

Sri Rajah SOBHANADHRI APPARAO  
BAHADUR ZEMINDARGARU—PLAINTIFF  
No. 3—APPELLANT

versus

DATHADU VENKATARAJU  
(DIED) AND OTHERS—DEFENDANTS  
—RESPONDENTS.

*Res judicata*.—Decision of Revenue Court, whether binding in a subsequent suit in Civil Court—Madras Estates Land Act (I of 1908), s. 189 (3)—Civil Procedure Code (Act V of 1908), s. 11.

A decision on issues arrived at in a Revenue Court in a suit cognisable exclusively by that Court is not binding on a Civil Court as *res judicata* even though the subsequent suit brought in the Civil Court could not be brought in a Revenue Court, as section 189 (3) of the Madras Estates Land Act does not extend the doctrine of *res judicata* in favour of decisions of Revenue Courts beyond what is enacted in section 11 of the Civil Procedure Code. [p. 702, col. 1.]

Second appeals against the decrees of the Court of the Subordinate Judge, Kistna, at Ellore, in Appeal Suits Nos. 262, etc., of 1917, preferred against the decrees of the Court of the District Munsif, Ellore, in Original Suits Nos. 667, etc., of 1915.

FACTS appear from the judgment.

The Hon'ble Mr. K. Sreenivasa Aiyangar, Advocate-General (with him Mr. T. Ramachandra Rao), for the Appellant.—The defendants are not entitled to raise the plea that suit-lands are part of their *sevati* holding. In a prior suit between the same parties for enforcement of *patta* in respect of the same lands in the holding, the decision of the Revenue Courts has been against the *ryots*. In the present case in ejectment in the Civil Court the same plea has again been urged. If it is not actually barred as *res judicata* under the provisions of section 11, Civil Procedure Code, the decision of the Revenue Court precludes the parties from further agitating in respect of the same matter under section 189 (3) of the Estates Land Act. Under the latter sections, decision of Revenue Courts in matters falling under their exclusive jurisdiction are binding on the parties. Suits to enforce terms of *pattas* under section 56 of the Act are within the exclusive jurisdiction of Revenue



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Courts. In such suits, when the Collector has to make the necessary enquiry as to whether the defendant is bound to accept a *patta* and whether it is a proper one and where the descriptions, etc., of the lands are contained in the *patta* if a decision is given on nature of the holding a Civil Court cannot go into the *ryot's* plea of occupancy rights.

Mr. P. Narayanamurthi (with him Mr. V. Suriyanarayana), for the Respondents.—The decision in the Revenue Court in the suit to enforce terms of a *patta* is certainly not *res judicata* in this case. To attract the operation of section 11, Civil Procedure Code, the Court must be same and the present ejectment suits are not cognizable by Revenue Courts. As to the applicability of section 189 (3) of Madras Act I of 1908, this does not extend the operation of section 11, Civil Procedure Code. Under section 189 (3) of the Madras Estates Land Act, the Collector's adjudication with regard to rate of rent only is final. But the fact that he incidentally discusses or decides a question of title will not affect or oust the jurisdiction of the Civil Courts. The Revenue Court's decision was not given on a matter exclusively within its jurisdiction. See S. A. No. 1002 of 1916 and S. A. No. 786 of 1919. Revenue Courts cannot have the final word on a question of title.

#### JUDGMENT.

SADASIYA AITAN, J.—The third plaintiff is the appellant, he being the Zemindar of Nozvid. The defendants in these suits claimed to hold what are called '*banjar*' lands as parts of their respective *jeroyati* holdings but which plaintiffs alleged had been in their occupation on temporary grazing leases and that on the date of the suits the defendants were in possession as mere trespassers. The suits were brought on the strength of section 163 of the Estates Land Act (Act I of 1908) in the Civil Court.

Both the lower Courts found, as a matter of fact, that these *banjar* lands were *jeroyati* lands, that they were treated by the Zemindar from time immemorial as parts of the respective holdings of the defendants which contained other lands admitted to be *jeroyati* and that the defendants were not trespassers. But the plaintiff argued that,

by reason of the decisions in certain prior suits brought by the plaintiff (or, rather the person who then represented the interest of the plaintiff) for the enforcement of *patias* for a former *fasti*, the question whether the defendants were entitled to hold these particular lands as *ryots* must be decided against them as *res judicata*. For this contention the language of section 189, clause (3), of the Estates Land Act is relied on. It is admitted that the matter is not *res judicata* if section 11 of the Civil Procedure Code, or if the principle embodied in section 11, can alone be relied upon in argument, because the present suits in ejectment are not cognizable by the Revenue Court which tried the former suits. Hence, the appellant was constrained to rely in support of his argument upon what he contended was the true meaning of section 189 (3) of the Estates Land Act.

Now, where Revenue Courts and Civil Courts are thus exercising jurisdiction in disputes between the same parties (one kind of Court in certain matters and the other kind in some other matters) it is desirable that the Legislature clearly sets out in detail the particular matters over which each set of Courts is intended to have jurisdiction, and also provides clearly and definitely what has to be done when conflicts arise between the opinions of the two sets of Courts on the same question when they are dealing with the separate matters within their respective jurisdictions. I shall first quote a few passages from the judgment in *Sheo Narain Rai v. Parmeshar Rai* (1) (such conflicts having apparently arisen in the United Provinces frequently):—  
"As it is not conceivable that the Legislature could have intended that there should be of its own creation two sets of Courts in these provinces, each having jurisdiction to determine the same questions of title to land let to agricultural tenants and neither having any power to compel the other to accept its decision by revision or other procedure or by process, we must assume that in all cases in which it is clear that, for the purposes of adjudicating upon an application, or making a decree in a suit, it was the intention of the Legislature that

(1) 18 A. 270 (U. P.); A. W. N. (1896) 59; 8 Ind. Dec. 325.

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the decision on the question of title of the Court which was given the exclusive jurisdiction to entertain the application or the suit...should, subject to such rights of appeal as was allowed by the Statute, be final between the parties unless the contrary intention was expressed." Then in another part of the judgment (at page 280) the learned Judges say: "It may be inferred from a long series of decisions..... that the opinion was entertained by all the Judges, who in these provinces or in the Lower Provinces of Bengal have considered the question, that questions of proprietary title to land and of title of tenancies between rival claimants, but not questions as to the status of a tenant of agricultural land, are questions which should be determined by the Civil Courts and not by the Courts of Revenue in the more or less summary proceedings of the latter Courts." Then they consider the particular provisions of the Act which had to be considered in that case and arrive at the conclusion that, on a particular point, the decision of the Revenue Courts should be treated as final. The difficulties which the learned Judges felt in arriving at their conclusion are indicated by other passages in the judgment (at page 275) as follows:— "It frequently happens that a Court of Revenue and a Civil Court come to different conclusions on the same question of title litigated between the same parties in reference to the same lands. In such a case, which decision is to prevail? Is that decision to prevail which was first given or is that decision to prevail which was given in the proceeding or suit first instituted, or is the time of one of such Courts to be taken up in arriving at a decision which when pronounced will not be binding on the other Court and will be for all practical purposes a *brutum fulmen*? How is such decision to be enforced? It is clear that, unless a question of title arising in proceedings in ejectment under Act No. XII of 1881 had been determined between the parties by a reference to a Civil Court under section 204 of that Act, or in a suit instituted in accordance with an order of a Court of Revenue made under section 203A of that Act, the Court of Revenue would not be bound by the finding as to title of a Civil Court. The decision of an issue as

to title by a Civil Court would not operate as *res judicata* under section 13 of Act XIV of 1882 as to the same question of title in proceedings under sections 36 and 39 of Act XII of 1881, although between the same parties and relating to the same land, and similarly a decision of a Court of Revenue under section 39 of Act XII of 1881 adverse to the application under that section contesting the liability of the person upon whom a notice of ejectment had been served would not operate as *res judicata* under section 13 of Act XIV of 1882 in a suit of ejectment in a Civil Court between the same parties, the Court of Revenue not having jurisdiction to try a suit to eject a trespasser, and a Civil Court not having jurisdiction to try an application under section 39 of Act XII of 1881 contesting liability to ejectment." At page 273, they say: "This is one of that class of cases which exemplifies the mischief which arises when the jurisdiction of Courts created by the Legislature is not plainly and explicitly and sharply defined. That mischief is intensified when, as in these provinces, there are two sets of Courts, the Courts of Revenue and the Civil Courts, each having in some matters exclusive jurisdiction, whilst as to other matters the question as to which of such Courts has exclusive jurisdiction depends, not upon plain and explicit language of the Legislature but upon inferences to be drawn from a painstaking examination of a variety of sections in an Act and upon general principles of jurisprudence upon which it is assumed that the Legislature has acted."

Having made the above quotations to indicate the difficulties created by the Legislature, I shall approach the consideration of this case with reference to certain general principles of jurisprudence. Civil Courts have got unlimited jurisdiction over civil rights except when such jurisdiction is expressly taken away and conferred upon another kind of Court. Hence provisions of Statutes taking away or restricting the jurisdiction of Civil Courts ought to be strictly construed. Further, it is the duty of Special Courts having restricted jurisdiction to respect and follow the decisions of ordinary Civil Courts on matters of title to land and on such important questions as questions relating to status and rights, even though the former Courts have jurisdiction



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to decide such important questions incidentally when dealing with special matters which have been placed by the Legislature within their exclusive jurisdiction. That duty is recognised expressly by the Legislature in the Provincial Small Cause Courts Act and in the Possession Chapter of the Criminal Procedure Code. That duty has been enforced by the decisions of this Court in cases arising under the Maintenance Chapter of the Criminal Procedure Code. Section 213, clause (3), of the Estates Land Act also recognises that general principle. No doubt, in the absence of a decision of a Civil Court on a question of title, the principle embodied in section 11, Civil Procedure Code, though not that section itself, (because that section is not one of the sections made applicable to the Revenue Courts expressly by section 192 of the Estates Land Act) would apply, and a Revenue Court deciding a subsequent suit ought to accept the findings (even incidentally necessary findings) of the same Court in a former suit. See *Bommidi Bayyan Naidu v. Bommidi Suryanarayana* (2) and *Venkatachalapati v. Krishna* (3). But (1) if a question of title arises in a Revenue Court for the first time in that Court incidentally and is decided in one way, (2) if it then arose in a Civil Court and was decided in the opposite way, and (3) if it again arose in the Revenue Court in a third suit exclusively cognisable by that Court the Revenue Court, in my opinion, should, on this third occasion, respect the decision of the Civil Court, given on the second occasion and not follow its own finding in the first suit. I have carefully considered the several relevant sections of the Estates Land Act (sections 40, 51, 57, 153, 163 and 213 besides the section directly in question, namely, 189) and have come to the conclusion that section 189 (3) was not intended to go beyond section 11, Civil Procedure Code, and to constitute the decisions on issues arrived at in the Revenue Court in suits cognisable exclusively by the Revenue Courts binding on the Civil Court as *res judicata* even though the subsequent suit brought in the Civil Court could not be brought in a Revenue Court. That principle seems to me to follow from the observations found

in *Subbanna Achariar v. Gopalakrishna Achariar* (4), *Ohidambaram Pillai v. Muthammal* (5), *Gouse Moideen Sahib v. Muthialu Ohettiar* (6) and also Second Appeal No. 1002 of 1916. I do not think it is necessary to elaborate the matter because I am glad to find that the question was considered so recently as last week in Second Appeal No. 769 of 1919 by a Division Bench of this Court (Ayling and Coutts-Trotter, JJ.). The learned Judges held that the decision of a Revenue Court on the question whether the relationship of landlord and tenant existed or not was not *res judicata* in a subsequent suit in a Civil Court, as this subsequent suit was not cognisable by a Revenue Court. Section 189, clause (3), was quoted before the learned Judges but they held that it did not extend the scope of the doctrine of *res judicata* in favour of the decisions of Revenue Courts beyond what was enacted in section 11 of the Civil Procedure Code.

As I said already, I think it is the duty of the Legislature to make the provisions in the Madras Estates Land Act on these points more clear and definite. I might even say that, whenever the relationship of landlord and tenant is denied in a Revenue Court or question of title which cannot be finally decided by a Revenue Court is raised in that Court, provision ought to be made to stay the proceedings in the Revenue Court till that matter is finally decided by a suit in a Civil Court. I shall just quote what the Allahabad High Court has said on this matter (modifying the language of the learned Judges slightly because they were dealing with a different enactment.) "In our opinion whenever in suits ..... or applications exclusively cognisable by a Revenue Court the relationship of landlord and tenant between the parties or between those through whom they claim had not been admitted..... it should be compulsory on the Court of Revenue to pass an order staying the proceedings before it for a limited time within which the party denying that the relationship of landlord and tenant existed might bring a suit in a Civil Court to determine the question of title. If no such suit should have been brought within a limited time, the Court of

(1) 34 Ind. Cas. 354.

(5) 23 Ind. Cas. 524; 15 M. L. T. 340; 1 L. W. 211; 25 M. L. J. 1042.

(6) 21 Ind. Cas. 762; 14 M. L. T. 523; (1914) M. W. N. 20; 20 M. L. J. 36.

(2) 17 Ind. Cas. 445; 37 M. 70; 12 M. L. T. 500; 13 M. L. J. 543; (1913) M. W. N. 1.

(3) 13 M. 287; 4 Ind. Dec. (N. S.) 912.



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Revenue should, without further enquiry, decide finally the question of title against the party who had denied that the relationship of landlord and tenant existed. If such suit were brought, the Court of Revenue should be bound to accept the result of that suit as determining the question of title whether the suit was determined in the Civil Court by a dismissal for default or upon an adjudication on the questions of title."

In the result, I agree in the lower Appellate Court's conclusion on the question of *res judicata* argued before us and would, therefore, dismiss these second appeals with costs.

SPENCER, J.—In these suits there can be no doubt that no plea of *res judicata* under section 11 of the Civil Procedure Code can be maintained, as the Revenue Court which decided the previous suits for acceptance of *patta* in 1909 was not competent to try the present suits for delivery of possession. But the plaintiff relies on section 189, clause (3) of the Estates Land Act which declares "the decision of a Revenue Court or of an appellate or revisional authority in any suit or proceeding under this Act on a matter falling within the exclusive jurisdiction of the Revenue Court shall be binding on the parties thereto and persons claiming under them, in any suit or proceeding in a Civil Court in which such matter may be in issue between them."

It is argued that suits to enforce acceptance of *pattas* under section 56 are suits within the exclusive jurisdiction of Revenue Courts. With this argument I agree. Similarly, suits under section 30 for enhancement of rent, section 38 for reduction of rent, section 40 for commutation of rent, and section 55 to obtain *patta*, are suits exclusively cognisable by Revenue Courts.

Next, it is argued that since in such suits the Collector is bound by the provisions of section 57 to enquire whether the defendant is bound to accept a *patta* and, secondly, whether the *patta* tendered is a proper one, and since in section 51 the local description and extent of the land and all special terms by which the parties are to be bound are some of the details to be contained in a *patta*, a Civil Court is precluded from going into the question whether a *ryot* who was previously a party to suits for acceptance of *patta* has occupancy rights in any portion of the land in that *patta*. I think the District Munsif

has given the correct answer to this argument in paragraph 11 of his judgment. He says: "In deciding the propriety of the terms of the *patta*, the question of the defendants' occupancy rights does, no doubt, arise for incidental decision, but it cannot be said that it arises so directly and substantially for decision that the decision thereon by a Revenue Court can be said to be *res judicata* in a subsequent ejectment suit in a Civil Court where the question may again directly and substantially crop up."

I think that the intention of the Legislature in framing section 189 was that such questions as those relating to the fairness and propriety of the rate of rent fixed by the Revenue Court which a Collector from his experience of the agricultural condition and the rates and prices prevailing in his district is in a position best fitted to settle, should not be again agitated in a Civil Court after they have been once decided in suits instituted in Revenue Courts under sections 30, 38, 40, 55 and 56 of the Estates Land Act. In the present case I am of opinion that the prior decision having been a decision upon an incidental question as to occupancy rights and a matter falling within the exclusive jurisdiction of a Revenue Court is not binding on a Civil Court under section 189 (3), although it did arise in a suit to enforce acceptance of *pattas* which was exclusively cognisable by a Revenue Court. This view is supported by the opinion expressed in two unreported cases Second Appeal No. 1002 of 1916 decided by Seshagiri Aiyar and Napier, JJ., and Second Appeal No. 786 of 1919 decided by Ayling and Coutts-Trotter, JJ. I agree with my learned brother that these appeals should be dismissed with costs.

M. C. P.

*Appeals dismissed.*

SHASHI BHUSAN V. DEB NATH.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 889  
OF 1919.

August 4, 1920.

Present:—Mr. Justice Newbould and  
Mr. Justice Abdul Majid.SHASHI BHUSAN MORAL—PLAINTIFF  
—APPELLANT

versus

DEB NATH MORAL AND OTHERS—

DEFENDANTS—RESPONDENTS.

*Mortgage—Mortgagor's lessee, whether can question  
validity of mortgage.*

It is not open to the lessee of a mortgagor, in a suit brought for his ejectment, to question the validity of the mortgage.

Appeal against the decree of the Subordinate Judge, Khulna, dated the 29th of January 1919, reversing the decree of the Munsif, Second Court, at Khulna, dated the 5th of March 1918.

FACTS appear from the judgment.

Babu Asita Ranjan Chatterjee for Dr. Jadunath Kanvilal, for the Appellant.—The defendant, as tenant of the mortgagor, is not entitled to raise the question of the passing of the consideration for the mortgage. In a suit of this nature against the lessee of the mortgagor it is not necessary to adduce any evidence. The question of the passing of consideration is one between the mortgagor and the mortgagee. I am not pressing my claim for ejectment and I am perfectly content with the decree passed by the Court of first instance.

Babu Sarat Chandra Roy Chowdhury (with him Babu Lal Mohan Ghose), for the Respondents.—If there was no consideration for the mortgage, the transaction was void and not merely voidable. The lower Appellate Court was, therefore, perfectly justified in dismissing the suit on a finding that there was no consideration for the mortgage. Refers to *Achal Ram v. Kazim Husain Khan* (1). See also *Rajoni Kumar Das v. Gaur Kishore Saha* (2).

Babu Asita Ranjan Chatterjee was not called upon to reply.

JUDGMENT.—This appeal arises out of what was originally a suit in ejectment. One Bhagaban Sardar had an occupancy holding of 45 bighas which he mortgaged to

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the plaintiff in 1318. The plaintiff sued on this mortgage, obtained a decree and in execution of that decree purchased that holding in 1916 and subsequently took symbolical possession. The defendant No. 4, who is the sole contesting defendant, admittedly was put in possession of the land by the plaintiff's mortgagor in the year before the mortgage was executed. On these findings the first Court gave the plaintiff a decree declaring his title to the land but refusing *khas* possession as the tenancy of defendant No. 4, having been created prior to the mortgage, the plaintiff obtained Bhagaban's interest subject to that tenancy. On appeal, the learned Subordinate Judge has dismissed the suit on the finding that no consideration passed for the mortgage.

We are unable to uphold this decision. Though the defendant No. 4 set up the title in himself alleging abandonment by the heirs of Bhagaban Sardar and re-settlement with himself by the landlord, that he has failed to prove. So his only right to remain on the land can be by virtue of his lease from Bhagaban. As the mortgagor's lessee he cannot question the validity of the mortgage. The appellant in this case is content with the decree as passed by the Court of first instance and does not press his claim in ejectment.

The result will be, therefore, that this appeal is decreed, the judgment and decree of the lower Appellate Court are set aside and those of the Munsif restored.

The appellant will get his costs in this and in the lower Appellate Court.

*Decree set aside.*

LAHORE HIGH COURT.

CIVIL REVISION APPLICATION NO. 590 OF 1920.  
January 31, 1921.Present:—Mr. Justice Martineau.  
SHOP OF RAM LAL JOHARI MAL  
THROUGH CHANDU LAL—PLAINTIFF—  
PETITIONER

versus

DIP CHAND AND ANOTHER—DEFENDANTS—  
RESPONDENTS.*Civil Procedure Code (Act V of 1908), O. VII*

(1) 27 A. 271; 9 C. W. N. 477 (P. C.); 8 O. C. 155;  
32 I. A. 113; 15 M. L. J. 197; 8 Sar. P. C. J. 772.

(2) 35 O. 1051; 7 C. L. J. 526; 12 C. W. N. 761.

ALI BANDI v. ALI HASAN.

r. 33—Appellate Court, power of, to set aside decree which has not been appealed against.

It is not competent to an Appellate Court, acting under rule 34 of Order XLI of the Civil Procedure Code, to interfere with the decree obtained by the appellant in so far as it has not been challenged by the respondent by way of appeal or cross-objections.

Application under section 44 of Act III of 1914, for revision of the decree of the Senior Subordinate Judge, Rohtak, dated the 30th March 1920, reversing that of the Munsif, First Class, Rohtak, dated the 21st February 1920.

Lala Amar Nath Chopra, for the Petitioners.

Mr. Ohiman Lal Gulati, for the Respondents.

**JUDGMENT.**—The plaintiffs sued for money due on book accounts, alleging that the defendant, Dip Chand, had struck a balance of Rs. 193 on the 29th August 1913, and claiming Rs. 400 as due to them for principal and interest. Dip Chand pleaded that he had struck a balance of Rs. 50 only.

The Munsif found that the defendant's thumb marks in the account-book had been obtained by misrepresentation, and that Dip Chand had acknowledged only a debt of Rs. 50. He gave plaintiff a decree for only Rs. 113, with proportionate costs.

The plaintiffs appealed to the Senior Subordinate Judge, who agreed with the finding of the Trial Court and held, further, that as there was forgery in the account the suit should have been dismissed, and, besides dismissing the appeal, proceeded to dismiss the suit also, acting under Order XLI, rule 33, Civil Procedure Code, although the defendant had not appealed or filed cross-objections.

The plaintiffs have applied to this Court for revision.

The lower Appellate Court's findings of fact cannot be challenged, and I cannot, therefore, entertain the second and third grounds of revision, but the application must be accepted on the first ground.

In *Rangamlal v. Jhandu* (1), where a plaintiff, who had been given a decree for only a portion of his claim, appealed, but the defendant neither filed a cross appeal nor took objections under Order XLI, rule 22, Civil Procedure Code, it was held that it was not

competent to the Appellate Court, acting under rule 33, to interfere with the decree obtained by the plaintiff in so far as it had not been challenged by the defendant. The learned Judges pointed out that rule 22 clearly showed that it was intended that, *prima facie* at least, a respondent should not be allowed to take exception to so much of a decree as was against him without complying with the provisions of the rule. With regard to rule 33 they went on to say: "The object of rule 33 is manifestly to enable the Court to do complete justice between the parties to the appeal. Where, for example, it is essential, in order to grant relief to an appellant that some relief should at the same time be granted to the respondent also, the Court may grant relief to the respondent, although he has not filed an appeal or preferred an objection. Of such cases the illustration to the rule is a type."

I agree with the decision of the Allahabad High Court, and hold that Order XLI, rule 33, Civil Procedure Code, did not empower the lower Appellate Court to set aside the decree passed against the defendant, when the latter had not appealed or filed cross objections.

I accordingly accept the application for revision, set aside the decree of the lower Appellate Court, and restore that of the Trial Court. The parties will pay their own costs in this Court, as the plaintiffs have been only partially successful, and in the lower Appellate Court.

*Application accepted.*

# ROUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 316 OF 1919.  
April 30, 1920.

Present:—Mr. Lindsey, J. C.

Musammal ALI BANDI—PLAINTIFF—  
APPELLANT

versus

ALI HASAN AND OTHERS—DEFENDANTS—  
RESPONDENTS.

*Pre-emption—Pre-emptor denying vendor's title whether estopped from claiming pre-emption.*

(1) 11 Ind. Cas. 640; 34 A. 82; 8 A. L. J. 1111.



ALI BANDI v. ALI HASAN.

The fact that a person who brings a suit for pre-emption has, at some time prior to the bringing of the suit, denied the title of the vendor, would not estop him from maintaining a claim for pre-emption. [p. 707, col. 2.]

Appeal against the decree of the District Judge, Rae Bareilly, dated the 30th July 1919, upholding the decree of the Subordinate Judge, Rae Bareilly, dated the 23rd July 1918.

Mr. Niamat Ullah, for the Appellant.

Mr. M. Wasim, for the Respondents.

**JUDGMENT.**—After hearing the Counsel on both sides in this case, I am of opinion that both the Courts below were in error in deciding that the plaintiff could not maintain the suit for pre-emption. In both the Courts the case has been decided on two preliminary issues; and as the appeal must, in my opinion, be allowed the result will be that the case will have to go back to the Court of first instance for decision on the merits.

The material facts to be considered are these. One Fakhruddin was the owner of certain property. In the year 1906 Fakhruddin transferred the whole of this property to his wife, Musammât Mohammad Bandi, in lieu of dower. The deed of transfer was registered on the 12th of November 1906.

After this Fakhruddin died and a dispute arose regarding the property between the wife, Mohammad Bandi, on one side and a sister of Fakhruddin, named Musammât Ali Bandi, who is the plaintiff in the present suit, on the other. The first dispute was in a Mutation Court and it is said that mutation was effected in favour of Musammât Ali Bandi.

After this a suit was brought by the widow, Musammât Mohammad Bandi, for possession of the property. Mohammad Bandi died while this suit was at trial and four persons were substituted as her legal representatives in the litigation. Two of these were Mahmud Ashraf and Mohammad Qayum, who are defendants Nos. 1 and 2 in the present suit. These two men are nephews of Musammât Mohammad Bandi.

After this substitution had been made a decree was passed in favour of the four persons and the result of that decree was that Mahmud Ashraf and Mohammad Qayum became entitled to one-half of the

property which formerly belonged to Fakhr-uddin. A decree in their favour was passed on the 30th of June 1916 and on the 18th of July 1916, they sold their one-half share to the defendant No. 3 who is their sister. Musammât Ali Bandi preferred an appeal against the decree of the 30th of June 1916. It is not shown from the record whether that appeal was actually pending on the 18th of July 1916 when the property was sold to the third defendant; but it is admitted that Ali Bandi's appeal was dismissed on the 15th of January 1917. On the 22nd of June 1917 the third defendant transferred the property which she had acquired from the first and second defendants to the defendant No. 4, who is her husband, and this was the state of things at the time this suit for pre-emption was filed on the 18th of July 1917.

The Subordinate Judge dismissed the plaintiff's claim on two grounds embodied in the fifth and sixth issues. He found, in the first place, that there was no sale which could be pre-empted, his reason being that what was sold to the third defendant on the 18th of July 1916 was not property, but a mere doubtful claim, or, in other words, a share in a law suit. On the sixth issue he found that, because prior to the suit the plaintiff Musammât Ali Bandi had been denying the title of these vendors, she was, therefore, not entitled to maintain the suit.

In my opinion, both these findings are wrong. I cannot accept the view that, because a person who brings a suit for pre-emption has at some time prior to the bringing of the suit denied the title of the vendor, he is thereby estopped from maintaining a claim for pre-emption. Such a view, to my mind, is altogether unreasonable and repugnant; and I need only refer to a decision of this Court reported as *Thepiri v. Mahabir Prasad* (1). That is a decision of a Bench and lays down the law in the sense which I have referred to. I agree with this decision.

As for the other ground taken by the Court of first instance and adopted by the lower Appellate Court, I am also of opinion that the decision is wrong. What are the

(1) 52 Ind. Cas. 621; 22 O. C. 144; 6 O. L. J. 313; 1 U. P. L. R. (J. C.) 64

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facts? On the 30th of June 1916, the two vendors had got a decree from a competent Court declaring their right to a half share in this property. It is plain that, up to this stage, there had been no attempt on the part of the vendors to dispose of any portion of the claim which they were prosecuting in the Trial Court. They got a decree, as I have said, on the 30th of June 1916 and having got that decree they proceeded to sell the property which had been awarded to them by the Court under a deed which was executed on the 18th of July 1916. I am certainly not prepared to take the view that, because either an appeal was pending at the time this transfer was made or an appeal was shortly afterwards instituted, the result must be that the Court should hold that what was being transferred by the first and second defendants to the third defendant was an unsubstantial item of property consisting of nothing more or less than a share in a law suit. That is not, in my opinion, the proper view to take of the facts.

I allow the appeal and set aside the decree of the Court below; and as there has been no trial on the merits in the Court of first instance, the result is that the case must be sent back to the Court of the Subordinate Judge for disposal on the remaining issues. Costs here and hitherto will abide the result.

*Appeal allowed.*

### CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2188  
OF 1918.

July 7, 1920.

*Present:*—Mr. Justice Walmsley and  
Mr. Justice Greaves.

MOHESH CHANDRA DE—PLAINTIFF—  
APPELLANT

*versus*

KALI KANTA SORMA AND OTHERS—  
RESPONDENTS.

*Benamdar for purchaser of separate account at Revenue sale, whether can maintain suit for joint possession—Bengal Revenue Sale Law (Act XI B, C. of 1859).*

A suit for joint possession by the purchaser of a separate account in a sale held under the Bengal Revenue Sale Law is maintainable even though the plaintiff is a *benamdar*.

Appeal against the decree of the Subordinate Judge, First Court, Chittagong, dated the 6th of August 1918, reversing the decree of the Munsif, South Ranjan, dated the 6th of June 1917.

FACTS appear from the judgment.

Babu Chandra Sekhar Sen, for the Appellant.—I got a decree for joint possession in the Court of the first instance. But on appeal by the other side the lower Appellate Court wrongly held that the plaintiff being a *benamdar* could not maintain the suit. The learned Judge in the Appellate Court has gone counter to the decision in *Muhammad Mahbub Ali Khan v. Bharat Indu* (1). It was not open to defendant to raise the question of *benami* and the fact that I have produced certificate of title is sufficient evidence of title to estate.

Babu Mohini Mohon Chakraverty, for the Respondents.—The *benamidar* is competent to bring suit. I cannot resist the appeal.

### JUDGMENT.

WALMSLEY, J.—This appeal is preferred by the plaintiff who purchased a separate account in a sale held under Act XI (B. C.) of 1859. The first Court gave a decree for joint possession but left open the question as to the identity of the plaintiff land with the land in the *mahal*. The learned Subordinate Judge on appeal dismissed the suit on the ground that the plaintiff was only a *benamdar* and, therefore, could not maintain the suit. But he held that, if it had not been for the fact that the plaintiff was a *benamdar* he would have been entitled to joint possession. He also held that there was no reason for doubting the identity of the suit land with the land of the *mahal*. It is conceded by the learned Vakil for the respondent that, since the decision of their Lordships of the Judicial Committee reported as *Muhammad Mahbub Ali Khan v. Bharat Indu* (1), the decision of the Subordinate Judge on the question of *benami* cannot be supported. It is also conceded that, in view of the finding that there was

(1) 52 Ind. Cas. 54; 23 O. W. N. 821; (1919) M. W. N. 507 (F. C.).

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no partition, the objection on that score also cannot be supported.

The result is that this appeal is allowed and the plaintiff's suit decreed in the manner suggested by the learned Subordinate Judge in the closing part of his judgment, with costs in all Courts.

GHEAVES, J.—I agree.

*Appeal allowed.*

## LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 3184 of 1916.

January 18, 1921.

*Present:*—Mr. Justice Scott-Smith and  
Mr. Justice Leslie-Jones.

GOLA SINGH—DEFENDANT—APPELLANT

*versus*

HAKAM RAI PL INTIFF—RESPONDENT.

*Partnership—Fraud of one partner—Party defrauded,  
rights of—Loss, liability for.*

Where a person is induced by the false representations of others to become a partner with them, the Court will rescind the contract of partnership at his instance, and will compel them to re-pay him whatever he may have paid them, with interest, and to indemnify him against all the debts and liabilities of the partnership. [p 70, col. 1.]

When a partnership is rescinded on the ground of fraud or misconduct, the partners at fault are not entitled to ask the other members of the partnership to contribute to the losses which may have occurred in the partnership business. [p. 710, col. 1.]

First appeal from the decree of the Subordinate Judge, First Class, Gujranwala, dated the 25th August 1916.

Mr. Manohar Lal, for the Appellant.

Mr. Mukand Lal Puri, for the Respondent.

**JUDGMENT.**—In the suit out of which these cross appeals arise the plaintiff, Hakam Rai, claimed Rs. 5,927-4-2 principal and interest, from Kharak Singh, defendant, or in the alternative he asked for dissolution of partnership and for recovery of the amount which might be found due to him after rendition of the partnership accounts. The Court below found that there was a partnership and passed a preliminary decree dissolving it and subsequently passed a final decree for Rs. 2,762-3-0 in favour of the plaintiff with proportionate costs against the defendant and ordered that the amount decreed should carry future interest at 6 per cent. per annum from the date of the decree

to the date of payment. There are cross-appeals by Gola Singh, the minor son of Kharak Singh, deceased, and by the plaintiff.

Mr. Manohar Lal, in arguing the defendant's appeal, began by contending that it was not proved that the whole sum of Rs. 5,000 said to have been paid by the plaintiff to the defendant was actually paid. This sum was made up of three items, as detailed in the judgment of the lower Court, namely:—

(1) Rs. 3,015-12-0 due to the Arya Bank on account of previous debt due by defendant to the said Bank;

(2) Received in cash in advance on the 21st of August 1913, Rs. 500,

(3) Received in September 1913 Rs. 1,484-4-0.

The latter sum was all along admitted by the defendant who gave plaintiff a credit for Rs. 1,500 in the partnership accounts. Mr. Manohar Lal frankly admitted before us that he could not contest the item of Rs. 500 and he also said very little about the debt of Rs. 3,015-12-0. In our opinion, this debt is clearly proved by the books of the Arya Bank and by the other evidence detailed by the lower Court in its judgment, printed at page 65 of the paper-book, and also by the fact that the defendant, who was literate, signed a promissory-note for the full sum of Rs. 5,000. It is unnecessary for us to go into all the arguments urged by Mr. Manohar Lal in regard to the accounts, because, in our view of the case, plaintiff's appeal must succeed. It is clearly proved that each of the partners was to put Rs. 5,000 into the partnership business of which the defendant was the manager. Defendant only put Rs. 1,500 of the plaintiff's money into the business, misappropriating the other Rs. 3,500. He denied receipt of this sum of Rs. 3,500 and made no entry of it in the accounts, and it is quite clear that his intention was to misappropriate it or to use it for his own private business.

Mr. Puri, who argued the plaintiff's appeal, urged that defendant had clearly been guilty of misconduct in not putting the whole of the plaintiff's Rs. 5,000 into the partnership business. Partnership was entered into in September 1913 and on the 5th December 1913 the plaintiff sent a notice to the defendant, printed at page 5 of the paper-book, in which he taxed the defendant with having obtained Rs. 5,000 from him by misrepre-



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resentation and called upon him to deposit the amount within four days in a certain firm, otherwise he would bring a criminal case against him charging him with cheating or criminal breach of trust. To this the defendant never replied. Under the circumstances, we consider that the defendant has clearly been guilty of misconduct if not of fraud and that, under the circumstances, the plaintiff is not liable to contribute to any losses which may have occurred to the business.

In Lindley on Partnership, Seventh Edition, page 524, it is stated that, "where a person is induced by the false representations of others to become a partner with them, the Court will rescind the contract of partnership at his instance; and will compel them to re-pay him whatever he may have paid them, with interest, and to indemnify him against all the debts and liabilities of the partnership," and so on. Again, at page C16 it is stated: "The Court may dissolve a partnership on the ground that a partner wilfully or persistently commits a breach of the partnership agreement." When a partnership is rescinded on the ground of fraud or misconduct such as has been committed in the present case, we consider that the partner at fault is not entitled to ask the other members of the partnership to contribute to the losses which may have occurred in the partnership business. In the present case it is quite possible that, if the defendant had complied with the terms of the agreement, there would have been no loss.

The plaintiff admitted that he had received goods worth Rs. 638 11-10 from the defendant which he deducted from the total sum which he said was due. In addition to these sums, the lower Court allowed the defendant credit for three other items, which will be found printed in the paper-book at page 54. These items are:—

- (1) Rs. 423 8 0 dated 11th February 1914.
- (2) Rs. 15 12 0 and
- (3) Rs. 7 9 2.

Total Rs. 446 13 2.

There is no evidence in support of the item of Rs. 423-8-0 except an entry made by the defendant in the partnership accounts. Plaintiff states that he was in the habit of giving receipts for any sums received by him, and a number of receipts have been produced by the defendant. We do not agree

with the reasons given by the Commissioner for allowing this item. It is clear that an item of Rs. 328 has been unlawfully entered by the defendant in the accounts (see the bottom of page 51 of the paper-book). We have examined the details which go to make up this item of Rs. 328 and we find that some of the items are sums spent by the defendant in this very case. Under the circumstances, we do not think that the defendant's accounts are so reliable that they should be accepted as proof of this item of Rs. 423 8 0 when no receipt is forthcoming signed by the plaintiff who says he gave a receipt for every sum received.

The item of Rs. 15-12-0 represents the difference between Rs. 1,484 4 0, received in cash by the defendant from the plaintiff, and the sum of Rs. 1,500, for which he gave credit in the accounts. As we hold that the whole sum of Rs. 5,000 was received by the defendant this item of Rs. 15 12-0 is non-existent. Plaintiff's Counsel says he does not object to the item of Rs. 7-9-2.

The plaintiff has calculated interest at 2 per cent. per mensem, but we think this is too much, because the interest which the defendant was paying to the Arya Bank was at half of this rate only. We consider that the plaintiff was entitled to his principal, Rs. 5,000 plus interest at 1 per cent. per mensem, i.e., Rs. 783 total Rs. 5,783. From this must be deducted Rs. 638 11-10 originally admitted by the plaintiff plus Rs. 7-9-2 now admitted. The balance remaining is Rs. 5,136-11-0.

We accept plaintiff's appeal and, in modification of the order of the lower Court give plaintiff a decree for Rs. 5,136 11 0 and proportionate costs in both the Courts to be realised from the estate of Kharak Singh, deceased. This sum shall bear interest from the date of the decree to the date of realisation as ordered by the lower Court at 6 per cent. per annum.

Defendant's appeal is dismissed with costs.

*Plaintiff's appeal allowed;  
Defendant's appeal dismissed.*

KALI DIN v. SHEO SARAN,  
 OUDH JUDICIAL COMMISSIONER'S  
 COURT

SECOND CIVIL APPEAL No. 12 OF 1920.  
 June 7, 1920.

Present:—Mr Lindsay, J. C.

KALI DIN AND OTHERS—DEFENDANTS—  
 APPELLANTS

versus

SHEO SARAN AND ANOTHER—PLAINTIFFS  
 —RESPONDENTS

*Oudh Rent Act (XXII of 1896), s. 42—Suit for possession based on right of inheritance—Right found not to exist, effect of—Defendant in possession without any right.*

Where in a suit for the possession of a cultivatory holding the plaintiff alleges a right based upon inheritance, and it is found that he has no right of inheritance whatever to possession of the holding, his suit is liable to be dismissed, even though it is found that the defendant is in possession without any right.

Appeal from the decree of the Subordinate Judge, Partabgarh, dated the 6th November 1919, confirming the order of the Munsif, Kunda, dated the 24th July 1919.

Mr. S. N. Roy, for the Appellants.

Mr. M. A. Khan, for the Respondents.

**JUDGMENT.**—After hearing Counsel in this case I have come to the conclusion that the judgment of the Court below is wrong and that appeal must be allowed.

The subject-matter of the suit was the right to possession of a cultivatory holding which had been in the possession of one Deoki, now deceased. Both the parties to the suit are collateral relatives of the deceased. The defendants, it is said, are in possession of the holding. They set up title to it under an oral bequest and also under a mortgage said to have been executed in their favour. The Courts below have found that the oral bequest was not proved and they have also held that the mortgage of a cultivatory holding is invalid and that, therefore, the defendants are in possession without any title. They have also held that the plaintiffs, being nearer reversioners to the deceased than the defendants, are entitled as against these defendants to possession.

It has been found by both the Courts that neither the plaintiffs nor the defendants shared in the cultivation of the holding during the lifetime of Deoki.

On these findings it appears to me that the suit of the plaintiffs ought to have been

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dismissed. They have, in my judgment, no right whatever to possession of this holding.

The law on the subject appears to be clear. The right of an ordinary tenant under the Oudh Rent Act is not a heritable right except to the extent which is laid down in section 48 of the Act. That section provides that the heir of a tenant who dies during the currency of a holding is entitled to retain occupation of the holding till the period expires. It is also provided in this section that a collateral relative who did not, at the date of the death of the deceased, share in the cultivation of the holding is not to be deemed an heir under the Act.

Applying these principles to the case, it will be obvious that the plaintiffs have no right whatever; and although it may be that the defendants have no right to be in possession of this property, nevertheless the plaintiffs, having no title in themselves, cannot be allowed to turn the defendants out.

The Courts below have arrived at their decision upon the consideration that the terms of section 42 of the Oudh Rent Act are for the benefit of the landlord. I am not sure that I understand what is meant by this expression. But whether section 48 confers any benefit on the landlord or not its provisions seem to me to be perfectly clear. The plaintiffs came into Court alleging a right based upon inheritance. Under the law they have no right of inheritance whatever and, in these circumstances, their suit was bound to fail.

The appeal is allowed, the decree of the Court below is set aside, and it is ordered that the plaintiffs' suit be dismissed with costs to the defendants in all three Courts.

*Appeal allowed.*

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 33 OF 1920.

August 13, 1920.

Present:—Sir Asutosh Mookerjee, Kt.,  
 Acting Chief Justice, and Justice  
 Sir Ernest Fether, Kt.

KALI NATH HAKRABARTY AND  
 OTHERS—PLAINTIFFS—APPELLANTS

versus

NAIMUDDIN AND ANOTHER—DEFENDANTS  
 —RESPONDENTS.

*Public nuisance—Damage, special—Partly allowed.*

KALI NATH U. NAIMUDDI.

tion of—Suit by one member of public to compel removal of obstruction, maintainability of.

Where it is shown that one member of the public has suffered special damage by the obstruction of a public pathway which prevents him from using the pathway as a convenient access to his house, he is entitled to maintain a suit for a declaration of right of way, and for an injunction to compel the removal of the obstruction.

Letters Patent Appeal against the decree of Mr. Justice Newbould, dated the 30th of April 1920, in Appeal from Appellate Decree No. 1363 of 1919.

FACTS appear from the judgment.

Babu Bepin Chandra Bose (with him Babu Rodhika Ranjan Guha), for the Appellants.—The plaintiff is the appellant. The appeal arises out of a suit for declaration of a right to village pathway and for an injunction for the removal of the obstruction by the defendant. The suit was dismissed by the Courts below on the ground that plaintiff did not describe the path as a public pathway. On appeal to this Court Mr. Justice Newbould also affirmed the decree of the Courts below on the further ground that the plaintiff had not proved any special damage. I submit there is ample evidence on the record to show that I have suffered special inconvenience by not being allowed access through the path in question. That, I submit, is sufficient for the purposes of my case to prove special damage.

Moulvi A. K. Fazlul Huq (with him Babu Jahnavi Charan Das), for the Respondents.—The plaintiff founded his claim on contract and grant but the findings on those points are against him. He should have complied with the provisions of Order I, rule 8, of the Civil Procedure Code. It has been found by the Courts concurrently that no special damage has been made out.

Babu Bepin Chandra Bose replied in brief.

### JUDGMENT.

MOOREPJEE, ACTG. C. J.—This is an appeal, under clause 15 of the Letters Patent from, the judgment of Mr. Justice Newbould in a suit for declaration of a right of way, and for an injunction to compel the defendants to remove an obstruction which they have erected across it.

The Courts below have found in favour of the plaintiffs upon the existence of the way as alleged by them. But they have dismissed the suit on the technical ground

that the plaintiffs had not described the way as a public pathway, as established by the evidence. That decree of dismissal has been affirmed by Mr. Justice Newbould on the ground that the plaintiffs have not suffered special damage as they would have to establish if the way was a public path, because the obstruction to the road had been placed at some distance from their house. In our opinion, the suit should not have been dismissed on a technical ground as has been done by all the Courts.

The judgment makes it plain that there is a way as alleged by the plaintiffs and that the defendants have unlawfully obstructed it. We shall assume for the purpose of our decision that it was a public village path and that the plaintiffs can succeed only upon proof that they have suffered special damage inasmuch as they have not instituted the suit on behalf of the members to the public in accordance with the provisions of the Civil Procedure Code. But upon the facts it is abundantly clear that they have suffered special damage. No doubt, the obstruction has been placed not in immediate front of the outer door of their house but at some distance; but it is clear that, while every member of the public has been prevented from using the pathway, the plaintiffs have suffered special inconvenience because they have been prevented from using the way as a convenient access to their house. They have thus complied with the requirement of the rule that where a wrongful act has been done affecting the public at large, as well as causing inconvenience and damage to the individual, if the inconvenience and damage caused to the individual be the same as the public at large are exposed to, the individual has no right of action, unless he can show that he has suffered some special and particular damage [See the judgment of Westropp, C. J., in *Satku v. Ibrahim Aga* (1), where numerous instances are given of special damage]. In the circumstances of this case, we are clearly of opinion that the suit should have been held maintainable.

The result is that this appeal is allowed, the decree of dismissal made by Mr.

(1) 2 B. 457; 2 Ind. Jur. 828; 1 Ind. Dec. (N. S.) 726.



MUKHTAR-UL-HUDA v. BAKHTAWAR KHAN.

Newbould, in affirmance of those of the lower Courts, set aside and the suit decreed with costs in all the Courts.

FLETCHER, J.—I agree.

*Appeal allowed.*

COURT OF THE BOARD OF REVENUE,  
UNITED PROVINCES.

PETITION No. 8 OF 1918 OF UNAO DISTRICT.

March 7, 1918.

*Present*:—Mr. Holms, S. M., and

Mr. Ferard, J. M.

*Qazi* MUKHTAR-UL-HUDA—

DEFENDANT—APPELLANT

*versus*

BAKHTAWAR KHAN—PLAINTIFF—

RESPONDENT.

*Jurisdiction of Revenue Court—Tenant, status of—  
Question raised in Revenue Court—Court, duty of.*

Where the question of the status of a tenant is raised before a Revenue Court, that Court must decide what the tenant's status is or decide that he has *prima facie* under-proprietary rights, in which case either party must go to the Civil Court for a decision on the question of under-proprietary title.

Second appeal from the order of the Commissioner, Lucknow Division, dated the 18th October 1917.

JUDGMENT.

FERARD, J. M.—(March 1, 1918.)—I would accept this appeal.

The plaintiff-respondent sets up to be an occupancy tenant. The defendant-appellant issued notice to eject him as an ordinary tenant. Decisions in the past have cancelled notices of ejectment by defendant-appellant's predecessors on the ground that plaintiff-respondent had status superior to that of an ordinary tenant, but have not decided what that status was. Courts in the past seem to have interpreted the law curiously, as I notice that Mr. Commissioner Quinn on the 22nd December 1885 held that the landlord must establish in the Civil Court that the tenant was an ordinary tenant before he could eject him by notice. Mr. Quinn was clearly wrong, as a question of tenant status (other than under-proprietary) was

for the Revenue and not for the Civil Court. The question of what the respondent's status is can never be decided until the Revenue Courts follow *Dhourwa Estate v. Chuttan Singh* (1) and, when the question is raised in a case like the present, decide what the tenant's status is, or decide that he has *prima facie* under proprietary rights, in which latter case either party could go to Civil Court on the question of under-proprietary title.

I would hold that a wrong application of *res judicata* in the past does not warrant similar action now.

The question *substantially* (see the wording of section 11 of the Civil Procedure Code) at issue in the past was, whether the tenant possessed this or that definite status and was or was not consequently liable to ejectment by notice. The vague decisions of the past in finding that the tenant was "something more" than an ordinary tenant slurled the matter substantially in issue, and, therefore, are not binding on the Courts as *res judicata* under section 11 of the Civil Procedure Code. I would hold that Courts are not bound by these "indecisive decisions" and must decide decisively on the substantial point when the question comes before them again, as in the present case. I would, therefore, remand this case to the lower Court for a definite decision, (1) as to the status of the tenant-respondent, and (2) as a consequence whether he is liable to ejectment by notice. Return to be made to this Court for final decision; costs of this appeal will be included in costs of suit.

HOLMS, S. M.—(March 7, 1918.)—I entirely agree. The view of the law stated by my colleague is that now accepted.

*Case remanded.*

(1) Sel. Dec. No 17 of 1910.

KANSHI RAM V. MAULA BAKHSH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2333 OF 1920.

January 31, 1921.

Present :—Mr. Justice Martineau.

KANSHI RAM—PLAINTIFF—APPELLANT  
versusMAULA BAKHSH—DEFENDANT—  
RESPONDENT.*Custom—Alienation by a male proprietor—Necessity,  
proof of, nature of—Just debt, what is.*

It is only in the case of an alienation by a woman that the alienee has to show that the alienor's income was insufficient to provide the money required. Where the alienor is a man, all that has to be considered is whether the purpose for which the alienation was effected was a necessary purpose [p 74, col. 1.]

A just debt need not be one incurred for necessary purposes [p. 74, col. 2.]

It is not necessary for an alienee, who is also the antecedent creditor, to prove that all the previous debts were incurred for necessity. It is only where the previous debts, besides not being for necessity, are unreasonable or prove reckless extravagance or waste, or a design to injure the reversioner's interests, that a distinction arises between the case of an alienation in favour of the antecedent creditor, who is *prima facie* fixed with knowledge of the nature of the debts, and an alienation in favour of a third person who cannot be presumed to have such knowledge [p 714, col. 2; p. 715, col. 1]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 17th April 1920, reversing that of the Munsif, First Class, Garhshankar, District Hoshiarpur, dated the 21st February 1920.

Lala Fakir Chaudhary, for the Appellant.

Mr. Badr ud-Din Tarehvi, for the Respondent.

**JUDGMENT.**—On the 15th January 1910 the defendant's brother, Adalat Khan, borrowed Rs. 60 from the plaintiff and executed a deed in his favour hypothecating his share in certain house property. On the 24th January 1913 he executed another deed hypothecating the same property to the plaintiff for Rs. 122 which included Rs. 93 on account of principal and interest due on the deed of 1910, Rs. 4 for registration expenses, and Rs. 25 which he received in cash before the Sub-Registrar. The plaintiff sues the defendant (Adalat Khan being dead) for the money due on the deed of 1913. The defendant pleaded that the property hypothecated was ancestral, and that the mortgage was without necessity.

The Munsif found that the property was ancestral, but that there was necessity for

the alienation, and he gave the plaintiff a decree.

On appeal, the District Judge agreed with the finding of the first Court that the property was ancestral, but also found that no necessity for the alienation was proved, and he, therefore, dismissed the suit. The plaintiff has filed a second appeal in this Court.

In the deed of 1910 it is stated that the Rs. 60 borrowed by Adalat Khan were required for "household" purposes, and the witnesses to the execution of the deed also say the money was borrowed for such purposes.

The learned District Judge holds that the plaintiff was bound to give some proof that it was necessary for Adalat Khan to raise the money by pledging ancestral property, and he points out that Adalat Khan, being in the army, had a source of income beyond the one *ghumao* of land which he possessed.

He is, however, wrong in thinking that the plaintiff had to show that Adalat Khan's income was not sufficient for his wants. It is only in the case of an alienation by a woman that the alienee has to show that the alienor's income was insufficient to provide the money required. Where the alienor is a man, all that has to be considered is whether the purpose for which the alienation was effected was a necessary purpose. I do not think it can be said that ordinary domestic requirements were not "necessities" for which Adalat Khan was justified in borrowing Rs. 60. Further, it appears to me that, in accordance with the principles enunciated in *Dasi Ditta v. Saudagar Singh* (1), the mere existence of the debt contracted in 1910 was sufficient to justify the alienation in 1913, whether the debt was incurred for a necessary purpose or not. On page 296 of that ruling, where the words "just debt" are defined, it is stated that a just debt need not be one incurred for a necessary purpose, and further on it is laid down that it is not necessary for an alienee, who is also the antecedent creditor, to prove that all the previous debts were incurred for necessity. It is only where the previous debts, besides not being for necessity, are unreasonable or prove reckless extravagance or waste, or a design to injure the reversioner's interests that a distinction

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arises between the case of an alienation in favour of the antecedent creditor, who is *prima facie* fixed with knowledge of the nature of the debt, and an alienation in favour of a third person who cannot be presumed to have such knowledge. In the present case there is nothing to show that the debt contracted by Adalat Khan in 1910 was of the character mentioned above.

I hold, therefore, that the item of Rs. 93 included in the deed of 1913 on account of the amount due on the deed of 1910 must be allowed.

The sum of Rs. 25 received by Adalat Khan at the time of the registration of the deed is trifling, and, according to the evidence Adalat Khan, borrowed it for the purpose of paying land revenue. This item should also be allowed.

I accordingly accept the appeal, set aside the decree of the lower Appellate Court, and restore that of the Trial Court. The respondent will pay the appellant's costs in this Court and in the lower Appellate Court.

*Appeal accepted.*

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1622  
OF 1918.

May 13, 1920.

Present:—Justice Sir N. R. Chatterjee, Kt.,  
and Mr. Justice Panton.

DINABANDHU MAITI—PLAINTIFF—  
APPELLANT

*versus*

BISHNU BEWA AND OTHERS—  
—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 132—  
Mortgage—Loan of paddy secured by mortgage—  
Suit to recover money due—Nature of suit—Limitation  
applicable.

D. obtained a loan of a quantity of paddy upon a mortgage of his property, covenanting to repay the loan with interest within a certain time and stipulating that, in case of default, the mortgagee could realise by sale of the property mortgaged. D. made default and the present suit was brought within 12 years of the due date of payment for recovery of the money with interest, and the question was whether the suit was within time.

Held, that the suit was one for enforcement of money charged upon mortgaged property within the meaning of Article 132, Schedule I, to the Limitation Act, and having been brought within the period prescribed by that Article, it was not barred by limitation.

Appeal against the decision of the Third Subordinate Judge, Midnapore, dated the 22nd May 1918, affirming that of the Munsif, Third Court, at Contai, dated the 30th November 1916.

Baba Sarada Charan Maity, for the Appellant.

Baba Satenuripati Ray, for the Respondent.

JUDGMENT.—The question involved in this case is, whether the suit upon the mortgage-bond out of which this appeal arises, is a suit for enforcement of money charged upon mortgaged property within the meaning of Article 132 of the Limitation Act.

The mortgagor took a loan of a certain quantity of paddy and agreed to repay it together with interest thereon at so many *kathas* per *kuri* per year and further agreed that, on default of payment within the time stipulated, the mortgagee would be entitled to realise the money—the subject-matter of the claim together with costs by sale of the property which was mortgaged to secure the loan, and that if that was insufficient to satisfy the debt, by attachment and sale of other properties of the mortgagor.

The suit was brought more than six years after, and within twelve years of the due date of payment.

The Court below, relying on the decision in the case of *Rash Bihari Das v. Kunjabihari Patra* (1), held that the suit was barred by limitation. That case has been considered and distinguished in several cases: See *Sripoti Lal Dutt v. Sarat Chandra Mondal* (2), *Sridhar Chandra Maity v. Ram Gobinda Jana* (3), *Indra Narain Shao v. Diabar Samanta* (4) and *Jagendra Nath Singh v. Mohan Lal Khan* (5).

We have been pressed to refer the case to the Full Bench; but the terms of the bond in the case of *Rash Bihari Das v.*

(1) 7 Ind. Cas. 805; 24 C. L. J. 348.

(2) 46 Ind. Cas. 78; 22 C. W. N. 710.

(3) 1 Ind. Cas. 608; 29 C. L. J. 67.

(4) 5 Ind. Cas. 899; 23 C. W. N. 949; 47 C. L. J. 101.

(5) 5 Ind. Cas. 975; 23 C. W. N. 951.



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*Kunjabihari Patra* (1) do not appear to be the same as those of the bond in the present case. In fact, all the terms of the mortgage-bond, and specially those relating to enforcement in default of payment, do not appear from the report of that

In the present case, as stated above, it was stipulated in the bond that the money (*Dabir taka mai kharcha*) would be realisable by the sale of the mortgaged property. The case, therefore, is distinguishable from that of *Rash Bihari Das v. Kunjabihari Patra* (1). In the circumstances, we do not think that the case should be referred to the Full Bench and the appeal must be allowed.

We accordingly hold that the suit is not barred by limitation. But as there are several other questions to be tried, the decrees of the Courts below must be set aside and the case sent back to the Court of first instance for trial of the other issues.

Each party to bear his own costs up to this stage. Future costs to abide the result.

Case remanded.

### LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 629 of 1920.

January 31, 1921.

Present:—Mr. Justice Martineau.

TEJ BHAN AND ANOTHER—PLAINTIFFS

—PETITIONERS

versus

WALI DAD—DEFENDANT—

RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r. 3—Death of plaintiff—Legal representatives of deceased brought on record—Defendant, failure of, to object—Estoppel, omission to consider question of—Material irregularity.*

Where on the death of a plaintiff certain persons are brought on the record as his legal representatives without any objection by the defendant, the latter is estopped from subsequently asserting that the persons impleaded are not the legal representatives of the deceased. [p 77, col. 1.]

The omission by an Appellate Court to consider the question of estoppel amounts to a material irregularity, justifying interference in revision. [p. 717, col. 2.]

Petition, under section 44 of Act IX of 1919, for revision of the decree of the Senior Subordinate Judge, Jhang, dated the 26th April 1920, reversing that of the Honorary Civil Judge, Jhang, dated the 12th June 1919.

Mr. *Mukand Lal Puri*, for the Petitioners.  
Sayad *Mohsin Shah*, for the Respondent.

JUDGMENT.—The facts which have given rise to the present application for revision are as follows: Mal Chand brought a suit for Rs. 380, on the basis of a lease executed by the defendant, in the Court of Rai Sabib Lala Ram Chand, Honorary Civil Judge, Jhang. The Honorary Civil Judge held that the suit was cognizable by a Revenue Court and returned the plaint. Mal Chand appealed to the Senior Subordinate Judge. While the appeal was pending the appellant's Pleader informed the Court that the appellant had died. On the 25th June 1918 an application was put in by Tej Bhan and Jawala Das, sons of the deceased Mal Chand, for being impleaded as appellants in place of their father. Notice was issued to the defendant, and on the 12th August 1918 he appeared and said that Tej Bhan and Jawala Das might be impleaded as representatives of Mal Chand. The Senior Subordinate Judge (Lala Devi Dial) accordingly passed an order impleading them, and after hearing the appeal he held that the suit was triable by a Civil Court and directed the Honorary Civil Judge to proceed with it.

The case was then tried. There were several hearings, evidence was recorded, and no objection was taken by the defendant that Tej Bhan and Jawala Das were not the legal representatives of the deceased Mal Chand. Ultimately, a decree was passed by the Court in the plaintiffs' favour on the 12th June 1919. The defendant appealed from the decree to the Senior Subordinate Judge (Sheikh Ali Muhammed) and he then, for the first time, took the objection that all the representatives of Mal Chand had not been brought on the record, Mal Chand having left three sons, Tej Bhan, Jawala Das, and Shiv Ram, and also a grandson (deceased son's son). The Senior Subordinate Judge has held that in consequence of the omission to bring all the representatives of Mal Chand on the record the suit as well as the appeal by virtue of

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which the suit was remanded had abated, and he, therefore, accepted the appeal which was before him and dismissed the suit. The present application is by Tej Bhan and Jawala Das for revision of that order.

It is contended on behalf of the petitioners that they alone are the legal representatives of the deceased Mul Chand for the purposes of this case, as the land of which the lease money is in dispute has been mutated in their names alone. Whether this contention is correct or not, I think that the order of the lower Appellate Court must be set aside on the ground that the respondent is estopped by his conduct from raising the objection that all the representatives of the deceased have not been brought on the record. In August 1918 he agreed to Tej Bhan and Jawala Das being impleaded as Mul Chand's representatives, and from that time up to June 1919 when the decree was passed against him by the Trial Court he never objected that there were other representatives also who should have been made parties.

In *Meenatchi Achi v. Ananthanarayana Ayyar* (1), where the widow of the deceased plaintiff had been brought on to the record in place of her husband, it was held that the defendant was precluded from raising at a late stage of the case the objection that the widow was not her husband's legal representative. The learned Subordinate Judge says that it was not necessarily within the defendant's knowledge who the representatives of Mul Chand were. It was, however, his duty to make inquiries and satisfy himself on the point. In the case cited above the learned Judges said, on page 228 of the judgment: "They (the defendants) were bound to use all reasonable diligence in acquainting themselves with the state of the family of the deceased in view to ascertain whether the widow was entitled to prosecute the suit as the legal representative of her deceased husband, and they were bound to take the objection at the earliest opportunity if they meant to insist upon their alleged right to raise the objection."

*Balabai v. Ganesh Shankar Pandit* (2) is also in point.

(1) 28 M. 224; 12 M. L. J. 380.

(2) 27 B. 162; 4 Bom. L. R. 252.

The lower Appellate Court's omission to consider the question of estoppel was a material irregularity which justifies the interference of this Court in revision.

I accept this application, set aside the decree of the lower Appellate Court, and remand the case to that Court under Order XLI, rule 23, Civil Procedure Code, for disposal of the appeal before it on the merits. Court-fee on the application to be refunded. Other costs to be costs in the case.

*Application accepted.*

## ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 13 OF 1920.

July 28, 1920.

Present:—Syed Wazir Hasan, A. J. C.  
FAZL HAQ AND OTHERS—DEFENDANTS—  
APPELLANTS

*versus*

Bibi RUQAIYA KHANAM—PLAINTIFF,  
BIBI UMMATUL FATIMA AND OTHERS  
—DEFENDANTS—RESPONDENTS.

*Lease—Lessee continuing in possession for more than 12 years, status of—Adverse possession—Limitation.*

Where a person holds a village under a lease continuously for more than 12 years paying the rent stipulated and not sharing the profits of the village with the lessor or his co-sharers he acquires the limited interest of perpetual lessee under the lease by force of adverse possession. His taking possession under the lease operates as a complete ouster of not only the grantor but of every other co-sharer of his, the possession of the lessee being adverse against them all, and limitation for a suit to deprive him of possession runs from the date of such possession. [p. 720, col. 1]

Appeal from the decree of the Subordinate Judge, Sultanpur, dated the 19th December 1919.

Mr. A. P. Sen, for the Appellants.

Babu Ram Chandra, for Respondent No. 1.

JUDGMENT.—The respondent, Bibi Ruqaiya Khanam, brought the suit out of which this appeal arises for possession of the village Pithapur, situate in the Pargana of Miranpur, district Sultanpur, and also for a declaration that the perpetual lease executed

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by Bibi Ummatul Fatima was null and void as against the plaintiff. The defendants to the suit were the heirs of one Tafazzul Husain, who was the lessee under the lease stated above. The facts are as follows:—The village in suit is included in a *taluka* called Maniarpur, the Summary Settlement of which was made with Bibi Saghra and afterwards her name in respect of this *taluka* was entered in Lists I and II framed under section 8 of Act I of 1869. It came to be vested in its entirety in one Bibi Ilahi Khanam, who died intestate on the 20th April 1899, leaving her surviving six daughters, Bibi Ummatul Fatima, Bibi Batul, Bibi Kaniz, Bibi Asghari, Bibi Ruqaiya and Bibi Haidari. The succession to this *taluka* has suffered many vicissitudes and the question of the title to it has not yet been finally settled [See the case of *Ghulam Abbas Khan v. Bibi Ummatul Fatima* (1)]. For the purpose of this appeal it is enough to mention the admitted facts that the six ladies took possession of the estate on the death of their mother. At first, the name of Bibi Ummatul Fatima, the eldest daughter, was alone recorded in the revenue papers but by a subsequent order the names of all the six ladies were recorded jointly, but Bibi Ummatul Fatima continued to be the *Lambardar* for the whole of the *taluka*.

It appears that the possession and management of the entire estate passed into the hands of the Collector of the District on the 15th November 1905 on account of a default having been made in payment of the Government revenue under section 150 of the U. P. Land Revenue Act (Act III of 1901) and the management continues up to the present moment.

In the several litigations which followed the death of Bibi Ilahi Khanam, one Tafazzul Husain helped these ladies by acts and advice and apparently received no or little remuneration in cash for his services. Accordingly, on the 22nd May 1905, a perpetual lease was executed by Bibi Ummatul Fatima, Bibi Asghari and Bibi Haidari in respect of the village in suit by way of reward or compensation for the services rendered by Tafazzul Husain. The lease was registered only so far as its execution by Bibi Ummatul Fatima was concerned but it was not

registered *qua* Bibi Asghari and Bibi Haidari obviously because they wanted to go back on the arrangement to which they had previously consented. On the 3rd March 1906 Tafazzul Husain applied for the entry of his name in the Revenue Records on the basis of the lease of the 22nd May 1905. In column No. 5 of his petition relating to the nature of the transfer he set out the perpetual lease and in column No. 8 of the same petition relating to the date of the transfer he gave the date of the document in question as the 22nd May 1905 (Exhibit A-2). On the 10th April 1906 the Deputy Commissioner of Saltanpur, who, as stated above, had come into the possession of the estate under section 150 of the U. P. Land Revenue Act (Act III of 1901) lodged his objections against the mutation for which Tafazzul Husain had asked by his petition of the 3rd March 1906. His objections were mainly two: (1) that Bibi Ummatul Fatima had no power to grant the lease in question so as to bind her other co-sharers, and (2) that the lease having been granted after the assumption of management by the Collector was invalid (Exhibit A 3). It may at once be pointed out that the second ground taken by the Deputy Commissioner was not correct in fact. The lease was granted in May 1905 while the Collector entered into the possession of the estate, as stated above, in November 1905.

On the 17th April 1906 Bibi Ruqaiya and Bibi Asghari, by means of a petition of that date, protested against the mutation in favour of Tafazzul Husain. They also founded their objection mainly on two grounds:

(1) That Bibi Ummatul Fatima had no authority to grant the lease in question and consequently the objectors were not bound by it, and (2) that the applicant, Tafazzul Husain, had never been in possession of the village to which the lease related (Exhibit A 4). These facts clearly establish the following three points: (1) Tafazzul Husain asserted his title to the lease-hold property on the basis of the instrument of the 22nd May 1905, (2) he did so to the knowledge of the plaintiff Bibi Ruqaiya Khanam, and (3) his claim that he entered into possession of the village by virtue of the lease was disputed, amongst others, by the plaintiff.

(1) 31 Ind. Cas. 748; 18 O. C. 182; 2 O. L. J. 636.



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A dispute having thus arisen the Assistant Collector, in whose Court the mutation proceedings were pending, entered into an enquiry as to who held the possession of the village in suit. It appears that he asked for a report on that question from the Tahsildar of the Tahsil within which the village in question lay. The report of the Tahsildar is a very important document bearing upon the question of possession. It is dated the 14th August 1905 (Exhibit A-7). The purport of that report is that Tafazzul Husain filed the deed of perpetual lease, produced oral and documentary evidence and the objectors also produced oral and documentary evidence in support of their objections. On the question of possession, he came to the conclusion that Tafazzul Hussain, the applicant, had proved that he was in possession of the village Pithapur. On the 24th August 1906 the Assistant Collector passed the following order:—"On the basis of the perpetual lease, mutation of the village Pithapur be made in favour of Tafazzul Husain as a perpetual lessee." In stating the grounds for his order, the Assistant Collector distinctly said that mutation in the revenue papers depended upon possession and that the applicant had proved his possession (Exhibit A-8). Tafazzul Husain continued to pay the rent reserved by the lease to the Deputy Commissioner and, in support of this, a large number of receipts are filed in this case. These facts demonstrate that Tafazzul Husain entered into possession of the whole of the village in virtue of the lease of the 22nd May 1905 since the date of its execution and he and, on his death, his heirs have continued in possession in the same capacity up to the present moment.

On the 17th November 1917 these six ladies entered into an agreement for partition of the entire estate and by the same agreement they appointed Rai Sahib Babu Shambhu Nath, a Pleader in Sultanpur, to make the partition on the lines settled amongst the parties themselves. Babu Shambhu Nath gave his award on the following day. The only function which he performed as an arbitrator was to incorporate the allotments which the ladies had privately settled into his award. Six *chittis* were prepared and each of these six ladies accepted the one which was by

consent intended for her. The result of this allotment was that the village in suit was assigned to the share of Bibi Ruqaiya Khanam, the plaintiff-respondent.

I have no doubt in my mind that the village was given to her and she accepted it subject to the lease in question. The rent payable under the lease is stated therein to be Rs. 537.5.9. Rs. 4.8 out of this amount is shown for revenue and cesses, etc., and Rs. 195.9 for *hoq m.likana*. In the *chitti* of the plaintiff-respondent the *nikasi kham* of the village is shown to be Rs. 512.5.9. This total is shown to have been made up of the following two items: for revenue Rs. 360 and for net profits Rs. 152.5.9 (Exhibit 5). The slight difference is due to the statutory reduction of cesses which has taken place between the date of the lease and of the partition. The *jamabandi* of 1917, the year in which the partition took place, shows the gross profits of the village to be Rs. 288.5.3 (Exhibit A-71). All the six *chittis* show that each of them contains property of almost equal profits. The irresistible inference is, that the entry of *nikasi kham* to the extent of Rs. 512.5.9 only as against this village in the *chitti* of Bibi Ruqaiya Khanam was due to the recognition of the lease-hold interest of Tafazzul Husain by all the co-sharers.

However that may be, the plaintiff-respondent brought the present suit on the 14th September 1918. In 1919 an application was made to the Court of the Subordinate Judge of Sultanpur that the award of Rai Sahib Babu Shambhu Nath be made a decree of Court. This was done by an order of the Court, dated the 27th August 1919. Amongst other defences raised on behalf of the appellants, one was a plea of limitation. This plea has been urged again in appeal before me. The lower Court rejected it on the ground that the plaintiff's cause of action for the possession of the village in suit arose by the allotment made to her in virtue of the partition mentioned above.

I am of opinion that the plea of limitation must prevail. The lease which Bibi Umamah Fathma granted to Tafazzul Husain has been treated by the learned Advocate for the plaintiff respondent as being wholly void. I need not decide the question

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whether the lease was wholly void or merely voidable: nor need I decide the other question as to whether it was good in respect of Bibi Ummatul Fatima's share and void in respect of the shares of the other five sisters of hers. I will assume the agreement that it is wholly void as correct. From the statement of facts which I have given at some length, it is quite clear to my mind that Tafazzul Hussain and his heirs acquired the limited interest of a perpetual lessee under the deed of the 22nd May 1905 by force of adverse possession. There is no evidence that the plaintiff or any of her other co-sharers ever got the profits of this village, awarded to them in any settlement of accounts between them and the *Lambardar*, Bibi Ummatul Fatima, or from the hands of the Deputy Commissioner, over and above their share in the rent payable under the lease. In fact, it is clear, from what I have stated above, that the Deputy Commissioner has throughout the course of his management relieved the rent fixed by the lease from Tafazzul Hussain and after his death from his heirs. When Tafazzul Hussain took possession of this village under the lease there was a complete ouster of not only the grantor of the lease but of every other co-sharer of hers including the plaintiff-respondent. Tafazzul Hussain's possession was adverse as against all of them. The subsequent partition in the year 1917 to which reference has already been made could not, in my opinion, have the effect either of stopping the limitation which had begun to run from the date of Tafazzul Hussain's possession or if it had run long enough, as in fact it had, of depriving Tafazzul Hussain of the rights which he had acquired by means of continuous adverse possession. As to adverse possession by one co-sharer as against another, see the recent decision of their Lordships of the Privy Council in *Varada Pillai v. Jeevarathnammal* (2). The proposition that a limited interest may be acquired by adverse possession is hardly questionable. I may here refer to a very exhaustive judgment on the subject

(2) 53 Ind. Cas. 901; 24 C. W. N. 346 at p. 352; (1919) M. W. N. 724; 10 L. W. 679; 38 M. L. J. 313; 18 A. L. J. 274 (P. C.); 43 M. 243; 2 U. P. L. R. (P. C.) 66; 22 Bom. L. R. 411; 46 I. A. 285.

of Mr. Justice Batty of the Bombay High Court in the case of *Thakore Fatesingji Dipsangji v. Bamani Ardeshir Dalal* (3). The opinion expressed by the learned Judge was followed by a Bench of this Court in *Husain Ali Mirza v. Muhammad Azim Khan* (4).

The learned Subordinate Judge has given a decree for proprietary possession and also for a declaration that the lease of the 22nd May 1905 is not binding on the plaintiff-respondent. So far as proprietary possession is concerned, there was no cause of action for a relief of that nature. The defendants had never disputed the proprietary interest of the plaintiff-respondent; and so far as the declaration is concerned, it cannot be granted in view of my finding on the question of limitation.

I, therefore, accept the appeal, set aside the decree of the Court below and dismiss the plaintiff-respondent's suit with costs in both the Courts.

*Appeal allowed.*

(3) 27 B. 515; 5 Bom. L. R. 274.

(4) 31 Ind. Cas. 728; 18 O. C. 163.

## LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 1134 OF 1917.

January 31, 1921.

*Present* :—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Wilberforce.

BHOLU—JUDGMENT-DEBTOR—  
PETITIONER

*versus*

RAM LAL—DECREE HOLDER—RESPONDENT.

*Civil Procedure Code (Act V of 1908), ss. 141, 151—Execution proceedings—Procedure applicable—Application for execution, dismissal of, for default—Court, whether has power to restore application—Inherent power.*

The provisions of section 141 of the Civil Procedure Code are not applicable to an application for execution [p. 721, col. 1.]

Proceedings for execution of a decree fall, however, within the ambit of section 151 of the Civil Procedure Code, and, if a decree-holder whose application for execution has been dismissed for default, can satisfy the Court that it should exercise

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its inherent jurisdiction *ex debito iustitiæ* to restore the application there is nothing in the law to debar the Court from exercising that inherent power. [p 722, col. 1.]

Petition under section 44 of Act III of 1914, for revision of the order of the Senior Subordinate Judge, Jhang, dated the 29th August 1917, reversing that of the Munsif, Second Class, Chiniot, District Jhang, dated the 2nd July 1917.

Sayed Mohsin Shah, for the Petitioner.

Lala Fakir Chand, for the Respondent.

JUDGMENT.—The question upon which we are invited to express our opinion is, whether a Court executing a decree can restore an application for execution after it has dismissed it for default. Now, there can be no doubt that section 141, Civil Procedure Code, 1883, does not apply to a proceeding for execution. That section reproduces with slight modifications section 647 of the previous Code, and it was held, with reference to the latter section, by their Lordships of the Privy Council in *Thakur Prasad v. Fakir-Ullah* (1), that it did not apply to proceedings in execution but applied only to original matters in the nature of suits, such as proceedings in Probate, guardianship, etc. It is to be observed that, at one time there was a considerable divergence of opinion as to whether section 647 applied to execution proceedings, and it was in consequence of this divergence that the Legislature added, by Act VI of 1892 an explanation to that section in order to make it clear that the provisions of the section were not applicable to proceedings in execution. The judgment of the Privy Council was, however, based upon the section as it stood before the explanation was added, the result being that the explanation was considered unnecessary and, consequently, omitted when the new Code was drafted. We are consequently of opinion that the procedure relating to suits is not applicable to an application for execution, and this view coincides with the rule enunciated in *Hari Charan Ghosh v. Manmatha Nath Sen* (2) and *B. lasubramania Chetti v. Swarnammal* (3).

There is, however, nothing in the Code to restrict the inherent power of the Court to pass such orders as may be necessary for the ends of justice. Indeed, this power is now expressly recognized by section 151 of the Code, and the learned Vakil for the petitioner admits that it was only in the exercise of this inherent power that the Court could dismiss for default an application for execution. Now, if the Court has an inherent power to pass an order of dismissal, there is absolutely no reason why it should not possess a similar power to set aside the dismissal if the ends of justice render it necessary to do so.

It is contended that a decree-holder, whose application for execution has been dismissed for want of prosecution, has got an alternative remedy and is entitled to make a second application for execution, and that he should not, therefore, be allowed to invoke the inherent power of the Court to set aside an order of dismissal. There may, however, be cases and, indeed, this is one of such cases, in which a second application may be barred by limitation; and if we accept the contention the decree-holder would in such cases have no remedy open to him. Be that as it may, we see no reason in principle for holding that the mere circumstance that an alternative remedy may be open to the decree-holder should prevent the Court from exercising its inherent jurisdiction if the circumstances of the case require its exercise. In this connection we are not unmindful of the observations to the contrary made by the Patna High Court in *Ritu Kuer v. Alakhdeo Narain Singh* (4), but we do not think that the learned Judges intended to enunciate any hard and fast rule of general application. We find that their Lordships of the Privy Council in *Debi Basish Singh v. Habib Shah* (5) laid down the rule that the Court has an inherent power to set aside an order dismissing a suit under Order IX, rule 8, Civil Procedure Code, for the non-appearance of the plaintiff, when the non-appearance was due to the plaintiff's death, which fact was

(1) 17 A. 108 (P. C.); 5 M. L. J. 2; 22 I. A. 44; 6 Sar. P. C. J. 526; 1 Ind. Dec. N. S. 393.

(2) 19 Ind. Cas. 684; 41 C. ; 18 C. W. N. 313.

(3) 21 Ind. Cas. 32; 28 M. 199 (1913) M. W. N. 695; 14 M. L. T. 196; 25 M. L. J. 867.

(4) 47 Ind. Cas. 154; 4 P. L. J. 330; (1918) Pat. 265; 5 P. L. W. 208.

(5) 19 Ind. Cas. 526; 35 A. 331; 17 C. W. N. 829; 11 A. L. J. 65; 18 C. L. J. 9; 15 Bom. L. R. 640; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 118; 16 O. C. 194; 40 T. A. 151 (P. C.).



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not brought to the notice of the Court dismissing the suit. There is, therefore, no adequate ground for holding that a similar power could not be invoked in the case of an application for execution dismissed for default, when it is clear that the Code contains no express provisions on the subject.

Proceedings for execution of a decree certainly fall within the ambit of section 151, Civil Procedure Code, and if a party to an application for execution can satisfy the Court that it should exercise its inherent jurisdiction *ex debito justitiæ*, there is nothing in the law to debar the Court from exercising that inherent power.

We accordingly dismiss the application for revision with costs.

*Application dismissed.*

### PATNA HIGH COURT.

APPEALS FROM ORIGINAL ORDERS NOS. 172, 220 and 271 OF 1919.

March 1, 1921.

Present :—Mr. Justice Das and Mr. Justice Ross.

GAJO SINGH AND OTHERS—JUDGMENT-DEBTORS—OBJECTORS—APPELLANTS IN APPEAL No. 172 OF 1919

RAM KHELAWAN SINGH—JUDGMENT-DEBTOR—OBJECTOR—APPELLANTS IN APPEAL 220 OF 1919

MALUKDHARI AND OTHERS—JUDGMENT-DEBTORS—OBJECTORS—APPELLANTS IN APPEAL No. 271 OF 1919

*versus*

AMRIT NARAIN SINGH—DECREE-

HOLDER—APPLICANT—RESPONDENT IN ALL.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Joint tort-feasors, suit against—Defendant, death of—Legal representatives not impleaded, effect of—Suit, whether abates.

In a suit for damages arising out of a tort the plaintiff is not required to implead as a defendant every person who is liable for the tort. [p. 74, col. 1.]

The only effect of suing some only out of a number of joint tort-feasors is that the judgment recovered against them bars a suit against the others. [p. 74, col. 1.]

Therefore, where in such a suit one of the defendants dies and his legal representatives are not brought on the record, the suit does not abate as a whole and a decree obtained in the suit is a good decree against those defendants who were living parties to it. [p. 74, col. 1.]

Appeals from an order of the Subordinate Judge, Patna.

Messrs. S. M. Mullick, S. N. Roy and P. O. Ray, for Mr. Gangadhar Das, for the Appellants.

Messrs. Sami and P. Banerji, for the Respondents.

### JUDGMENT.

ROSS, J.—These three appeals are directed against an order of the Subordinate Judge of Patna in execution proceedings.

The material facts are these. Jhamman Singh, the maternal grandfather of the plaintiff, was the owner of certain shares in Mouzah Makawan and Mouzah Gauspur Syed Bhikh. The defendants are the descendants of five persons, Gotias of the said Jhamman Singh. There were disputes about the estate of Jhamman Singh between these Gotias and his widow, and, later, his daughter, the plaintiff's mother. As a result of a fraudulent compromise 5 dams 3 cowris and odd share in Mauza Makawan and 2 annas 18 dams share in Mouza Gauspur Syed Bhikh came into the possession of the ancestors of the defendants. The former share was reduced to 5 dams 1 cowri and odd by a sale on account of the plaintiff's grandfather's debts; but the balance of the share and the whole of the latter share continued in possession of the defendants. The former share, together with the ancestral share of the defendants, in all 5 dams 15 cowris and odd, was formed into a separate Tanzi in which 13 annas and odd, *kham*, represented the original share of the plaintiff's grandfather. When the plaintiff became entitled to possession on the death of his mother, he brought a suit for the recovery of the aforesaid shares. The suit was decreed by the Subordinate Judge and dismissed by the High Court. On appeal to the Privy

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Council, the decree of the Subordinate Judge was restored. The plaintiff then proceeded to execute this decree.

It has been proved, and is not now disputed, that, during the pendency of the appeal in the Privy Council, several of the defendants, namely, Jasoda Koor, Jungli Singh, Kuldip Singh, Ramu Singh *alias* Firangi Singh, Rameshwar Singh and Batoran Singh, died and their heirs were not substituted.

The first question in these appeals is as to the effect on the decree on this failure to substitute the heirs of these defendants. It was contended for the appellants-judgment-debtors, that the whole appeal abated and that the decree is a nullity. Reference was made to Order XXII, rule 4. But all that that rule provides is that, when one of several defendants dies and the right to sue does not survive against the others alone (as in the present case), then, if the heirs of the deceased defendant are not substituted, the suit abates as against that defendant. The rule does not provide that the whole suit abates.

The appellants are on the horns of a dilemma. If the interest of the defendants is joint, then the right to sue survives against the surviving defendants alone. If substitution is necessary, as in the present case, it is because the interest of the defendants is separate, and, therefore, does not survive, and, consequently, there is no reason why the suit should not proceed against the surviving defendants. The defendants are joint tortfeasors. A plaintiff has never been required to join as defendant every person who is liable for the tort. The liability of others is no defense for those sued because the liability is joint and several. The only effect of suing some only out of a number of joint tortfeasors is that the judgment recovered against them bars a suit against the others. The decree in the present suit is a good decree against those who were living parties to it.

The next contention was, that the Subordinate Judge had erred in basing his judgment on *khewats* of the villages of Makawan and Gauspur Syed Bhikh filed during the argument in order to ascertain the shares of the surviving judgment-debtors. No objection seems to have been

taken to the admission of this evidence, and I see no reason why a public document like the *khewat* should not be put in at any stage. As to the sufficiency of the evidence there can be no doubt. It is the best possible evidence and it is difficult to see what other evidence in respect of the shares could be given. It shows the shares of the deceased parties and these shares should first be deducted from the shares claimed. It is said that, as the defendants have ancestral shares as well as the shares in suit, the deduction can not be made. If the shares of the deceased defendants shown in the *khewat* include ancestral shares as well as shares in suit, then the deduction of the total shares is to the advantage of the judgment-debtors. The evidence given on behalf of the judgment-debtors is, that they held their shares separately. The plaint shows the total shares of the defendants, ancestral and obtained by trespass. The extent of the share obtained by trespass is also stated. The difference must, therefore, be set aside as ancestral. The shares of the deceased defendants must further be excluded and the balance will not be more than the shares of the surviving defendants obtained by trespass and, therefore, recoverable in execution.

The last point taken was, that the Subordinate Judge had erred in ordering restitution of Rs. 2,533-12-2, the amount paid by the plaintiff as costs under the High Court decree. It appears that this decree for costs was executed by the then decree-holders, now the judgment-debtors, jointly. Their liability to make restitution was, therefore, joint and, in the absence of some, the claim must fail against all.

The result is that these appeals are decreed only in respect of the order for restitution of the sum of Rs. 2,533-12-2 which is set aside, and in other respects are dismissed. There will be no costs of the appeals.

DAS, J.—I agree.

*Appeals allowed in part.*

MEHR DAIM V. SHAHAMAD.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2737 OF 1917.

February 9, 1921.

*Present:*—Mr. Justice Leslie-Jones and  
Mr. Justice Broadway.

MEHR DAIM—PLAINTIFF—APPELLANT  
*versus*

SHAHAMAD AND OTHERS—DEFENDANTS—  
RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. IX, r. 8*  
—Pre-emption suit—Plaintiff, failure of, to appear—  
Defendant, admission by, of plaintiff's right to pre-  
empt, effect of—Procedure.

Plaintiff sued to pre-empt certain land on payment of Rs. 1,500. On the date of hearing the plaintiff failed to appear, the defendant appeared and admitted the plaintiff's right to pre-empt, but stated that the price paid for the land was Rs. 1,000. The Court passed a decree in favour of plaintiff on payment of Rs. 12,000.

*Held*, that the defendant's admission did not amount to an admission of any part of the plaintiff's claim within the meaning of Order IX, rule 8, of the Civil Procedure Code, and that, therefore, the proper course for the Court was to dismiss the suit for default.

First appeal from the decree of the Senior Subordinate Judge, Multan, dated the 3rd July 1917.

Khawaja Feroz-ud-Din Ahmad, for the Appellant.

**JUDGMENT**—On the 22nd May 1916 one Shahamad sold certain land to Muhammad Akram Shah and Ghulam Ahmad, the consideration being shown in the sale deed as Rs. 12,000. On the 4th May 1917 Mehr Daim instituted a suit for possession of the land conveyed under the said deed, by pre-emption, alleging that the sum of Rs. 12,000 had not been paid and had not been fixed in good faith. It was further alleged that the market value of the said land was Rs. 1,500. On the first two hearings of the case, the defendants were absent, not having been served with summonses. On the 3rd July 1917, which was the next hearing of the case, the defendants appeared and filed in their written statements. The plaintiff and his Pleader were, however, absent. In their written statements the defendants admitted the plaintiff's right to pre-empt, but averred that the price paid was Rs. 12,000, and that that sum represented the correct market value of the land. The Pleader for the defendants also made a statement in which

he admitted the plaintiff's right to pre-empt and stated that a decree might be passed conditional on the payment of Rs. 12,000. The Court below, purporting to act under Order IX, rule 8, Civil Procedure Code, passed a decree for possession by pre-emption on payment of Rs. 1,000 by the 5th October 1917, directing that, on failure of such payment, the suit would stand dismissed with costs. Against this decree the plaintiff has preferred this appeal through Mr. Feroz-ud-din Ahmad. No appearance was entered on behalf of the respondents.

Order IX, rule 8, Civil Procedure Code, provides that, where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder. In the present case, the claim was for possession of certain land which the plaintiff claimed to be entitled to get as a pre-emptor on payment of a sum of Rs. 1,500. The defendants did not admit the plaintiff's claim. All they admitted was that the plaintiff had a right of pre-emption. There was a controversy as to the value of the land as the defendants did not admit the plaintiff's averment with regard to that. The admission of the plaintiff's right to pre-empt cannot, we think, be regarded as an admission of any part of his claim. On the failure of the plaintiff to appear, the Court should have dismissed the suit.

We, therefore, accept this appeal and remand the case to the Court below for disposal in accordance with law.

Costs will be costs in the cause.

*Appeal accepted.*  
*Case remanded.*



RIAZAT HUSAIN O. ALI BANDI,

OUDEH JUDICIAL COMMISSIONER'S  
COURT.

SECOND CIVIL APPEAL No 102 OF 1920.  
Sentember 14, 1920.

Present:—Syed Wazir Husain, A. J. C.  
Saiyad RIAZAT HUSAIN—PLAINTIFF—  
APPELLANT

versus

Musammal ALI BANDI AND OTHERS

—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 53, 118—  
Transfer, mutual, of immoveable property, nature of  
—Exchange—Transfer to defeat anticipated attachment  
in execution, nature of.

A mutual transfer of immoveable property between two persons amounts to an exchange within the meaning of section 118 of the Transfer of Property Act, and each party acquires title in the property transferred to him on execution of the deed of transfer in his favour. [p 725, col. 2.]

A transfer made merely with intent to defeat an anticipated execution is not a transfer of property made with intent to defraud, defeat or delay creditors within the meaning of section 3 of the Transfer of Property Act. [p. 727, cols 1 & 2]

Appeal from the decree of the District Judge, Rae Bareilly, dated the 7th April 1920, upholding the order of the Subordinate Judge, Rae Bareilly, dated the 19th January 1920.

Mr. Haider Husain, for the Appellant.

Mr. H. K. Ghosh, for Respondents Nos. 2, 4 and 5.

**JUDGMENT.**—This appeal arises out of a suit brought by the plaintiff appellant for a declaration that he is the owner of 3½ *sahams* in houses Nos. 4377 and 4550, situate in Mohalla Shaikhana and Mohalla Ghauriana Khurd of Qasba Jais, District Rae Bareilly, under a deed of transfer dated the 30th January 1919, executed by Musammal Ali Bandi Bibi, defendant No. 1, in favour of the plaintiff and that, consequently, they are not liable to attachment and sale in execution of decree for costs held by the defendants Nos. 2 to 5 against the defendant No. 1. So much of the defence as is necessary for the purposes of this appeal was to the effect that the deed of transfer dated the 30th January 1919 was fictitious, that it was executed for the purpose of depriving the decree holders of their money, and that it was legally void. This defence has succeeded in both the Courts below and the suit has been dismissed.

I have come to the conclusion that this appeal must prevail. It appears that the decree-holders commenced proceedings in

execution of their decree for the attachment of the property in suit on the 21st February 1919, and this date has been accepted in both the Courts below as well as before me as the date of the attachment of the shares in houses in question. It further appears that Musammal Ali Bandi Bibi, in order to effect a settlement of a *bona fide* dispute pending between her and Syed Tawakkul Husain and others, transferred certain properties in favour of Tawakkul Husain, amongst which was included some property belonging to the appellant, and with a view to compensate the appellant she effected the transfer of the shares in the houses in suit and also of other property in favour of the appellant by the instrument of the 30th January 1919. The appellant on his part transferred the property belonging to him and which Musammal Ali Bandi Bibi had transferred to Tawakkul Husain for the purpose of effecting the settlement already mentioned by executing a document in her favour on the 20th March 1919.

It would follow from the above statement of facts that there was a mutual transfer of immoveable property between Musammal Ali Bandi Bibi and the plaintiff appellant. This transaction has been technically characterised as an exchange and treated to fall within the scope of section 118 of the Transfer of Property Act (Act IV of 1882). In my opinion, this is a right view to take of the nature of the bargain between these two persons. The Courts below have, however, held that there was no transfer in law from one party to the other until the execution of the deed of the 20th March 1919 by the appellant in favour of Musammal Ali Bandi Bibi, and as the execution of this document was subsequent to the attachment, the deed of the 30th January 1919 was ineffectual and inoperative as against the attachment. It is difficult to appreciate the logic of this reasoning. An exchange as well as any other transaction between two parties must, in the nature of the thing, be preceded by a consensus of mind of the parties in respect of the incidents and terms of the transaction; in other words, by a perfected contract between them in relation to the subject matter of the contract. Ordinarily, the rules of law applicable to contracts of sale would govern

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the contracts of exchange as well. There is no doubt in my mind that the law as it obtains in India also assimilates them. Section 77 of the Indian Contract Act (Act IX of 1872) defines 'sale' as follows:—"Sale is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer." Section 118 of the Transfer of Property Act (Act IV of 1882) defines "exchange" in the following terms:—"When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an 'exchange'." In both cases, therefore, there is a transfer of ownership from one party to the other and the distinguishing feature between the two cases is that, in the case of sale, the transfer of ownership is for price, that is money, while in the case of an exchange it is for the ownership of another thing. This difference cannot affect transfer of title from one party to the other when the requirements of law to make such a transfer are completed. The result of an instrument of transfer, so far as the transfer of ownership is concerned, is the same whether it is in the case of a sale or in that of an exchange. The following statement of law is given in Halsbury's Laws of England, Volume XXV, page 109:—"The law relating to contracts of exchange or barter is undeveloped, but the Courts seem inclined to follow the maxim of the Civil law, *permutatio vicina est emptioni*, and to deal with such contracts as analogous to contracts of sale". And in the foot-note, at the same page, it is stated:—"Lord Blackburn says (Contract of Sale, First Edition, Introduction, page 3) that the legal effect of contracts of sale and of barter is the same; see the Indian Transfer of Property Act, 1882, (Act IV of 1882) sections 118 *et seq.*"

The second paragraph of section 118 of the Transfer of Property Act (Act IV of 1882) is as follows:—

"A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale". In a case of sale it cannot be doubted that, as soon as the instrument affecting the transfer of ownership from one party to another is perfected, the vendor becomes divested of the title in the property

sold and the title becomes vested in the vendee. It follows that in a transaction of exchange each party becomes vested with legal title in the thing transferred by one to the other from the date of the execution of the instrument of transfer. I am, therefore, of opinion that the plaintiff-appellant acquired title in the houses in dispute on the execution of the deed of transfer in his favour by *Musammatt Ali Bandi Bibi* on the 30th January 1919, and the fact that the appellant performed his part of the contract at a later date does not in the least affect the title acquired by him by virtue of the deed of the 30th January 1919. On the reasoning set out above, *Musammatt Ali Bandi Bibi* acquired title to the property transferred to her by the appellant on the 20th March 1919, when the latter executed the deed of transfer in favour of the former. I am not concerned in this case as to what would have happened if the appellant had failed to perform his part of the contract, but it may be mentioned that *Musammatt Ali Bandi Bibi* would not have been without a remedy in that event.

The second ground upon which the Courts below dismissed the suit is, that the deed of the 30th January 1919 was executed to defraud, or at least to delay, the respondents decree-holders in realizing their decretal money. In the first place, no particulars of any fraud are set out in the defence. In the case of *Gunga Narain Gupta v. Tiluckram Choudhry* (1) Lord Watson, in delivering the judgment of the Judicial Committee of the Privy Council, quoted the following observation of Lord Selborne in *Wallingford v. Mutual Society* (2):—

"With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice". The rule of pleading in English law and in the Indian law are assimilated in this respect by the provisions of Order VI, rule 4, of the Code

(1) 15 I. A. 119; 15 C. 533 (P. C.); 12 Ind. Jur. 254; 6 Sar. P. O. J. 168; 7 Ind. Dec. (N. S.) 989.

(2) (1880) 5 A. C. 685 at p. 687; 60 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81.

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of Civil Procedure (Act V of 1908). In the second place, there is no evidence whatsoever to substantiate the plea of fraud even if it be taken to have been properly raised. The following facts have been relied upon by the Court of first instance in support of the finding on this question in favour of the respondents. (1) The plaintiff is a full brother of *Musammât Ali Bandi Bibi's* husband. (2) She and the plaintiff are joint in estate, business and residence and in fact in every respect. (3) The stamp on which the deed of the 30th January 1919 was engrossed was purchased on the 30th October 1918 and that of the deed of the 20th March 1919 was purchased on the 15th March 1919. (4) The deed of the 30th January 1919 was registered on the 14th April 1919 and that of the 20th March 1919 on the 7th July 1919, both dates being subsequent to the attachment. To my mind, these elements, either singly or collectively, do not establish fraud on the part of *Musammât Ali Bandi Bibi*. At best, they may give rise to a suspicion as to the *bona fide* character of the transaction in question but, as observed by their Lordships of the Privy Council in a similar case in *Mina Kumari Bibi v. Bijoy Singh Dudhuria* (3), "the Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony." But the most fatal objection to this part of the respondents' case is that, whatever might have been the motive of *Musammât Ali Bandi Bibi* in transferring the property in suit to the plaintiff-appellant, no fraud has been brought home to the appellant. There is neither any finding nor any evidence to the effect that the appellant participated in the commission of fraud, if any, by *Musammât Ali Bandi Bibi*. The lower Courts have proceeded in determining this part of the case upon the provisions of section 53 of the Transfer of Property (IV of 1882). In my opinion, those provisions have no application to the facts of this case. A transfer made merely with intent to defeat an anticipated execution is not a transfer of property

made with intent to defraud, defeat or delay creditors within the meaning of section 53 of the Transfer of Property Act [See the Observations of their Lordships of the Privy Council in the case of *Musahar Sahu v. Hakim Lal* (4)].

I, therefore, allow the appeal, set aside the decrees of the Courts below, and decree the plaintiff's suit with costs throughout.

*Appeal allowed.*

(4) 32 Ind. Cas. 343; 43 L. A. 104; 30 M. L. J. 116; 3 L. W. 207; 20 C. W. N. 393; 14 A. L. J. 198; (1916) 1 M. W. N. 198; 19 M. L. T. 203; 23 C. L. J. 406; 18 Bom. L. R. 378; 43 C. 521 (P. C.).

LAHORE HIGH COURT.  
CIVIL REVISION PETITION No. 714 of 1920.  
January 27, 1921.

Present:—Mr. Justice Chevis.

KISHEN CHAND—DEFENDANT—  
PETITIONER  
versus  
KHUDA BAKHSI—PLAINTIFF—  
RESPONDENT.

*Broker, when entitled to commission—Brokerage, contract to pay, whether immoral or opposed to public policy—Contract Act (IX of 1872), s. 23.*

A broker is ordinarily entitled to his brokerage when he has succeeded in bringing about a sale, he is also entitled to his brokerage if he so far succeeds as to bring about an agreement to sell and the sale then falls through because the intending purchaser backs out [p. 728, col. 1.]

A contract to pay brokerage is neither immoral nor opposed to public policy. [p. 728, col. 2.]

*Madho Ram v. Badr-ud-din*, 8 Ind. Cas. 317; 91 P. R. 1910; 129 P. W. R. 1910; 189 P. L. R. 1910, distinguished.

*Bala Parshad Sarni Mal v. Jawala Dat-Ram Kunnur*, 50 Ind. Cas. 975; 16 P. W. R. 1919, dissented from.

Petition, under section 25 of Act IX of 1887, for revision of the decree of the Judge, Small Cause Court, Amritsar, dated the 19th August 1920

Mr. Lal Chand Mehra, for the Petitioner.

Parlit Bishen Nath, for the Respondent.

JUDGMENT.—Bali Ram contracted to sell a shop to Muhammad Amin and Bhagat

(3) 40 Ind. Cas. 242; 41 L. A. 72; 1 P. L. W. 425; 5 L. W. 711; 32 M. L. J. 475; 21 C. W. N. 645; 21 M. L. T. 844; 15 A. L. J. 382; 25 C. L. J. 508; 9 Bom. L. R. 424; (1917) M. W. N. 473; 44 C. 602 (P. C.).



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Ram for Rs. 15,000 on the 15th December 1919. On the 10th January 1920 Muhammad Amin and Bhagat Ram contracted to sell the same shop to defendant for Rs. 16,500. Khuda Baksh was the broker employed in the latter transaction, and he now sues to recover Rs. 165 due as brokerage. The defence is, that the defendant is not liable to brokerage as he was misled and the shop was not the property of Muhammad Amin and Bhagat Ram when they contracted to sell it to him. The lower Court says that the defendant knew very well what the position was and was not the victim of any fraud or deception, as it was stated in the agreement of sale executed by Bhagat Ram and Muhammad Amin that they had till then only obtained an agreement of sale from Beli Ram. This is quite wrong, as the agreement to sell executed by Bhagat Ram and Muhammad Amin clearly states that they are the owners of the shop by purchase from Beli Ram. Both the sales fell through, and the Small Cause Court Judge says that apparently they fell through because the defendant backed out. Why he says this I do not know, for there is no sufficient material on the record to prove that it was the defendant's fault that the sales fell through, and the starting presumption would seem to be that the defendant never succeeded in buying the shop from Muhammad Amin and Bhagat Ram because the latter had not themselves acquired any title to sell. But the Small Cause Court Judge proceeds as follows: "In this case we are not concerned with as to how the sales fell through. The plaintiff had done his duty and is entitled to his brokerage. It has not been shown that he was guilty of any bad faith." The Small Cause Court Judge, therefore, gives the plaintiff a decree with costs.

Now, a broker is ordinarily entitled to his brokerage when he has succeeded in bringing about a sale, and I should certainly say that he is also entitled to his brokerage if he so far succeeds as to bring about an agreement to sell and the sale then falls through because the intending purchaser backs out. It is, therefore, necessary in this case to decide whether it is the fault of the defendant that the two sales fell through. *Frima facie*, as I have

said before, it would appear that the sale to the defendant fell through for the simple reason that Muhammad Amin and Bhagat Ram, contrary to what was stated in their agreement to sell, had not acquired any title in the shop. It is, therefore, for the plaintiff to prove that it is the defendant who is responsible for the sales falling through. This question must be put in issue and decided after due enquiry. The plaintiff can only get a decree if he can prove that it is the defendant who is responsible for the sales having fallen through.

Another point raised on behalf of the petitioner is, that a contract to pay brokerage is immoral and opposed to public policy, and here reliance is placed on *Madho Ram v. Badr ud din* (1) and the judgment published as *Bali Parishad v. Mol v. Jawala Dul Ram Kunwar* (2). The former is a case of *dasturi* and is totally different from claims for brokerage. The latter is not an authorized publication and I have no hesitation in refusing to follow it. There is a note\* by the Editor below the case doubting whether *Madho Ram v. Badr ud din* (1) which the ruling professes to follow, is not distinguishable, and I can only say that I agree with the Editor. I remark, too, that if such cases are to be regarded as opposed to public policy it would be difficult for a person to employ an agent in any respect.

I accept this application and, setting aside the decree of the lower Court, I remand the case for re-decision after due enquiry into the above issue the onus of proving which will lie on the plaintiff. Stamp on the application to this Court will be refunded and other costs will follow the result.

*Application accepted.*

(1) 8 Ind. Cas. 317; 91 P. R. 1910; 129 P. W. R. 1910; 189 P. L. R. 1910.

(2) 50 Ind. Cas. 175; 16 P. W. R. 1919.

\* Refer to 6 P. W. R. 1919. [Ed.]

NIBARAN CHANDRA SEN v. SASHI BHUSAN SEN.

OAL UTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 784  
OF 1917.

August 4, 1920.

Present:—Mr. Justice Newbould

and Mr. Justice Abdul Majid.

NIBARAN CHANDRA SEN GUPTA

AND ANOTHER—PLAINTIFFS—APPELLANTS

VERSUS

SASHI BHUSAN SEN AND ANOTHER—

PRINCIPAL DEFENDANT NO. 1 AND ANOTHER

Pro forma DEFENDANT—RESPONDENTS.

*Hindu Law—Dayabhaga School—Joint family—  
Property acquired by one member—Self-acquired property—Burden of proof.*

Under the Dayabhaga School of Hindu Law where one of the members of a joint family acquires property in his own name during the lifetime of his father, the burden of proving that the property was not the self-acquired property of that member, but in reality belonged to the father, lies on the party making the assertion.

Appeal against the decree of the District Judge, Backergunge, dated the 31st of January 1919, affirming the decree of the Subordinate Judge, Additional Court, at Backergunge, dated the 21st of March 1918.

FACTS appear from the judgment.

Babu Suresh Chandra Taluqdar (with him Babu Jatindran th Sannyal), for the Appellants.—It has been found that the family was joint in food, worship and estate when the property was acquired in 1302 B. S. Thus, the onus of proving that the property was the self acquired property of the defendant lay on him. Refers to *Sarada Prosad Ray v. Mahananda Ray* (1), *Gobind Chandra Das v. Radh. Kristo Das* (2), Trevelyan's Hindu Law (112 Edition) page 245, *Karsondas Dharamsey v. Gangobai* (3), *Laldas Narandas v. Motibai* (4), *Huro Soonduree Debia v. Doorga Doss Bhattacharjee* (5), *Taruck Chunder Totadar v. Joodheshteer Chunder* (6), *Jugodumba Debia v. Rohinee Debia* (7).

Babu Gunoda Chiran Sen (with him Babu Nrasanta Bhusan Gupta), for the Respondent.—My friend has practically conceded that if the property was acquired during the

life time of the fathers of both the parties, there is no presumption of jointness. See Trevelyan's Hindu Law, page 245. Therefore, the case in *Sarada Prosad Ray v. Mahananda Ray* (1) is exactly in point and is in my favour.

Babu Suresh Chandra Taluqdar replied.

JUDGMENT.—The plaintiffs and the defendants in this case are consine, the plaintiffs being the sons of the younger brother of defendant's father. The plaintiffs brought the suit to recover 8 annas interest in several items of property described in the schedule to the plaint and were partially successful. In the present appeal, though the other items have not been expressly abandoned, the plaintiff's claim to the immoveable property described in the schedule *kha* to the plaint has been pressed.

It is contended, as was contended before the lower Courts, that as this property was acquired in 1302 and the family was admittedly joint in mess, estate and worship up to 1303 B. S, the onus of proving that the property was the self acquired property of defendant No. 1 lay on the defendant. This property was acquired when the fathers of the plaintiffs and the defendants were both living. Having regard to this fact, we think the lower Courts were right in applying the decision in *Sarada Prosad Ray v. Mahananda Ray* (1), in which it was held, under very similar circumstances, that the burden of proof rested on the party who asserted that the property in reality belonged to the father and not to the son in whose name it was acquired. Though the learned District Judge remarks in his judgment that the decision of the case seemed to turn mainly on the question of onus it appears to us that in both the Courts below the judgments have dealt fully with the evidence and circumstances of the case, and have in effect arrived at findings that such presumptions as may arise in favour of the plaintiffs have been rebutted by the evidence. It is found, for instance, on the evidence, that such joint property as the family had could not have been sufficient to purchase the property now in dispute. It is also found that the defendant's story that the property was given to him in recognition of good work done by him as Tahsildar is greatly strengthened by the plaintiffs that no money was required for acquiring the property and by the contents of the document itself. The

(1) 31 O 448.

(2) 8 Ind. Cas. 563; 31 A. 477; 6 A. L. J. 591.

(3) 52 B. 479; 10 Bom. L. R. 184.

(4) 10 Bom. L. R. 175.

(5) 16 W. R. 265.

(6) 19 W. R. 178.

(7) 23 W. R. 422.

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lower Courts have in fact found that the plaintiffs have failed to prove either any original nucleus from which the property could be purchased or that there was any abandonment by the first defendant of this property to the common stock, and they appear to believe the defendant's story supported by his own evidence that he himself acquired this property as his individual property. As already stated, we hold that the lower Courts have committed no error in law as regards the party on whom the burden of proof lay, and we also hold that in finding as they do that this property was the self-acquired property, there had been no legal defect which would justify our interference in second appeal.

We accordingly dismiss this appeal with costs.

*Appeal dismissed.*

# LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO 1081 OF 1917.

February 4, 1921.

*Present* :—Mr. Justice Broadway and  
Mr. Justice Abdul Raoof.

RULIA SINGH—DEFENDANT

—APPELLANT

*versus*

TUNIA MAL AND ANOTHER—PLAINTIFFS—

RESPONDENTS.

*Account-book, entry in—Consideration, proof of—Burden of proof.*

In the case of a formally registered document in which the receipt of consideration has been recited, the onus of proving that consideration did not actually pass is on the party who alleges non-payment. In the case of an entry in an account-book, however, the onus is on the party alleging payment to prove it. [p. 732, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, Ludhiana, dated the 29th March 1917.

Pandit Sheo Agrain, R. B., and Mr. Muhammad Hafi, for the Appellant.

B. khashi Tek Chand and Mr. Ghulam Rasul, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit brought by Tunia Mal, etc.,

against Rulia Singh on the 5th of May 1916, in which the plaintiffs claimed a sum of Rs. 5,705.8 as principal and interest, due by the defendant on certain *bahi* accounts. It was alleged in the plaint that Rulia Singh, had, on the 15th February 1915, borrowed a sum of Rs. 5,137 to be utilized in connection with certain kiln work and had undertaken to re-pay the same with interest at the rate of annas 12 per cent, per mensem. It was further alleged that this transaction had been entered in the plaintiffs' account-book, which had been duly signed by the defendant, who had also made an entry in the same account-book in his own handwriting. Interest calculated up to the date of the suit amounted to Rs. 568.8 and hence the claim for the total amount as stated above.

On the 24th of May 1916 Rulia Singh filed a written statement. In this he denied the plaintiffs' claim and alleged that he had not borrowed any money from them. He further objected to the admissibility of the entry in the account-book, which formed the basis of the suit, alleging that the said entry amounted to a promissory note and that, as it was not stamped, no suit could be brought in relation thereto. On the 9th of June 1916 he filed a further written statement, in which he stated that he did not admit the first paragraph of the plaint, and for the rest re-iterated what had been said in his first written statement. The Trial Court thereupon framed certain preliminary issues in connection with the admissibility of the entry in question, and, on the 10th of July 1916, came to the conclusion that the entry amounted to an agreement which required an eight-anna stamp, and that on payment of the prescribed penalty it could be received in evidence and form the basis of the suit. The stamp duty was paid by the plaintiffs, and, on the 20th October 1916, Rulia Singh filed his written statement in detail on the merits. He denied having borrowed any money from the plaintiffs and alleged that there had formerly been a partnership between him and them in connection with a kiln, but that the partnership accounts had been settled. He next proceeded to explain the entry in the plaintiffs account-books. He stated that the plaintiffs contemplated carrying on



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another kiln in partnership with him and that, under that impression and thinking that the plaintiffs would contribute a similar sum towards the partnership capital, he had signed and written the memorandum in question, without, however, having received any sum of money. The entry was not stamped and attested, because it was intended to have the whole transaction duly attested and completed when land could be procured for the purposes of the kiln, and it was only then that the money was to be paid over to him. He further alleged that, as no land could be secured for the new kiln, the money was not taken by him, and that the plaintiffs have brought this suit taking undue advantage of this incomplete entry. This written statement is dated the 20th October 1916, but was not placed on the record till the 11th of December 1916, on which date Tunia Mal, plaintiff, and Rulia Singh were examined by the Court as parties. Tunia Mal insisted that the sum of Rs. 5,137 had been paid by him in cash to be re-paid with interest at the rate of annas 12 per cent. per mensem and denied that he had agreed to be a partner with defendant as alleged. He further stated that a sum, Rs. 37, was paid to Biru Mal, son of Idu, at the time when the entry was made, and named Ram Chand, Munshi Mal, Asa Ram and Prabhu Mal as the persons who were present when the money was paid and the entry made. Rulia Singh, on the other hand, denied having received the money, admitted having made the entry and reiterated his allegations that the transaction was an incomplete one, and that the entry had been made and left unstamped with the intention of having it duly stamped and attested after a site for the kiln had been acquired and the money had actually been taken. He also named Pir Bakhsb, Atra and others as being present when this entry was drawn up. After the parties had been examined, the Trial Court framed the following issues:—

1. Did the defendant borrow Rs. 5,137 and agree to pay the amount with interest at the rate of annas 12 per cent. per mensem?

2. Did the defendant make the entry sued upon without consideration and agree to take money afterwards?

3. What relief is the plaintiff entitled to?

After recording the evidence for both sides, the learned Senior Subordinate Judge came to the conclusion that the plaintiff had discharged the onus placed on him and had proved that the sum of Rs. 5,137 had been advanced in cash to the defendant, and granted the plaintiffs a decree for the sum claimed. Against this decree Rulia Singh has preferred this appeal, and on his behalf we have heard Mr. Sheo Narain, while Bakhsbi Tek Chand has addressed us on behalf of the plaintiffs-respondents.

Mr. Sheo Narain took us through the whole of the evidence on the record and contended that the onus being on the plaintiffs to prove that the money had actually been advanced, the evidence produced on their behalf was wholly inadequate to establish the fact. In addition to the plaintiffs' own statement there is the evidence of Munshi Mal, Asa Ram, Biru Mal, Bakhsbi Chumar, Bakhsbi Mal Bania and Ram Chand. After a careful consideration of the evidence of these witnesses we find it possible to believe what they say. Munshi Mal accounts for his presence at the time of the payment of the money by saying that he had gone by chance to purchase Re. 1 worth of powdered sugar. Asa Ram similarly states that he had gone by chance to the plaintiffs' shop to purchase cloth. Biru Mal is a relative of the plaintiffs and was in partnership with them at one time. His statement was that the defendant owed him Rs. 36 13-6 and that he had gone there to get this amount from him, apparently having heard of what was going to happen. Bakhsbi Chumar who claims to have been in the service of Rulia Singh at the time for a period of 14 or 15 days, says that it was during this period that he accompanied Rulia Singh to the shop of the plaintiffs and from there carried off three bags of rupees said to contain Rs. 1,000 each. In cross-examination he said that four days after this transaction he left Rulia Singh's service. He also distinctly remembers that each of the bags was said to contain the same number of rupees but that one bag contained Rs. 100 more than the others. Bakhsbi Mal is a collateral of the plaintiffs and had gone to their shop to purchase

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cloth and to make over some rice to a Jat whose name he does not know. As the notes made during the course of the examination of this witness by the Trial Court indicate, he is a clever person and was deliberately fencing with the questions put to him in cross-examination. Finally, there is the statement of Ram Chand who is said to have actually weighed out the money. This man's antecedents are not all that they might be, and his evidence does not impress us at all. We must, therefore, hold that the evidence produced by the plaintiffs in support of the first issue is wholly inadequate and unreliable. Mr. Tek Chand on behalf of the respondents contended that the onus of proving the failure of consideration should really have been placed on the defendant and in support of his contention he referred us to *Mahabir Prasad v. Bishan Dayal* (1) and *Ram Chand v. Behari* (2). No objection as to the onus was taken in the Trial Court. While we are in complete accord with the Allahabad ruling, we consider that the present case is distinguishable from that reported as *Mahabir Prasad v. Bishan Dayal* (1). *Ram Chand v. Behari* (2) was reversed on appeal as reported in *Behari v. Ram Chander* (3). The Allahabad case as well as *Bisheshwar Dayal v. Harbans Sahay* (4) dealt with formally registered documents in which the receipt of consideration had been recited. In such cases we have no doubt that the onus would shift to the person alleging non payment. In the present case we have to deal with an entry in an account-book. The defendant is a *raj* or mason by occupation and, although he is able to read and write *gurmukhi*, it by no means follows that he is an acute business man, and we, therefore, are unable to agree with the learned Vakil's contention that the onus should have been placed on Rulia Singh to prove that he had not received the money.

In any event, we consider that the story told by Rulia Singh is not improbable and his statement as to what occurred at the time when the entry was made is supported

by his witnesses, of whom Pir Bakhsh and Atra, *Lambardar*, are two. We have been unable to find any reason for doubting the correctness or veracity of the statements made by these two witnesses and their statements, supporting the statement of Rulia Singh, would, in our opinion, be sufficient to shift the burden of proof on to the plaintiffs. Mr. Tek Chand then contended that his clients had discharged the onus by the production of their account-books and he laid great stress on the fact that Rulia Singh had not only signed the entry but had re-copied the entry in his own handwriting immediately below the entry made by the plaintiffs. This circumstance has been given due weight to by us. We have also carefully considered the contention that, had Rulia Singh not received the money as he states, he should have in due course got the entry cancelled. A great deal has been said by both sides in regard to the account books, and Mr. Tek Chand has strongly urged that the said books are shown to be regularly kept and for that reason have considerable probative value. We are, however, unable to regard this as sufficient. Rulia Singh contended that in the brick kiln at Malerkotla the plaintiffs were partners with him, yet, in spite of the fact that former account-books were called for, it is said that no account books were forthcoming prior to the year *Sambat* 1971. As pointed out by Mr. Bheo Narain, the failure to produce these account-books is of material importance, for if they had been produced and, an examination of them, had disclosed the fact that Rulia Singh's statement was true that he had been in partnership with the plaintiffs, his present statement that it was the intention of the parties to start another kiln, also in partnership, would be considerably strengthened. The non-production of the books, therefore, in our opinion, weighs heavily against the plaintiffs, and whether their books are regularly kept or not is a matter of comparatively small importance.

Finally, after giving our best consideration to the arguments advanced by Mr. Tek Chand and a careful examination of the record, we have arrived at the conclusion that the plaintiffs have failed to prove their case, and we accordingly accept this

(1) 27 A. 71; 1 A. L. J. 423; A. W. N. (1904) 163.

(2) 7 Ind. Cas. 643.

(3) 10 Ind. Cas. 927; 33 A. 453; 8 A. L. J. 333.

(4) 6 O. L. J. 659; 3 M. L. T. 88.

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appeal and, setting aside the decree of the Court below, dismiss the suit with costs throughout.

*Appeal accepted.*

# CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1927  
OF 1918.

June 7, 1920.

*Present*:—Justice Sir N. R. Chatterjee, Kt.,  
and Mr Justice Panton.

MADHU MANGAL SADHU—PLAINTIFF—  
APPELLANT

*versus*

GOUR SUNDAR SWARNAKAR—

PRINCIPAL DEFENDANT AND ANOTHER—*Pro*

*forma* DEFENDANT—RESPONDENTS.

*Interest—Rate stipulated in mortgage-bond excessive—Hardship, whether ground for disallowing rate.*

In the absence of any evidence to show that a money-lender has unduly taken advantage of his position, mere hardship would not justify a Court in disallowing the rate of interest stipulated in a mortgage-bond, even when the transaction appears to be undoubtedly improvident. [p. 783, col. 2.]

Appeal against the decree of the Subordinate Judge, Second Court, Burdwan, dated the 24th of July 1918, modifying the decree of the Munsif, First Court, at Katwa, dated the 13th of October 1917.

FACTS appear from the judgment.

Babu Hiralal Sanyal, for the Appellant.—The learned Subordinate Judge has committed an error in not allowing interest at the bond-rate. The recent Privy Council decision in *Azis Khan v. Duni Chand* (1) is conclusive on the point. The mere fact that the rate of interest was high is not sufficient to disallow the interest at the stipulated rate. The Court is powerless to give relief on ground of simple hardship. See also *Palla Mal v. Ahad Shah* (2).

Babu Bankim Chandra Mukherjee, for the Respondents.—I cannot question the correctness of the decisions cited by my learned friend nor is it necessary for me to do so. I

(1) 48 Ind. Cas. 983; 23 C. W. N. 180; 101 P. R. 1918; 166 P. W. R. 1918 (P. C.).

(2) 48 Ind. Cas. 1; 23 C. W. N. 223; 37 M. I. J. 614; 16 A. L. J. 105; 124 P. R. 1918; 26 M. L. T. 53; 180 P. W. R. 1918; 24 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.).

would only draw your Lordships' attention to the finding of the Court of first instance that the defendant was a servant at the shop of the plaintiff at the time of the execution of the bond, and that he was compelled to take the loan at the exorbitant rate of interest. This point of view has not been taken into consideration by the lower Appellate Court. If the stipulation as to the rate of interest was made by reason of the advantage which the plaintiff took of his position, then, of course, he is not entitled to recover interest at the usurious rate. In this view, the case ought to be remanded.

Babu Hiralal Sanyal replied.

JUDGMENT.—This appeal arises out of a suit upon a mortgage-bond and the only question relates to the rate of interest.

The rate stipulated in the bond was Rs. 28, annas 2 per cent. per annum with yearly rests. The Courts below have allowed simple interest at 12 per cent.

The principal amount was Rs. 60 and it swelled up to Rs. 1,770, annas 11, with interest at the bond-rate. The plaintiff laid his claim at Rs. 599, after giving up Rs. 1,170, annas 11.

The learned Subordinate Judge disallowed interest at the bond-rate, because there was ample security for the loan and the stipulation as to interest was harsh and unconscionable.

But, as pointed out in the recent Privy Council decision in *Azis Khan v. Duni Chand* (1), "it is difficult for a Court of Justice to give relief on grounds of simple hardship in the absence of any evidence to show that the money lender had unduly taken advantage of his position even when the transaction appeared to be undoubtedly improvident."

In the case of *Palla Mal v. Ahad Shah* (2), in considering the question of compound interest and unconscionable contracts, their Lordships, in the course of their judgment, observed: "Rs. 2 per mensem is by no means an unusual rate of interest in cases from India coming before this Board." (See also judgment of this Court in Second Appeal No. 2986 of 1916, decided by the present Bench on 26th August 1919), [*Harendra Kumar Roy Choudhury v. Detendra Kumar Das* (3)].



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It has, however, been pressed before us that the Court of first instance found that the defendant was a servant at the shop of the plaintiff at the time of the execution of the bond, and that the defendant was forced to take the loan on usurious interest. It is contended that the plaintiff was in a position to dominate the will of the defendant as he was a servant at his shop and took advantage of his position at the time of the execution of the bond, and that the lower Appellate Court has not considered these questions.

We think, therefore, that the case should go back to the lower Appellate Court in order that the Court may consider whether the plaintiff had taken advantage of his position at the time of the execution of the bond and dispose of the case according to law.

Costs to abide the result.

*Case sent back.*

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1394 OF 1920.

January 11, 1921.

*Present:*—Mr. Justice Chevis.

Musammal BEGAN AND ANOTHER—  
DEFENDANTS—APPELLANTS

*versus*

FAIZ BAKHSH—PLAINTIFF—RESPONDENT.

*Restitution of conjugal rights—Muhammadan Law—Nikah, denial of, whether includes repudiation—Nikah read in absence and without consent, validity of.*

In a suit for restitution of conjugal rights the defendant denied that a marriage had ever taken place between her and the plaintiff. It was found that, if a *nikah* was read at all, it must have been read in the defendant's absence and without her consent:

*Held*, (1) that the *nikah*, if any, was invalid; [p. 735, col 2]

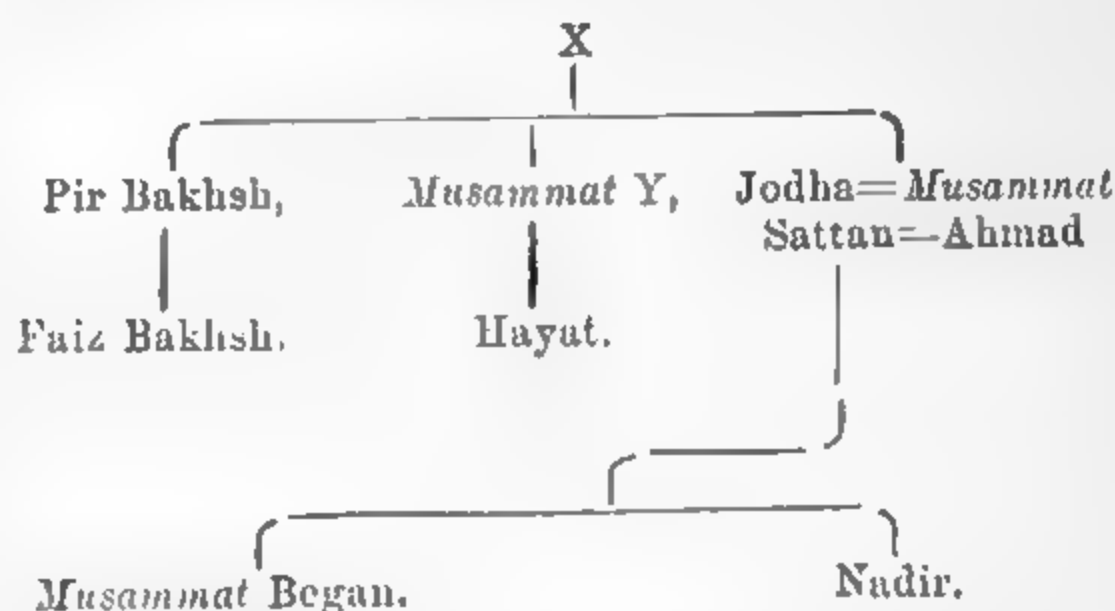
(2) that the plea of denial of a *nikah* amounted not only to a denial of the factum of the *nikah* but should be regarded as a repudiation of any *nikah* ceremony that may have been performed. [p. 735, col 2]

Second appeal from the decree of the District Judge, Shahpur, at Sargodha, dated the 18th May 1920, reversing that of Munsif, First Class, Shahpur, dated the 23rd February 1920.

Mr. Shuja ud-Din, for the Appellants

Mr. Hishon Narain, for the Respondent.

JUDGMENT.—This is a suit by Faiz Bakhsh, plaintiff, for restitution of conjugal rights. Faiz Bakhsh is a first cousin of Musammal Began, as will be seen from the following genealogical tree:—



The case for the plaintiff is that, about five years prior to suit, Musammal Began was married to the plaintiff and as she was then a minor and her father had died, Pir Bakhsh, father of the plaintiff, acted as her guardian. After that Musammal Began lived in the plaintiff's house till about a month prior to the institution of the suit when she was abducted by Hayat, defendant No. 2, who was also a cousin of Musammal Began, being her father's sister's son. The defence was a denial of the marriage and a statement that since her father's death Musammal Began had been living with her step-father, Ahmad, and had now been married to Hayat, defendant No. 2.

The first Court found that, after the death of Jodha, Musammal Sattan re-married Ahmad and that Musammal Began and her brother had since been living with their step-father; that Pir Bakhsh, father of the plaintiff, had no doubt had his son's *nikah* with Musammal Began read but that neither Musammal Began nor her mother knew anything about the *nikah*, and that since the girl denied the *nikah* and was entitled to repudiate a *nikah* performed in her absence on its coming to her knowledge, the defendant was now entitled to rescind the *nikah*. So the first Court dismissed the suit.

The learned District Judge says that it is not very clear from the judgment of the lower Court whether the Munsif found the marriage not proved or whether, considering all the circumstances of the case, he is not prepared to exercise his discretion in favour

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of the plaintiff. As far as I can see, the findings of the lower Court are perfectly clear, and the District Judge is, in my opinion, wrong when he takes it as the opinion of the lower Court that the plaintiff had failed to prove the alleged marriage. What the lower Court finds is, that a marriage ceremony took place but that it was in the absence of *Musammât Began* and that she had no knowledge of it. The District Judge goes on to hold that there was no plea of repudiation and that there could be none when the factum of the *nikah* was denied. He says that he has carefully considered the evidence produced by the plaintiff to prove that *Musammât Began* is his wife and that he sees no reason to reject it. He does not, however, come to any finding as to whether *Musammât Began* was present at the time of the marriage, or as to whether she had any knowledge of the marriage, so that on these points I think it is necessary to come to a finding of my own, for I consider that, if the marriage took place without *Musammât Began*'s knowledge, she is entitled to repudiate it on its coming to her knowledge. In my opinion, although the defendant does not in her pleas state that if any *nikah* was read, she repudiates that *nikah*, the denial of the *nikah* must be regarded as an utter repudiation of any *nikah* that may have taken place without the knowledge of the defendant. That a *nikah* ceremony was performed I see no reason to doubt, but in other respects I am not prepared to rely on the evidence as to the presence of *Musammât Began* at the time of the *nikah*. *Sher Khan*, witness, states that ornaments and new clothes were put on *Musammât Began* at the time of the *nikah*, while the next witness says that no ornaments were put on and that the girl's clothes were changed one year later. The next witness, *Bakhsh*, even goes so far at the beginning of his evidence as to say that *Musammât Sattan*, the mother of the girl, was also present, though the plaintiff's father, on the contrary, has stated that *Musammât Sattan* was not present and was not invited to the *nikah* as she had re-married *Ahmad* contrary to the wishes of *Pir Bakhsh*. *Kazi Ata Muhammad*, who seems to be a respectable witness, was not himself present when the *nikah* was read but states that when *Pir Bakhsh* came to him and asked whether he could marry his son to *Musammât Began*, *Pir Bakhsh* told the witness that his

sister-in-law had re-married and had taken her minor daughter to live with her. This seems to be a strong corroboration of the evidence produced by the defendant that, since her mother's re-marriage, *Musammât Began* had been living with her step father. I hold, therefore, that *Musammât Began* was not present at the time when her *nikah* to *Faiz Bakhsh* was read and that she has all along been living with her step-father. What appears to be the fact is, that the girl, having grown up and having been married to her cousin *Hayat*, or intending to marry *Hayat*, her uncle *Pir Bakhsh*, wishing to obtain her as a wife for his own son, got the *nikah* ceremony read in her absence and without her consent. The presumption is, that as she was not present she knew nothing about this, and there is nothing to show that she had any knowledge of any *nikah* having been performed. No doubt, she may have been told about the *nikah* subsequently but she was not bound to regard any such information as correct, so it cannot be said that she had knowledge of the factum of the *nikah*. She came into Court absolutely denying any marriage to *Faiz Bakhsh* and I consider that this denial is in itself not only a denial of the factum but should be regarded as a repudiation of any *nikah* ceremony that may have been performed.

I may note that the learned District Judge's remark that the union of cousins is favoured among *Muslimans* cuts both ways, as *Hayat* and *Faiz Bakhsh* are both first cousins of *Musammât Began*.

In conclusion, I note that, even if I am wrong in holding that the denial of the factum of the *nikah* should be regarded as including a repudiation of the *nikah*, still in the exercise of my discretion, I would not give a decree to the plaintiff in the present case, the facts found by me being that the girl was living with her step-father and that the *nikah* ceremony was read without her consent or knowledge.

I accept the appeal and dismiss the plaintiff's suit with costs throughout.

*Appeal accepted.*

JANAKI NATH ROY v. ASWINI KUMARI DEVI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 237  
OF 1919.

July 12, 1920.

Present:—Mr. Justice Walsley and  
Mr. Justice Greaves.

JANAKI NATH RAY—DEFENDANT  
No. 2—APPELLANT

versus

ASWINI KUMARI DEVI—RESPONDENT.

*Transfer of Property Act (IV of 1882), s. 59—  
Mortgage-deed—Attestation, what amounts to*

A mortgage-deed consisted of three sheets of paper. The mortgagor signed the second sheet in the presence of two witnesses who also signed at the foot of the sheet as having witnessed the signature of the mortgagor. Then some addition was made and a third sheet was added including other properties in the mortgage. The third sheet was signed by the mortgagor in the presence of the same witnesses who had signed the second sheet:

*Held*, that there was a sufficient compliance with section 9 of the Transfer of Property Act and to validate the third page of the mortgage-deed it was not necessary for the two witnesses to sign the third page of the deed [p. 737, col. 1.]

Appeal against the decree of the Subordinate Judge, Burdwan, dated the 11th of November 1918, reversing the decree of the Munsif, Fourth Court, at Burdwan, dated the 10th of October 1917.

FACTS appear from the judgment.

Babu Upendra Narayan Bagchi, for the Appellant.—The appeal arises out of a suit on a mortgage bond. The present appellant is a puisne mortgagee. Defendant No. 1 executed a mortgage in favour of the plaintiff in 1310. The first Court dismissed the suit. On appeal the learned Subordinate Judge has decreed the suit. The question before you is as to what constitutes proper attestation of a document. The document at first consisted of two sheets and the last sheet was signed by the mortgagor in the presence of the attesting witnesses who also signed their names at the foot. Subsequently, owing to some additions in the terms of the deed, another sheet had to be added to the document. The third sheet, however, was signed by the mortgagor alone in presence of those attesting witnesses who did not sign it. The addition was with respect to properties which were mortgaged to the present mortgagee-appellant. My point is, that the mortgage was not valid and effective as regards the properties mentioned in the third sheet which was signed by the attesting witnesses. The provisions of section 59 of the Transfer of

Property Act are compulsory. The document, in order to be valid and operative in law, must be signed by the mortgagor and at least two attesting witnesses. It has been held in several cases that the provisions of section 59 must be strictly fulfilled. *Reads Gosh on Law of Mortgages: Notes on section 59. Refers to Shamu Patter v. Abul Kadir Rowthan (1)*

Babu Karunamay Basu, for the Respondent.—I submit there has been sufficient compliance of the provisions of section 59. The case in *Shamu Patter v. Abul Kadir Rowthan (1)* rather supports my contention. Refers to page 61\* where "attestation" has been defined. An attesting witness must be present and see what passes and shall, when required, bear witness to the facts. In this the mortgagor signed in the presence of the attesting witnesses who had already signed on the previous sheet. This, I submit, is sufficient compliance of section 59, which does not require that the attesting witness must sign on every page of the document.

Babu Upendra Narayan Bagchi replied in brief.  
JUDGMENT.

GREAVES, J.—This is an appeal by a puisne mortgagee, defendant No. 2. The first defendant executed a mortgage in favour of the plaintiff on the 10th Sravan 1310. The document consisted of three sheets. The facts as found are as follows:—

The mortgagor signed the second sheet in the presence of two witnesses who wrote their names at the foot of the document as having witnessed the signature of the mortgagor. Then, apparently, some addition was made and a third sheet was added including other properties which I understand are comprised in the security given to the second defendant, the puisne encumbrancer. Then the third sheet was signed by the mortgagor in the presence of the same witnesses who wrote their names on the second sheet. But so far as third sheet is concerned, the names of those witnesses do not appear on that sheet.

It is contended on behalf of the appellant, that, this being so, the mortgage cannot be enforced so far as regards the

(1) 16 Ind. Cas. 250; 35 M. 607; 23 M. L. J. 321; 16 C. W. N. 009; 12 M. L. T. 338; (1912) M. W. N. 985; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 546; 39 I. A. 218 P. C.



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properties comprised in the third sheet; and it is urged that there has been no compliance with section 59 of the Transfer of Property Act inasmuch as the witnesses are said not to have attested the third sheet. We have been referred to several authorities including the case of *Shamu Patter v. Abdul Kadir Rowathan* (1).

Now, it seems to us that that case is no assistance to us with regard to the question we have to decide. All that that case decides is that it is not sufficient for the executant to sign his name first in the absence of the witnesses and afterwards to acknowledge his signature in their presence, and that this is not a sufficient compliance with the provisions of section 59 of the Transfer of Property Act. But there are some passages with regard to certain cases which are cited in the judgment which have some bearing on the question we have to decide. At page 611\* of that volume, a reference is made to the case of *Bryon v. White* (2), in which Dr. Lushington laid down that "attest" means the persons shall be present and see what passes, and shall, when required, bear witness to the facts." It is true that on the same page there is a reference to another case, the case of *Burdett v. Spilsbury* (3). The Lord Chancellor summed up the conclusion in these words:—"The party who sees the Will executed is in fact a witness to it; if he subscribes as a witness, he is then attesting witness."

I am inclined to think that what has happened in this case is a sufficient compliance with section 59 of the Transfer of Property Act; and I do not think that, to validate the third page of the mortgage-deed, it was necessary for the two witnesses to sign the third page of the mortgage-deed.

In these circumstances, the appeal fails and it is dismissed with costs.

WALMSLEY, J.—I agree.

*Appeal dismissed.*

(2) (1850) 2 Rob. Ecc. 315 at p. 317; 14 Jur. 919; 103 E. R. 1320.

(3) (1843) 10 Cl. & F. 340; 59 R. R. 105; 8 E. R. 772.

\*Page of 35 M.—[E.L.]

LAHORE HIGH COURT.  
LETTERS PATENT APPEAL No. 167  
OF 1920.

February 21, 1921.

Present :—Mr. Justice Le-Rossignol and  
Mr. Justice Martineau.

FATTEH MUHAMMAD—PLAINTIFF—  
APPELLANT

versus

CHOTHU RAM AND OTHERS—DEFENDANTS  
—RESPONDENTS.

*Letters Patent (Lahore), cl. 10—Appeal—Limitation, extension of—Court closed on last day of limitation—Appeal, whether can be presented on re-opening of Court.*

The period of limitation for an appeal under the Letters Patent is governed exclusively by the rules made by the High Court. The provisions of the Limitation Act do not apply to such an appeal.

When the period of limitation for presenting a Letters Patent Appeal expired the High Court was in vacation and the appeal was presented on the day the Court re-opened:

*Held*, that the appeal was barred by time.

Appeal, under section 10 of the Letters Patent, from the decree of Mr. Justice Abdul Raoof, dated the 30th June 1920, passed in Civil Appeal No. 1668 of 1918.

Bakhshi Tek Chand, for the Appellant.

Lala Hargopal, for the Respondents.

JUDGMENT.—The respondent in this case raises the preliminary objection that this appeal is time-barred, and the objection is valid.

The decree of the learned Judge in Chambers bears the date of 30th June 1920; the appeal to us was presented on 23th September 1920, long after the expiry of the prescribed period of 30 days.

Counsel for appellant urges that, even if the provisions of the Indian Limitation Act do not apply to Letters Patent Appeals, time should be extended as his client was not aware of the special rules applying to these appeals; moreover, this Court was in vacation when the period of thirty days expired and the appeal was presented on the day the Court re-opened.

In our opinion, the period for an appeal under the Letters Patent is governed exclusively by the rules made by this Court, which provide, *inter alia*, that no copy of the decree, order or judgment appealed from need accompany the memorandum of appeal. The avoidance of delay was treated

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as a paramount consideration and all probable causes of delay were swept from the path of the appellant.

Though the Court was in vacation when the thirty days expired, the Court Office was open, and even ordinary appeals to this Court can be and are presented to the office even during vacation.

We see no reason for extending time in this case, for ignorance of the law is the only excuse offered. Moreover, the time for extending the period for appeal is not now: application should have been made to a Judge at the time of presentation for leave to present after limitation.

Indeed, the memorandum of appeal having been presented after limitation should not have been entertained at all, but rejected forthwith. The rules are strict and were made so intentionally.

We accordingly dismiss the appeal with costs.

*Appeal dismissed.*

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CALCUTTA HIGH COURT.

CIVIL RULE No. 689 of 1919.

July 5, 1920.

*Present:*—Mr. Justice Teunon  
and Mr. Justice Newbould.

RADHA RAMAN SAHA BANIKYA

— PLAINTIFF—PETITIONER

*versus*

SITANATH BANIKYA AND OTHERS—

DEFENDANTS—OPPOSITE PARTIES.

*Civil Procedure Code (Act V of 1908), O. XXXIII,  
r. 4—Application for permission to sue in forma  
pauperis—Defendant, right of, to cross-examine appli-  
cant.*

When a plaintiff applies for permission to sue in *forma pauperis*, and is examined under Order XXXIII, rule 4 of the Civil Procedure Code, the opposite party is entitled to cross-examine the applicant on the merits of his claim to test the statements he makes in his examination. [p. 739, col 1.]

Rule against the order of the Sub-Judge, 1st Court, Dacca.

FACTS appeal from the judgment.

Babu Haramda Chandra Guha (with him Babu Mukunda Lal Roy), for the Petitioner.—

The facts of the case are briefly these. The plaintiff petitioner applied for permission to sue as a pauper which was allowed by the Court of first instance. The other side moved this Court and obtained a Rule which was ultimately discharged. Subsequently, the opposite party applied for a review of the order of the lower Court on the ground that he was not allowed an opportunity to cross-examine the plaintiff. The review was granted, against which order the present Rule was obtained. The original order granting the plaintiff permission to sue in *forma pauperis* was dated the 3rd August 1918. The Rule against that order was issued on 18th November 1918 and was discharged on the 31st January 1919. The application for review was made on the 6th November 1918 before the granting of the Rule of this Court. My contention is that Order XXXIII, rules 5, 6, of the Civil Procedure Code would apply. The opposite party cannot be allowed to cross-examine me on the merits of the case. He ought to be confined to the question of pauperism of the plaintiff. I submit, therefore, the order of the Court below is clearly illegal. Review should not have been granted on that ground. Then, as to the petition for review itself, it is barred. There were two other similar applications and it was not until 23rd June 1919 that the present point was taken. The application for review is, therefore, clearly barred by limitation. The whole proceedings tell harshly on the poor plaintiff who is sought to be deprived of his legal remedies against the opposite party.

Babu Brojolall Chuckerbutty, for the Opposite Parties, was not called upon to reply.

JUDGMENT.—This Rule is directed against an order made by the Subordinate Judge of Dacca, by which he disposes of an application made for the review of an order made by his predecessor-in office on 3rd August 1918. The order arises out of an application made by the petitioner before us for permission to sue in *forma pauperis*. Permission was granted on 3rd August 1918 and the application for review was made by the opposite party who was the first defendant in the proposed suit. This application was made on the ground that when the petitioner—the applicant for permission to sue in *forma pauperis*—was examined under the provisions

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of Order XXXIII, rule 4, Code of Civil Procedure, he was refused an opportunity of cross-examining the applicant on the merits of his claim. In the cases reported in *Nawab Bahadur of Murshidabad v. Harish Chandra Acharjee* (1) and in *Jogenāra Narayan Ray v. Durga Charan Guha* (2) it has been held that the Court, in considering the question whether the applicant has a good subsisting cause of action, must take into consideration not merely the allegations made in the plaint but also the allegations made by the applicant when and if examined under Order XXXIII, rule 4. It follows from these rulings, from the provisions of Order XXXIII, rule 7 (2), that on general principles, when the opposite parties contend that the applicant has no subsisting cause of action, they are entitled to test the statement that he makes in his examination under Order XXXIII, rule 4, by cross-examination. This ground, therefore, on which the petitioner in the Rule supports the Rule must, we think, fail.

It is, then, suggested that the application for review is barred by limitation, but that is not so. The application for review was made on 6th November 1918 and was followed by two subsequent applications on 13th June 1919 and 2nd July 1919. But these are to be regarded not as fresh applications in review but as setting out grounds on which the application made on 6th November 1918 is to be supported, those grounds not having been clearly set out in the original application.

Both the grounds taken in support of this Rule, therefore, fail, and the Rule is accordingly discharged. We make no order as to costs.

*Rule discharged.*

(1) 11 Ind. Cas. 55; 13 C. L. J. 593.

(2) 52 Ind. Cas. 610; 46 C. 651.

# LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 372 OF 1917.

January 31, 1921.

*Present*:—Mr. Justice Broadway and  
Mr. Justice Abdul Raouf.

MESSRS. MOOSAJEE AHMAD AND  
COMPANY—DEFENDANTS—APPELLANTS  
*versus*

THE ADMINISTRATOR-GENERAL OF  
BENGAL, AT CALCUTTA, AS MANAGER  
OF THE PROPERTY ATTACHED TO THE  
AMRITSAR DISTILLERY COMPANY  
—PLAINTIFF—RESPONDENT.

*Contract Act (IX of 1872), ss. 115, 209—Principal and agent—Death of principal—Agent, authority of, whether revoked—Party entering into contract with agent with knowledge of death of principal, whether can subsequently question agent's authority—Estoppel.*

The agent of a business man has authority, even after the death of his principal, to enter into transactions which are necessary or reasonable for the protection and preservation of the interest of the heirs of the deceased, and such authority continues till it is revoked by the heirs. A person who enters into a contract with an agent after the death of his principal, with knowledge of that fact, is estopped from subsequently impugning the transaction on the ground of the want of authority of the agent. [p. 742, col. 2.]

Second appeal from the decree of the Additional District Judge, Amritsar, at Gurdaspur, dated the 11th of November 1918, affirming that of the Senior Subordinate Judge, Amritsar, dated the 23rd of February 1916.

Mr. Aziz Ahmad, for the Appellants.

Mr. Mackay, for the Respondent.

JUDGMENT.—The following facts will disclose the nature of the dispute between the parties. One Mr. Dyer was the sole owner of the Amritsar Distillery Company. He had in his employment one Mr. Carter, who was appointed Manager of the Distillery in 1909. Mr. Dyer died on the 21st January 1911. After his death Mr. Carter, the Manager, continued to work the Distillery in his capacity of an Agent and Manager during the years 1911 and 1912. In November 1911 he entered into a contract on behalf of the Amritsar Distillery Company with Messrs. Moosajee Ahmad and Company for the purchase of 200 tons of Java Molasses. The defendant Company under the contract agreed to supply the goods at Karaobi (F. O. R.) at the rate agreed upon. Out of these 200 tons 50 tons were supplied and delivered towards the end of December 1911. On



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receipt of the 50 tons Mr. Carter complained that the Molasses was not of the quality which the defendant Company had agreed to supply. The balance of 150 tons was yet to be supplied when a question as to damages on account of inferior quality of the 50 tons was raised. On the 27th of December 1911 a written contract was entered into between the two companies, according to which 1,300 tons of Java solidified Molasses of the best quality were to be supplied by the defendant Company, Moosajee Ahmad and Company, at Amritsar. The following terms were specified in the written contract :—

*Rate*—Rs. 2 5 0 per Maund net weight, Amritsar. F. O. R. Net weight to be the weight arrived at by deducting 6 seers per basket from the gross R/R weight.

*Delivery*—500 to 600 tons to be delivered during February 1912, to commence before February 7th and the remainder before the 31st March 1912.

*Payment*—Full amount of invoice (at Rs. 2-5-0 per Maund net) to be paid by the Amritsar Distillery Company within 15 days of receipt of Railway Receipt.

A clause was added for deduction on account of defective quality in the following words :—

"Should there be any red Molasses or reddish brown Molasses in the consignment, Messrs. Moosajee Ahmad and Company agree to make an allowance up to 12½ per cent. as the Manager, Amritsar Distillery Company, may consider fair, but if the Manager, Amritsar Distillery Company, observes that there is a percentage of red Molasses in any of the consignments he is to wire at once to the Manager of Messrs. Moosajee Ahmad and Company, branch Karachi."

This contract was signed on behalf of Messrs. Moosajee Ahmad and Company by their agent, Mr. A. H. Joonus. It may be stated that the defendant Company had their Head Office at Calcutta and a branch firm at Karachi, Mr. A. H. Joonus being the Manager of the latter. 150 tons, the balance of 200 tons under the contract of November, were subsequently delivered, but Mr. Carter

objected to the quality of the Molasses supplied. The 1,300 tons contracted to be supplied under the contract of 27th December 1911 were not delivered at all, nor was the price of 150 tons paid by the Amritsar Distillery Company. The circumstances above-mentioned led to three suits.

(1) A suit by Messrs. Moosajee Ahmad and Company, against the Administrator-General of Bengal at Calcutta (who had, in the meantime, been appointed as Receiver of Dyer's estate, Amritsar Distillery, etc., on the 29th August 1913) for the price of 150 tons of Molasses supplied to the Distillery. This suit was originally instituted at Sindb, but the plaint was returned and was to be filed in the Court at Amritsar, where it was subsequently presented and registered as Suit No. 47 of 1915.

(2) A suit by the Administrator-General of Bengal, representing the Amritsar Distillery Company, for the recovery of Rs. 1,300 as damages on account of inferior and defective quality of the Molasses supplied by the defendant, Messrs. Moosajee Ahmad and Company. This suit was registered as No. 27 of 1914.

(3) A suit by the Administrator-General of Bengal, at Calcutta, representing the Amritsar Distillery Company, for the recovery of Rs. 10,606 14 3 by way of damages for non-delivery of 1,300 tons of Molasses under the contract of the 27th December 1911. In suit No. 47 of 1915 a decree for Rs. 7,556 9 9 with costs was passed by the learned Senior Subordinate Judge of Amritsar in favour of Messrs. Moosajee Ahmad and Company. That decree has become final as no appeal has been preferred against it. In Suit No. 27 of 1914 a decree for Rs. 1,300 was passed in favour of the Administrator-General, at Calcutta, against the defendant Company. Against that decree an appeal was preferred to the Court of the District Judge at Amritsar, who having confirmed the decree of the first Court a second appeal has been preferred to this Court and has been numbered as 372 of 1917. In Suit No. 28 of 1914 a decree for Rs. 6,256 0 10 with costs has been passed against the defendant Company and first appeal No. 1494 of 1916 has been preferred against the decree.

Both these appeals have come up for decision before us, and have been argued together as the two suits were heard and

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disposed of together. By consent of the parties the evidence in the three suits was treated as applicable to each one of them. We will take up the second appeal first and, as some of the facts are common, we will summarise them in our judgment in this appeal.

The material allegations on which the suit for damages with respect to 200 tons was based were these, that on the 10th of November 1911 the defendant Company, namely, Messrs. Moosajee Ahmad and Company, agreed to supply the plaintiffs with 200 tons Java Solidified Molasses at Rs. 2-6-0 *per Maund*, that 50 tons out of these were delivered towards the end of December 1911, which were decidedly of inferior quality and against the terms of the contract. On the 27th December 1911 a contract for supply of 1,300 tons of Molasses was entered into between the parties and with regard to 150 tons, the balance of 200 tons, it was agreed subsequently that the defendants would supply them on the same terms as were embodied in the new contract for 1,300 tons. These 150 tons were delivered at the end of January 1912 and they were also of inferior quality of which due notice was given to the defendant. Under the contract of the 27th December 1911 a deduction of 12½ per cent. in case of the inferior quality of the goods was agreed upon. The plaintiffs accordingly claimed compensation at the above rate with interest "at 12 percent." The claim was laid at Rs. 1,300. The defendant Company resisted the claim on the following pleas: that the plaintiff disclosed no cause of action; that the Court at Amritsar had no jurisdiction to try the suit; that the suit was not entertainable as another suit involving the same issues had been filed against the plaintiffs in the Court of the Judicial Commissioner of Sindh; that the defendant had agreed to deliver the goods at Rs. 1-12- F. O. R. Karachi; that the 150 tons were merged by the agreement of the parties into 1,300 tons contracted to be supplied under the agreement, dated the 27th December 1911; that the plaintiffs were not entitled to claim damages separately in respect of them, and that the contract for the supply of 1,300 tons was made subject to the confirmation by the defendant's Calcutta office, and as this had not been confirmed the plaintiffs were not entitled to rely upon its terms in any case.

The plea as to the want of cause of action was explained to mean that, inasmuch as Mr. Dyer, the Proprietor, having died, Mr. Carter, the agent, had ceased to have authority to enter into agreements on behalf of the defendant Company, and that, therefore, the Administrator-General, at Calcutta, had no right to maintain the suit. The plea as to the want of jurisdiction was based on the allegation that, according to the contract of November 1911, the delivery was to be made at Karachi, and that the defendants had their Head Office at Calcutta and a Branch Office at Karachi, and that, therefore, the suit could not be instituted at Amritsar.

The Trial Court framed six issues, namely:—

- (1) Does the plaintiff disclose no cause of action against the defendant, or, more clearly, has the plaintiff no *locus standi* to sue the defendant?
- (2) Has this Court no jurisdiction to try the suit?
- (3) Is this suit barred by reason of a previously instituted suit between the parties based on the same facts, pending in the Court of the Judicial Commissioner of Sindh?
- (4) Does the plaintiff's suit not lie in respect of 150 tons of Molasses by reason of the contract relating thereto having merged into another contract entered into on the 27th December 1911 for supply of 1,300 tons?
- (5) Was the Molasses, supplied by defendant, of inferior quality and against the terms of the contract?
- (6) If not, has the plaintiff suffered a loss of Rs. 1,300?

After a careful consideration of the correspondence between the parties and other evidence on the record, the Trial Court decided all the issues in favour of the plaintiffs and decreed the claim for Rs. 1,300.

An appeal was preferred to the lower Appellate Court which has upheld the decree of the Court of first instance.

The defendants have, therefore, come up in second appeal to this Court. The pleas raised in the Courts below have been reiterated in this Court and we are called upon to decide almost all the issues involved in the case. Nothing need be said as to the plea involved in Issue No. 3 as it was not serious.

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ly urged in the Courts below and is not pressed before us. The three important pleas which have been strongly pressed before us, are those involved in Issues Nos. 1, 2 and 4, and we shall proceed to give our decision upon those pleas.

The first issue raises the question of the *locus standi* of the plaintiff to maintain the suit. It is argued that, as the principal had died before the contracts sued upon were entered into, Mr. Carter, the agent, had ceased to have authority to enter into them on behalf of the Distillery Company, as no authority had been given to him by the legal representatives of the deceased principal. The decision of this question depends upon the true construction to be placed on section 209 of the Indian Contract Act of 1872. The section provides that :

"When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him."

We have to decide whether, entering into a contract for the supply of Molasses in order to keep the Distillery going, was a reasonable step for the protection and preservation of the interests of the representatives entrusted to Mr. Carter. We have no manner of doubt as to the meaning of this section and we are clearly of opinion that it was a reasonable step for Mr. Carter to take. The law is thus stated in section 492 of Story on the Law of Agency :

"Nevertheless, there are cases, in which the agent, although he has knowledge of the death of his principal, not only may, but ought to, act in the business entrusted to him. As, for example, if one is charged with gathering the vintage of another, and hears of the death of his principal at the very time, when the vintage cannot properly be deferred as the grapes of the country are then fit to be gathered, and there is not time to advise his heirs thereof, who live at a distance, then it will be the duty of the agent to gather the vintage, notwithstanding such death."

This passage is quoted from Pothier. This rule is further elucidated in section 493 of the same book, where it is thus stated :—

"Pothier adds another most important exception to the rule, as applicable to the

business of commerce. Although (says he), regularly, every mandate ends with the death of the person giving it, yet it has, for the benefit of commerce, been established, that the commission of these agents (or mandatories) shall last even after the death of the merchant, who appointed them, until it is revoked by the heir, or other successor."

In this case, instead of the mandate being revoked, the act done by the agent has been ratified by the Administrator-General as the representative of the deceased principal. This rule is based on sound common sense and the Legislature has embodied it in section 209 of the Contract Act. Moreover, the defendants, with their eyes open, entered into the contract with Mr. Carter, who professed to act on behalf of the Distillery and in the interests of the representatives of his late principal. The defendants themselves fully recognized the authority of Mr. Carter to act on behalf of the estate and sued the Administrator-General for the price of 150 tons supplied by them to the Distillery. It is too late for them to raise the question of want of *locus standi*. They are estopped and cannot be allowed to raise the plea. We, therefore, decide the first issue against the appellants.

In order to decide the second issue, raising the question of jurisdiction, we must first decide Issue No. 4. The decision of this issue depends upon the construction to be placed upon the voluminous correspondence between the parties and the oral evidence given in the case. The plaintiff's contention is, that 1,450 tons were to be supplied, namely, 1,300 tons under the contract of the 27th December 1911 and 150 tons under the previous contract of November 1911, and all that was agreed upon between the parties by way of the modification of the previous contract was that the balance of 150 tons was to be supplied according to the terms of the later contract at Amritsar. The defendants, on the other hand, contend the 150 tons, according to the agreement, formed part of 1,300 tons and no more than 1,300 tons was to be supplied. Both the Courts below, upon a consideration of the correspondence and the oral evidence, have come to the conclusion that 150 tons were not merged in the contract of December in the sense that only 1,300 tons were all that had to be supplied. It is common ground that the alleged



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modification was not affected by the written contract, dated the 27th December 1911, Exhibit P.-4, printed at page 8 of the paper-book of Appeal No 1494 of 1914. There is no mention of the 150 tons in the contract. It is, however, urged that the alleged merger took place subsequently. We have carefully considered the effect of the Exhibits D.-11, D.-14, D.-15 and D.-16 upon which a great deal of reliance was placed. We have also referred to Exhibits D. 10 and P.-98 along with the other documentary and oral evidence to be found on the record, and we find ourselves in entire agreement with the Courts below as to the conclusion arrived at on the evidence. In one respect only we have to differ from the Courts below. By an oversight those Courts have treated the entire 200 tons as being subject to the terms of the contract of the 26th December 1911 and have given a decree for damages in respect of the defective nature of the 50 tons of Molasses also. It is admitted by the plaintiff's Counsel that the modification of the previous contract related to 150 tons only. Therefore, the contract relating to 50 tons previously delivered was to be completed at Karachi and not at Amritsar. We, therefore, hold that as regards 150 tons the suit was rightly brought at Amritsar, but the Court had no jurisdiction to decide the dispute as to 50 tons.

The finding as to the inferior quality of the Molasses supplied is a finding of fact. We must, therefore, accept it as conclusive. The amount of damages has been properly assessed and we accept the finding as to that also. The item representing the damages assessed in respect of the bad quality of the 50 tons must, therefore, be deducted from the total sum assessed. We accordingly accept the second appeal in part and modify the decree of the lower Courts by deducting Rs. 325 from Rs. 1,300 and pass a decree for Rs. 975 with costs. We allow no costs to the appellants as their appeal has substantially failed.

*Appeal accepted.*

CALCUTTA HIGH COURT.  
APPEAL FROM APPELLATE DECREE  
No. 2011 of 1918.

July 2, 1920.

*Present:*—Sir Asutosh Mukherjee, Kt.,  
Acting Chief Justice, and Justice Sir Ernest  
Fletcher, Kt.

ROY JATINDRANATH CHOWDHURY  
AND OTHERS—PLAINTIFFS—APPELLANTS  
*versus*

AJODHAYA NATH NANDI AND OTHERS  
—DEFENDANTS—RESPONDENTS.

*Landlord and tenant*—Kibaliyat, provision in, for  
payment of increased rent on land being measured—  
Increased rent, due from which recoverable.

Where a *kibaliyat* provides for the payment of increased rent on the measurement of the land leased, such increased rent can only be claimed from the time the land is measured, and not from any anterior date. [p. 744, col. 1.]

Appeal against the decree of the District Judge, Kibulna, dated the 10th of July 1918, modifying the decree of the Additional Subordinate Judge of that district, dated the 30th of July 1917.

FACTS appear from the judgment.

Baba Sarat Chandra Roy Choudhury (with him Babi Lilit Mohan Banerjee), for the Appellants.—The plaintiffs are the appellants. They are the superior landlords of the *jote*. The facts are these. The plaintiff let the lands in dispute in *se ganti jots* to the defendants. At the time of the Settlement of the lands it was arranged that the *se-gantidar* would pay Rs. 300 for 300 *bighas* of land. The area of the land is 633 *bighas*. The plaintiffs by this suit claim proportionate enhancement according to the terms of Settlement. The registered *kibaliyat* was dated 1898. I purchased the *ganti* interest at a rent sale and so I sue as the *gantidar*. It was a personal contract. The measurements of the lands have been made not in this suit but in a previous suit. The defendants admitted that they are in possession of 633 *bighas* of land. All that the clause in the lease about enhancement requires is that measurement will have to be made. I submit the measurement made in course of the previous suit fulfils the terms of the lease. It is not necessary that a fresh measurement is to be made before I am entitled to claim increase of rent. The term in the lease should not be so strictly construed.

Dr. Jalunath Kanitlal, for the Respondents, was not called upon.

DATTATRAYA SITARAM GADKARI v. SECRETARY OF STATE FOR INDIA.

### JUDGMENT.

MOOKERJEE, ACIG. C. J.—We are of opinion that the decree made by the District Judge in this case must be affirmed.

The plaintiffs claim additional rent for increased area. That claim is based on a contract of tenancy, dated the 28th April 1898, entered into between the predecessors of the defendants on the one hand and the Sardars on the other. That *kabuliat* contained a provision to the following effect: "You have let out the said 300 *bighas* of land at a rental of Rs. 1 per *bigha* including cesses aggregating Rs. 300... If the rent-land is measured by your landlords, (i. e. the *Bhanja gantidars*) we shall accept the same and pay for increased land at the aforesaid rate." The tenancy of the Sardar has come to an end and the interest of the *Bhanja gantidars* has vested in the plaintiffs. Consequently, the plaintiffs are entitled to increased rent for increased land, when the condition precedent has been fulfilled and not earlier, namely, when there has been measurement of the land by the *Bhanja gantidars* or their representatives-in-interest, namely, the present plaintiffs. It is conceded that there was no such measurement before the suit was brought. Consequently, at the time of the institution of the suit, the plaintiffs had not become entitled to claim any increased rent for any increased land. The decree of the District Judge must, therefore, be affirmed. The plaintiffs can exercise the right originally vested in the *Bhanja gantidars* at any time and will thereafter be entitled to increased rent for increased land.

The appeal is dismissed with costs.

FLETCHER, J.—I agree.

*Appeal dismissed.*

### BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 903 OF 1919.

August 16, 1920.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

DATTATRAYA SITARAM GADKARI

—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA—RESPONDENT.

*Limitation Act (IX of 1908), s. 5—Appeal, delay in filing—Sufficient cause for extension of time—Appeal filed in wrong Court—Good faith, what is.*

Where the delay in filing an appeal is due to the fact that the appeal was at first filed in a wrong Court, this is a sufficient cause for extending the period of limitation within the meaning of section 5 of the Limitation Act provided it is shown that the appellant acted in good faith.

An appellant acts in good faith who files an appeal in a wrong Court acting honestly under the advice of a Pleader.

"In good faith" in this connection, does not mean "without due care or attention", but means "honestly" though it may be negligently.

Appeal from the decision of the District Judge, Thana, in Appeal No. 46 of 1919, from the decree passed by the Assistant Judge at Thana, in Civil Suit No. 1 of 1914.

Mr. S. R. Bakhale, for Mr. B. V. Desai, for the Appellant.

Mr. S. S. Patkar, Government Pleader, for the Respondent.

### JUDGMENT.

MACLEOD, C. J.—We think that this appeal must be allowed. The learned Judge thought that because the question as to which Court the appeal lay was not involved in doubt, therefore, there was not sufficient cause for the appellant not preferring the appeal to the Court of the District Judge within time. But that is not, in my opinion, the right criterion in cases of this kind. I do not think that the learned Judge has read the remarks of Mr. Justice Jardine (*Dadabhai Jamsetji v. Maneksha Sorabji* (1)) in the way in which they should be read. He has not attached the right meaning to the words "in good faith." I think that the appellant was entitled to rely upon the advice of his Pleader that the appeal lay to the High Court and a party cannot be said to be acting without good faith because he relies upon a person whose status entitled him to give advice to litigants. It may be that the Pleader ought to have known that the appeal lay to the District Judge. But there, again, some questions may appear to be so entirely free from doubt to one person, that only one opinion is possible, and yet another may equally well come to a different conclusion. I do not think it can be said that the appellant has acted in such a way that he should be debarred from his right to appeal. In *Ram Ravi Jambhekar v. Pralhaddas Subkarn* (2) their Lordships say: "We feel unable to accept the argument for the appellant that because the mistake made

(1) 21 B. 552; 11 Ind. Dec. (N. S.) 370.

(2) 20 B. 133 at p. 143; 10 Ind. Dec. (N. S.) 647.

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in filing the suit at Cawnpore was an error of law, that the suit was not a *bona fide* one. It was a stupid, though not an unaccountable, blunder; but the ignorance of law, or the ill-advice of a Pleader, does not, in our opinion, necessarily or *prima facie* establish a want of good faith" and I do not think that Mr. Justice Jardine [*Dodabhai Jamsetji v. Maneksha Sorabji* (1)] used the words "good faith" in the sense that the District Judge thought he did, that is to say, as meaning without due care and attention. Usually, no doubt, the presiding Judge has to use his discretion whether there is sufficient cause or not in excusing delay; but in this case I think the Judge erred in law.

The appeal must be allowed and the case sent back to the District Judge to be heard on its merits.

Costs to be costs in the appeal.

FAWCETT, J.—I agree. The Allahabad High Court no doubt has ruled that the presentation of an appeal to a wrong Court through a mistake in or ignorance of law is not a "sufficient cause" within the meaning of section 5 of the Indian Limitation Act: *Jag Lal v. Har Narain Singh* (3). But this view has not been adopted by the Calcutta, Madras and Bombay High Courts which treat the matter as depending upon the circumstances of each particular case. This is not a case in which the appellant lost time in appealing against the judgment that the appeal lay to the District Court and not to the High Court so as to fall within the view taken in *Daudbhai Musabhai v. Emnabai* (4). Though, no doubt, there was carelessness in the matter, yet I think there is no reason to believe that the appeal in the High Court was not filed "in good faith," using those words in the sense given to them by the definition in the General Clauses Act, that is to say, honestly, though, it may be, negligently.

I concur, therefore, in allowing the appeal.

*Appeal allowed.*

(3) 10 A. 524; A. W. N. (1888) 218; 6 Ind. Dec. (N. S.) 853.

(4) 28 B. 235; 5 Bom. L. R. 947.

# CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 305 OF 1919.

June 21, 1920.

Present:—Mr. Justice Teunon  
and Mr. Justice Newbould.

ENTAZUDDI SHEIKH—INSOLVENT—  
APPELLANT

*versus*

RAM KRISHNA BANIK AND OTHERS—  
RESPONDENTS.

*Provincial Insolvency Act (III of 1907), s. 18—  
Sale by Receiver—Procedure.*

A sale by a Receiver in whom the property of an insolvent vests under section 18 of the Provincial Insolvency Act is really a sale by the owner, and may be held either by auction or by private treaty and need not be held in the manner provided for sales in execution of decrees under the Civil Procedure Code. [p. 746, col. 2.]

Appeal against the order of the District Judge, Faridpur, dated the 15th of July 1919.

FACTS appear from the judgment.

Babu Nilratan Banerjee, for the Appellant.—I submit that occupancy holding and under-*raiya*ti holding cannot be legally held in that way. As no notice was served and no sale proclamation was published, the sale cannot stand. Unless sale proclamation is published, the intending purchaser cannot come up. Without the landlord's consent the sale is bad. The under-*raiya*ti holding is not at all saleable. As regards occupancy holding, I am part holder. Without landlord's consent, it cannot be sold. There is nothing to show that the landlord gave consent. The Receiver has nothing to do with the case. He cannot be allowed to oppose the case.

The Hon'ble Mr. T. O. P. Gibbons, (Advocate-General) and Babu Dwarkanath Chatterbutty and Surendranath Guha, for the Receiver.—The statement as to under-*raiya*ti holding is not supported even by his schedule. Under section 20 of the Provincial Insolvency Act the Receiver shall sell insolvent's property,—he has to sell at once. He does that with the consent of the Court. It is a holding which can be sold. Here the Receiver is in place of tenant. Under the ruling of the Special Bench of your Lordships the tenant's consent is not necessary.

Babu Nogendra Nath Ghosh, for the Purchaser.—I beg to submit that the insolvent took a month's time to bring up his witnesses.

Babu Nilratan Banerjee in reply.—The Receiver's report shows that the lands were



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not only occupancy holdings. The report also shows that the lands were all along transferable. He relies on landlord's consent. But there is nothing to show that such consent was taken.

**JUDGMENT.**—This appeal is directed against an order made by the District Judge of Faridpur on 15th July 1919, by which he confirmed the sale of certain occupancy holdings being the property of an insolvent vested in a Receiver under the provisions of section 18 of the Provincial Insolvency Act. In the Court below the District Judge dealt at great length with the saleability of occupancy holdings without the consent of the *raiyat*. That matter has now been concluded by the decision of a Special Bench in the case of *Chandra Benode Kundu v. Ala Bux*\* not yet reported. The result is that before us nothing has been said on that point, and the contentions advanced by the learned Pleader for the insolvent are these, (1) that the insolvent is only a part-owner of these occupancy holdings; (2) that some of the properties sold are not occupancy holdings, but under-*raiyati* holdings; (3) that there is no evidence that the landlord gave consent to the sale, (4) that no sale proclamation was issued, and (5) that the Receiver is not a necessary party.

Nothing need be said with regard to the last point.

If it be the case that the insolvent is only a part-owner of these occupancy holdings it follows, on the principle laid down in the Full Bench case of *Dayamoyi v. Ananda Mohan Roy* (1), that no consent of the landlord is necessary to the sale. What has been sold by the Receiver in these proceedings is the right, title and interest of the insolvent, and whether he is the sole owner or only a part-owner of the occupancy holdings is a matter which was not gone into in the Court below and need not be discussed by us in this appeal. The question is one which may have to be decided should the alleged co-owner of the insolvent claim an interest in the property sold. Such decision, if necessary will have to be had, in separate proceedings, certainly not now.

The judgment of the Court below proceeds on the assumption that a sale by a Receiver

is one which should be held in the manner provided for sales in execution of decrees under the Civil Procedure Code. But that view, for which no authority has been placed before us, appears to be a mistaken view. Sales by a Receiver in whom the property of the insolvent is vested are really sales by the owner and may be held either by auction as in the present case or by private treaty. When he proceeded to sell, the Receiver satisfied himself that he had obtained the consent of the landlord to the sale. That was sufficient for his purposes and is also sufficient for us in these proceedings.

Whether some of the properties were, in fact, under-*raiyatis* is a question that was not raised before the Court below, certainly there is no trace of any such question in its somewhat voluminous judgment. If there be any under-*raiyatis* amongst the properties sold, we can, as at present advised, see no reason, for holding why, at the instance of the Receiver, and with the consent of the landlord such under-*raiyatis* should not be sold.

This sufficiently disposes of the appeal that has been presented to this Court by the insolvent and we now dismiss that appeal with costs. We assess the hearing fee at five gold *mohurs* to be divided into two equal moieties—one moiety to the Receiver and one moiety to the auction purchasers who have appeared.

*Appeal dismissed.*

#### PATNA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 63  
AND 72 OF 1918.

February 23, 1921.

*Present*:—Justice Sir B. K., Mallik Kt.,  
and Mr. Justice Bucknill.

IN APPEAL NO. 63 OF 1918.

MESSRS. SURAJ MULL HAR PRASAD  
—DEPENDANT NO. 3—APPELLANTS

*versus*

THE BANK OF BIHAR—PLAINTIFF AND  
*Babu* BAIJ NATH PRASAD AND ANOTHER  
—DEPENDANTS NOS. 1 AND 2—RESPONDENTS.

IN APPEAL NO. 72 OF 1918

THE BANK OF BIHAR LTD., THROUGH  
*Babu* RAM CHANDRA Pandit, GENERAL  
MANAGER—PLAINTIFF—APPELLANTS

*versus*

*Babu* BAIJ NATH PRASAD AND OTHERS  
—DEPENDANTS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 5—

(1) 27 Ind. Cas. 61 (F. B.); 42 C. 172; 18 C. W. N. 971; 21 C. L. J. 52.

\*Since reported as 58 Ind. Cas. 353; 24 C. W. N. 818; 31 C. L. J. 510—[Ed.]

## SURAJ MULL-HAR PRASAD V. BANK OF BIHAR.

*Hundi*—Signature of drawer, whether must appear at a specific place.

It is not necessary that the name of the drawer of a *hundi* should be separately entered upon the document, either at the foot or any other part of it. [p. 748, col. 2.]

It is sufficient if the name of the drawer is introduced in the document to prove authentication, that is to say, to show the person to whom it is addressed that it has been made by a third person who purports to be bound by the document. [p. 748, col. 2.]

Appeal from a decision of the Subordinate Judge, Patna, dated the 23rd February 1917.

Messrs. *Khurshed Husnain, Banwari Lal, Sunder Lal and Bimala Charan Sinha*, for Appellants in No. 63 and Respondents in No. 72.

Messrs. *Purnendu Narain Sinha, Naresh Chandra Sinha and Nitai Chandra Ghose*, for the Respondents in No. 63 and Appellant in No. 72.

## JUDGMENT.

IN APPEAL NO. 63 OF 1918.

MULLICK, J.—Appeal No. 63 arises out of Suit No. 88 of 1917, which was instituted before the Subordinate Judge of Patna on the 23rd February 1917. Appeal No. 72 of 1918 arises out of Suit No. 89 of 1917, which was instituted on the same date before the same Subordinate Judge. Although both suits have been disposed of by one judgment, it will be convenient in this Court to keep the cases separate.

We take up Appeal No. 63 first. In this case the subject-matter is a *hundi* for Rs. 5,000 said to have been drawn on the 5th August 1916 by the firm of Mirzamal-Harbhagat Dass of Bhagalpur against a firm in Calcutta, trading under the name and style of Suraj Mull-Har Prasad. It has been found by the Subordinate Judge that this sum was advanced as a loan by the Bank of Bihar, carrying on business at Patna, to the drawer Mirzamal-Harbhagat Das through defendant No. 1, Baijnath Prasad. The actual amount paid in cash was Rs. 5,000 less a sum of Rs. 46 4-0 which was deducted by the Bank on account of interest at 6 per cent. from the date of the loan till the date of maturity, a period of 63 days. The plaintiff-Bank, however, in their plaint assert that the defendant No. 1, Baijnath Prasad, was the real borrower, and that the *hundi* was received by the plaintiff as security for the loan. It appears that when the money was

advanced, the signature of the acceptor was not upon the *hundi*, and it was sent to Calcutta in order that the acceptor might complete the document. The evidence is that one Sriballav, who has been examined as a witness in this case on behalf of the defendants, first of all accepted on behalf of the firm of Ramrishdas-Chimanbux, but subsequently cancelled this acceptance and endorsed on the bill the name of the firm of Suraj Mull-Har Prasad. There is an allegation that two or three days previously Suraj Mull-Har Prasad had been asked to accept the *hundi* but that they had declined to do so. Why Sriballav, notwithstanding that refusal, endorsed the firm's name has not been explained, but the fact remains that he did do so. On the 12th September Suraj Mull-Har Prasad appear to have discovered that Mirzamal-Harbhagat Dass were insolvent and that they had no credit with their firm, and they accordingly, through Mr. N. C. Das, an Attorney in Calcutta, addressed a letter to Lakshmi Nath Pandit, the Agent of the Bank of Bihar, in Calcutta, repudiating the *hundi* and asking Lakshmi Nath to bring it to them so that the acceptance might be cancelled. There is evidence that the day before this, namely, the 11th September, Lakshmi Nath Pandit had, through a Notary Public, Mr. W. G. Ross, called upon Suraj Mull-Har Prasad to signify confirmation of acceptance. Upon Suraj Mull-Har Prasad's refusing to do so, an endorsement was made upon the document by the Notary Public to the following effect:—"Answer given, not the signature of the right person, decline to accept."

The present suit was thereupon brought for a sum of Rs. 5,122-6-0 on account of the principal and interest and the notarial charges incurred.

Defendant No. 1, Baij Nath Prasad, in his written statement admitted that he had received the money on behalf of Mirzamal-Harbhagat Dass and had delivered it to them and he repudiated any liability to the plaintiff.

Defendant No. 2 admits drawing the *hundi* and receiving the consideration money. Defendant No. 3, Suraj Mull-Har Prasad, deny liability on the ground that Sriballav had no authority to sign their name on the *hundi*.

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The Subordinate Judge finds that Sriballav had authority to sign and has decreed the suit against Suraj Mull-Har Prasad and defendant No. 2 for the full amount. He has declined to decree interest on the ground that, as the *hundi* was a collateral security for a prior debt, interest cannot be chargeable under section 80 of the Negotiable Instruments Act, and there being no stipulation making interest payable otherwise, the claim for interest must fail. As against defendant No. 1 the suit has been dismissed.

The present appeal is preferred by defendant No. 3 and the plaintiff prefers a cross-appeal in regard to the interest disallowed.

Now, the first question raised by the learned Vakil for the appellants is that, upon the evidence, it ought not to have been held that Sriballav had authority to sign the *hundi* on behalf of Suraj Mull-Har Prasad. On this point the evidence of plaintiff's Manager at Patna, Ram Chander Pandit, and Agent in Calcutta, Lakshmi Nath Pandit, and the evidence given by Sriballav himself show that Sriballav was in the habit of transacting the business of the firm of Suraj Mull-Har Prasad during the absence of the ordinary Manager, Ram Narayan. It is contended that, unless the plaintiff gives clear evidence to show that Sriballav had authority to sign *hundis*, his employment as one of the managers of the firm will not suffice. The learned Subordinate Judge, however, observes that Sriballav's minor son, Har Prasad Das, is a partner in the firm of Suraj Mull and that, unless Sriballav had been authorised to sign *hundis*, it is not likely that after he had cancelled the acceptance endorsed by him on behalf of the firm of Ramrichdas-Chimanbux, he would have consented to sign the name of Suraj Mull-Har Prasad. To me the point seems to be conclusively established by the letter written by Mr. Bose on 12th September 1916 to Lakshmi Nath Pandit. In that letter the Attorney, acting on behalf of Suraj Mull-Har Prasad, clearly admits that Sriballav signed the document on behalf of the firm, and reading the whole letter it is impossible to escape the conclusion that Suraj Mull Har Prasad felt themselves bound by Sriballav's act unless they could repudiate the transac-

tion on the ground that fraud and misrepresentation were practised upon Sriballav. In the face of this document, it seems impossible to come to any conclusion other than that which has been recorded by the Subordinate Judge, and the defendant No. 3 is clearly liable for the debt.

To this the learned Vakil replies, that the *hundi* is not in conformity with the Negotiable Instruments Act inasmuch as the drawer's signature does not appear upon it. The document runs as follows:—  
"From Mirzamal-Harbhat Das of Bhagalpur to Suraj Mull-Har Prasad at Calcutta Post. Greetings. We have drawn on you a *hundi* for Rs. 5,000 in figures, rupees five thousand which is twice (the sum of) 2½ thousand rupees in favour of the Bihar Bank Limited to whom payment should be made in coins according to custom on the 63rd day, from Saturday." Then follows the date "Savan Sudi 6 Saturday, Sambat 1973." Then follows the entry "Accepted *hundi* Suraj Mull-Har Prasad, Pandit Lakshmi Nath Jo."

It is true that Mirzamal-Harbhat Das have not signed the document, but, according to the authorities, it is not necessary that the name of the drawer should be separately entered upon the document, either at the foot or any other part of it. The word "signature" has not been defined in the Negotiable Instruments Act but the authorities explaining the word in connection with the Indian Limitation Act show that it is sufficient if the name of the drawer is introduced in the document to prove authentication, that is to say, to show the person to whom it is addressed that it has been made by a third person who purports to be bound by the document. This is the view of their Lordships of the Allahabad High Court in *Mathura Das v. Babu L I* (1), and to the same effect is the decision of their Lordships of the Calcutta High Court in *Sadasook Agarwalla v. Baikantha Nath Basunia* (2). It is quite clear that although Mirzamal-Harbhat Das' name does not appear at the foot of the document, the contents of the document indicate that Mirzamal intended to be

(1) 1 A. 683; 1 Ind. Dec. (N. S.) 477.

(2) 9 O. W. N. 83; 31 O. 1043.



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bound by the document. But then it is said that the writing should have been proved. Now nowhere in the pleadings do we find that it was denied that the document was written by the authorized agent of the firm. If there had been a denial, evidence would, no doubt, have been given, and we must take it that proof upon this point was waived by the defendants.

The next point of law is, that as there was no consideration for the *hundi*, therefore, under section 43 of the Act, the document is void. The argument is put in this way. It is said that the specific case made in the plaint is that the negotiable instrument was collateral security for an advance made to the defendant No. 1; the finding of the Subordinate Judge at the trial being that the defendant No. 1 did not receive the money for himself but merely as the servant of defendant No. 2, the consideration proved is not the consideration which was alleged in the plaint, and that there has been in effect a failure of consideration which vitiates the transaction.

In my opinion, there is no substance in this argument. The plaintiff in effect asks for a decree upon a *hundi* for a loan made to either defendant No. 1 or defendant No. 2. It is true he made the case that defendant No. 1 was the principal, but his failure to prove that case ought not to affect the liability of the drawee if it has been proved that the loan was in fact made to defendant No. 2. It makes no difference to defendant No. 3 whether defendant No. 1 or defendant No. 2 received the money, and the acceptor cannot be heard to urge that, because the plaintiff mistook the status of defendant No. 1 and sued him as the principal the whole transaction is void for want of consideration.

With regard to the cross-appeal in this case, the plaintiff maintains that under section 80 of the Negotiable Instruments Act, he is entitled to interest at 6 per cent. The Subordinate Judge thinks that to decree interest in this case would be to decree accretions or usufruct upon a collateral security. It is contended by the learned Vakil who appears for the defendants appellants that if the *hundi* was merely a security, then the plaintiff is entitled to recover only the debt secured by the document, that is to say, the principal sum

advanced by the Bank. I think this argument must prevail. The *hundi* does not mention any interest, and, accepting the case made by the plaintiff in his plaint, it cannot be security for more than the debt as it stood on the 5th August 1916. The decree of the Subordinate Judge, therefore, upon this point is correct and the cross appeal must fail. The cross-appellant is, however, entitled to interest *pendente lite*.

The result is that the Appeal No. 63 is dismissed and the cross-appeal also is dismissed as regards interest prior to the date of the suit but is allowed as regards interest from the date of the suit till the date of the Subordinate Judge's judgment; that is to say, the plaintiff will be entitled to interest upon the sum of Rs 4,953-12-0 from the 23rd February 1917 till the date of the judgment, 2nd March 1918, at 6 per cent. per annum and interest upon the total decretal amount at 6 per cent. from that date till the date of realization.

I have to draw attention to two matters in connection with this case. The first is, that the Subordinate Judge records in the deposition of Lachmi Nath Pandit that he identified the signature of Sriballav on the *hundi*. Now, nowhere upon the *hundi* does Sriballav's signature appear and it is clear that the Subordinate Judge was guilty of carelessness of the gravest description. The second matter is that in the paper-book before us there is (see page 7 of paper-book of Appeal No. 72 of 1918) an entry in the translation of the *hundi* to the following effect "Exhibit I, a signature of Sriballav." Now, as the document does not contain the signature of Sriballav at all it is clear that there was gross carelessness on the part of the officer who translated this document for the preparation of the paper-book.

Both matters will form the subject of departmental enquiry.

IN APPEAL NO. 72 OF 1918.

This appeal relates to a *hundi*, dated the 5th August 1916, drawn by the same Mirzamal Harbhagat Dass upon the firm of Ram Chander Sagar Mull. The *hundi* is in the same terms as the other *hundi* and the endorsement of acceptance runs as follows:— "Accepted *hundi* Ramchander-Sagar Mull." Then follows the signature of Pandit Lakshmi

SOBHA KANTA MISRA v. KARIMAN HALVAI.

Narayan. The Subordinate Judge finds that the *hundi* was presented to Ram Chander-Sagar Mull on the 14th August 1916. The money having been paid on the 5th August Ram Chandar-Sagar Mull denied acceptance and on the 11th September Mr. Rose, the Notary Public, called upon them to confirm the acceptance, and upon their refusal to do so recorded an endorsement to the same effect as in the *hundi* in Appeal No. 63. It has been found by the Subordinate Judge that Jai Narayan, the person who is alleged to have signed on behalf of Sagar Mull, had no authority, and that, therefore, defendant No. 3 in the suit cannot be bound. He has dismissed the suit against defendant No. 1 also on the ground that this defendant was merely a servant acting on behalf of Mirzamal-Harbhagat Dass, but he has decreed it against defendant No. 2 upon his own admission.

Now, Lakshmi Nath Pandit, the Manager of Calcutta Office of the Bihar Bank, gives evidence that Jai Narayan and Sagar Mull, who are two brothers, came to Lakshmi Nath's office and signed the acceptance on the 14th August. Sagar Mull denies this in his written statement which suggests that on the 14th August he was not in Calcutta at all but was attending to some business in Rajputana. When called at the trial he was obliged to admit that he was in Calcutta on that day. The order-sheet of the trial shows that on the 17th November 1917 the defendants were asked to put in cross-interrogatories for the examination of Lakshmi Nath in Calcutta. They failed to appear before the Commissioner, with the result that Lakshmi Nath was not cross-examined. No reason is given for their failure to cross-examine this most important witness, whose story, if believed, entitles the plaintiff to a decree against defendant No. 3. The learned Subordinate Judge lays considerable stress upon the circumstance that Lakshmi Nath could not have been personally acquainted with Jai Narayan and that he could not have known that Jai Narayan was a partner in the firm. The only evidence upon which the Court could have drawn any inference at all as to this point is the evidence of Ramchander Pandit, the brother of Lakshmi Nath, who says

that he did not know Ram Narayan. It does not, however, follow from this that Jai Narayan was a stranger to Lakshmi Nath and that Lakshmi Nath's statement that Jai Narayan was a partner in the firm is incorrect.

In the absence, therefore, of any evidence to the contrary, I see no reason for disbelieving Lakshmi Nath's evidence that Sagar Mull came with Jai Narayan and was present when Jai Narayan signed the *hundi*. This disposes of the only point argued in this appeal, and the result is that it must be decreed with costs.

The arguments with regard to interest apply also to this case, but we think that the interest should be disallowed. The plaintiff will get a decree for the principal sum less Rs. 46-4-0, i.e., 4,953-12-0 with interest from the date of the suit till the date of the Subordinate Judge's judgment at 6 per cent. per annum, and interest thereafter at 6 per cent. on the total decretal amount till the date of the realization against the defendants Nos. 2 and 3. The plaintiff does not ask for any remedy against defendant No. 1.

BUCKNILL, J.—I agree.

*Appeals dismissed.*

# CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 41  
OF 1919.

July 1, 1920.

Present:—Mr. Justice Tennon and  
Mr. Justice Newbould.

SOBHA KANTA MISRA, ADMINISTRATOR  
TO THE ESTATE OF LATE CHANDRA  
BALI DEBYA—DEFENDANT—APPELLANT  
*versus*

KARIMAN HALVAI AND ANOTHER—  
PLAINTIFFS—RESPONDENTS.

*Will*—Annuity, perpetual, payment of, out of specific property—Annuity, whether charge on property—Succession Act (X of 1865), ss. 101, 160, 161.

The operative words of a Will provided for the payment of an annuity to the first annuitant and to his sons, grandsons and so on in due order of succession, out of the rents and profits of certain specific property:

KASTURI MAL v. LAJJA RAM.

*Held*, that the intention was that there should be a perpetual annuity which constituted a charge upon the property specified in the Will.

Appeal against the decree of the Subordinate Judge, First Court, Mymensingh, dated the 1st of October 1918, modifying the decree of the Munsif, First Court, at Mymensingh, dated the 12th of October 1917.

FACTS appear from the judgment.

Babu Mukundanath Roy (with him Babu Profulla Chandra Nag for Babu Indu Bhutan Eiswas), for the Appellant.—The annuity claimed by the plaintiff is not a perpetual annuity. It was payable as a legacy under a Will and was limited to the lifetime of the son of the testatrix. Then, again, the annuity payable to the plaintiff does not constitute a charge upon the property. And, lastly, the provision in the Will for the payment of a perpetual annuity is bad in law inasmuch as it offends against the provisions of section 101 of the Indian Succession Act, and cannot, therefore, be enforced.

Babu Jatindranath Lahiri, for the Respondents.—The Will itself makes it clear that the annuity is payable not only to the first annuitant but also to the heirs of the grantee generally. The annuity was thus intended to be descendible to the heirs of the grantee. The language of the grant makes it clear that the annuity was not intended to be limited in point of time. The Will further provides that the annuity is payable out of the rents and profits of certain specified properties. This is sufficient to constitute a valid charge on these properties. See *Rajarajeswara Dorai v. Sundarapandiyaswami Thevar* (1). Finally, section 101 of the Indian Succession Act, has no application to the facts of the present case. The suit is, therefore, rightly decreed by the Courts below.

Babu Mukundanath Roy replied.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff to recover from the present holders of certain properties the arrears of annuity said to be due to him. The suit has been decreed except as to a portion found to be barred by limitation in both the Courts below. The annuity in question is a legacy made under the Will of one Chandrabali Debya; and the questions urged before us are, *first*, that this annuity is not a perpetual annuity as held

by the Courts below but limited to the lifetime of the son of the testatrix who died unmarried; *secondly*, that it does not constitute a charge upon the property, and, *thirdly*, that the provisions as to perpetual annuity offend against the provisions of section 101 of the Indian Succession Act. No doubt, as has been pointed out by the learned Subordinate Judge, there is a reference in the Will to payment by the son of Chandrabali Debya; but that specific reference cannot be taken to limit in any way the generality of the operative words of this Will in which it is clearly provided that the annuity is to be received by the first annuitant, one Ram Yad Jamadar, and by his sons, grandsons and so on in due order of succession. These words make it clear that the intention was that this should be a perpetual annuity. It is further provided in the Will that this annuity is payable out of the rents and profits of the properties mentioned in the Will and this, as is held by the Courts below on the authority of the case reported as *Rajarajeswara Dorai v. Sundarapandiyaswami Thevar* (1), is sufficient to constitute a charge. The suggestion that the provisions under the Will as regards this annuity offend against the provisions of section 101 of the Indian Succession Act appears to be made in this Court for the first time. Section 101 does not appear to be at all applicable to the present case, the sections applicable being sections 160 and 161. For these reasons, we dismiss this appeal with costs.

*Appeal dismissed.*

#### LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1665 of 1920.

February 5, 1921.

*Present* :—Mr. Justice Chevis.

KASTURI MAL—DECREE-HOLDER

—APPELLANT

107848

LAJJA RAM, MINOR, THROUGH PIARE  
LAL HIS DECEASED—PLAINTIFF AND NIRANJAN  
LAL—JUDGMENT-DEBTOR—RESPONDENTS.  
*Civil Procedure Code (Act V of 1908), O. XIV, r. 1*

(1) 27 Ind. Cas. 283; 27 M. L. J. 694



**KASTURI MAL V. LAJJA RAM.**

(5), O. XXI, r. 63—*Issues, framing of—Court, duty of—Execution of decree—Claim proceedings—Regular suit—Burden of proof—Hindu Law—Joint family—Debts incurred by father—Son, liability of.*

It is the duty of the Court to frame proper issues arising from the pleadings in a case. [p. 752, col. 2.]

It is the duty of a litigant to produce evidence in respect of issues framed by the Court but he cannot be expected to produce evidence with regard to points not covered by the issues. [p. 752, col. 2.]

Where an executing Court can enquire into a question and does so and decides the question against an objector, then if the objector brings a regular suit to contest the correctness of the decision of the executing Court, the onus of proof lies on him. Where, however, there is no decision of the executing Court adverse to the objector, this rule does not apply. [p. 753, col. 1.]

In Hindu Law in order to render a son liable for his father's debts, the creditor must prove the existence of a debt due by the father, the mere existence of a decree against the father is not evidence against the son who was not a party to the suit in which the decree was obtained. [p. 753, col. 1.]

Second appeal from the decree of the District Judge, Karnal, dated the 12th May 1920, reversing that of the Mansif, First Class, Karnal, dated the 24th February 1919.

Mr. Sundar Das, for the Appellant.

Dr. Gokal Chand Narang, for the Respondents.

ORDER.—This judgment will cover the connected appeal No. 1666 of 1920.

Kasturi Mal obtained decrees against Niranjan Lal and in execution of those decrees attached certain property. Lajja Ram, the minor son of Niranjan Lal, brought objections against the attachment which were dismissed by the executing Court. He has now brought two regular suits for declarations that the property attached belongs to the joint Hindu family of which he and Niranjan Lal are members and is not liable to attachment and sale in execution of the decrees obtained against his father. The plaintiff alleges that the debts for which the decrees were obtained do not really exist, and that if they do exist, the debts were incurred for immoral purposes.

Both the lower Courts have concurred in finding that it is not proved that the debts are tainted with immorality. As regards the question whether the debts which form the basis of the decrees were really due by Niranjan Lal, the first Court framed no issue and did not discuss the point; so the first Court dismissed the

suit. The learned District Judge went into the question of the existence of the debts and, coming to the finding that they were not proved, accepted the plaintiff's appeal and decreed the suits. The decree-holder has lodged a second appeal to this Court.

Counsel for the decree-holder does not deny that in such a case the plaintiff is entitled to challenge the existence of the debts, but he urges that if the plaintiff wanted the matter to be put in issue, he should have asked the first Court to frame an issue on the point. I think, however, that it is the duty of the Courts to frame proper issues arising from the pleadings. The plaintiff distinctly in the pleadings denied the existence of the debts and the first Court should have put the question in issue. Probably, because there was no issue with regard to the existence of the debts, the decree-holder produced no evidence on this point, and on his behalf it is urged in this Court that before it is held against him that the debts were not really due, he should be given an opportunity of producing evidence. On behalf of the plaintiff-respondent it is urged that if the appellant wished to produce evidence on the point, he should have asked the lower Appellate Court to allow him to do so. I cannot, however, say for certain what was argued in the lower Appellate Court though certainly there is nothing in the judgment of that Court to show that the decree-holder asked for an opportunity of producing further evidence. Still, the fact remains that the point has been decided against the decree-holder without any issue being framed, and I think the District Judge should have asked the decree-holder whether he wished to produce evidence. It is the duty of a litigant to produce evidence in respect of issues framed by the Court and he cannot be expected to produce evidence with regard to points not covered by the issues. The case must, therefore, be remanded, so that the decree-holder may now have the opportunity of producing evidence with regard to the existence of the debts on which the decrees are based.

Counsel in this Court are not agreed as to the burden of proof, Counsel for the decree-holder urging that as the plaintiff

BIPIN BEHARI SAHA v. CHARU CHANDRA GHOSH.

was unsuccessful in his objections lodged in the execution proceedings, the *onus probandi* should be on the plaintiffs. This is, no doubt, the ordinary rule, see *Ram-nath v. Bindraban* (1), *Gorind Almaram v. Kantai* (2), *Jamahar Kumari Bibi v. Askaran Boid* (3) and *Maung Po Hnyin v. Ma Hnyein* (4), but in this particular case what the plaintiff is challenging is the existence of the debts. This was a point which the executing Court could not enquire into, as it could not, as an executing Court, go behind the decrees. Where the executing Court can enquire into a question and where it does so and decides the question against the objector, then, no doubt, when the objector brings a regular suit to contest the correctness of the decision of the executing Court, the onus of proof lies on him, but, as I have already shown, the executing Court could not go into the question of the existence of the debts, and so there is no decision of the executing Court on this point adverse to the objector.

On behalf of the plaintiff reliance is placed on *Bhogwant v. Tursi Ram* (5) which seems to me an authority directly in point. That judgment lays down that, in order to render a son liable for his father's debts, the creditor must prove the existence of a debt due by the father, and that the mere existence of a decree against the father is not evidence against the son who was not a party to the suit in which the decree was obtained. I hold, therefore, that the burden of proving that the father owed the debts lies on the decree-holder.

I remand both of these appeals for enquiry on the following issue:—

Were the debts, which form the basis of the decrees, due by Niranjana Lal?

The burden of proving this issue lies on the decree-holder and he should be allowed to produce evidence in proof of this issue in the first Court. The plaintiff will be allowed to produce evidence in rebuttal if he wishes to do so. The first Court, after recording evidence, should record

a finding and then return the cases through the District Judge, who will hear arguments if the parties so desire and return the cases to this Court with his own finding on the issue.

*Case remanded.*

### CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2025 OF 1917.

May 20, 1920.

*Present*:—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice

Sir Ernest Fletcher, Kt.

BIPIN BEHARI SAHA—DEFENDANT—  
APPELLANT

*versus*

CHARU CHANDRA GHOSE, AND ON  
HIS DEATH HIS HEIRS AND LEGAL REPRESENTA-  
TIVES SOSHI BHUSAN GHOSE

AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Muhammadan Law—Wakf property—Mutwalli, a minor female—Mutwalli, temporary, proceedings for appointment of, pending—District Judge, power of, to appoint Receiver and grant lease—Husband of minor female mutwalli, whether can act as mutwalli—Suit for possession—Defence, failure of—Appeal, second—Defence, new, whether can be set up.*

Where the *mutwalli* of *wakf* property is a minor female, and proceedings are instituted before the District Judge for the appointment of a temporary *mutwalli*, the District Judge is bound to make suitable arrangements for the up-keep and administration of the estate, and is competent to appoint a Receiver during the pendency of the proceedings and to grant a lease of the property. [p. 754, col. 2.]

The husband of a minor female *mutwalli* has, under the Muhammadan Law, no authority to act as *mutwalli* of the *wakf* estate, and any lease of that estate granted by him is void and not voidable. [p. 754, col. 2; p. 755, col. 1.]

Where, in answer to a suit for possession, the defendant contends that he has acquired a good title by adverse possession, the burden is upon him to allege and establish such title, and, if he fails to do so, he cannot set up a new defence for the first time in second appeal. [p. 755, col. 2.]

Appeal against the decree of the First Additional District Judge, 24-Pargannas, dated the 23rd of July 1917, affirming the decree of the Munsif, First Court, at Alipur, dated the 20th of September 1915.

(1) 18 A. 269; A. W. N. (1896) 106; 8 Ind. Dec. (N. S.) 952.

(2) 12 B. 270; 6 Ind. Dec. (N. S.) 665.

(3) 30 Ind. Cas. 855; 22 O. L. J. 27.

(4) 37 Ind. Cas. 767; 10 Bur. L. T. 238.

(5) 51 Ind. Cas. 130; 1 U. P. L. R. (A) 48.

BIPIN BEHARI SAHA v. CHARU CHANDRA GHOSH.

FACTS appear from the judgment.

Babu Sures Chandra Talukdar (with him Babu Gopal Chandra Das), for the Appellant.—The defendant is the appellant. The appeal arises out of a suit for ejectment. Both the Courts below have decreed the suit. The present *mutwalli* of the *wakf* estate to which the lands in suit appertain being a minor lady, application was made for a temporary *mutwalli* during the lady's minority. In the meanwhile, the Judge appointed, pending that proceeding, one of the Court officers as a Receiver who leased the lands in suit to the plaintiff. My point is, that the Receiver so appointed was not properly appointed in accordance with law. If a Receiver has to be appointed certain formalities of the law must be gone through. There must be a decree. The lease was granted with the permission of the Court and I submit it is not open to the plaintiff to institute the present suit without the Court's permission. I have been on the lands for more than 12 years as a *mourasi mokrari* tenant to the full knowledge of the Receiver. The former *mutwalli* inducted me into the lands which I have been holding ever since. Under the circumstances, I cannot be evicted except with the express permission of Court. Refers to *Upendra Krishna Mandal v. Ismail Khan Mahomed* (1). My next point is, that the lease not having been avoided the suit is not maintainable. Refers to *Madhu Sudan Mandal v. Radhika Prosad Das* (2).

Babu Mohendranath Roy (with him Babus Satyacharan Sinha and Abinash Chandra Ghose), for the Respondents.—The question of limitation involved in the last point taken by the other side was not raised before except that Article 134 is not applicable. Of course, the lease was executed in 1898 by the minor *mutwalli*. But I submit that question should not now be allowed to be raised as that would necessitate a further finding of fact as to when the lady became major. Further, regard being had to the pleadings, they cannot raise the question now. As regards the other question, I submit the learned Courts below were perfectly within the law in decreeing the suit.

(1) 32 C. 41 (P. C.); 31 L. A. 144; 8 C. W. N. 889.

(2) 16 Ind. Cas. 927; 16 C. L. J. 349; 17 C. W. N. 873.

Babu Sures Chandra Talukdar replied in brief.

### JUDGMENT.

MOOKERJEE, ACTG. C. J.—The subject-matter of this litigation is a tract of land included in a *wakf* estate. The plaintiff-respondent seeks to recover possession of the land on the strength of a lease, dated the 19th June 1912, while the defendant bases his claim on a lease granted to him on the 16th November 1898. The case for the plaintiff was that the defendant never had a title to the property, and that if he had any title as a lessee, his interest had been terminated by a notice to quit. There can be no doubt, in our opinion, that the plaintiff has established his title, while the defendant has failed to prove his allegations.

As regards the title of the plaintiff, we observe that the present *mutwalli* is a lady who is still a minor. Proceedings were instituted before the District Judge for the appointment of a temporary *mutwalli* during her minority, and during the pendency of such proceedings the Court granted a lease to the plaintiff through one of its officers who was appointed Receiver. A doubt has been suggested as to the validity of the appointment of the Receiver, but it is plainly needless to investigate that question. The essence of the matter is that the Court had seisin of the estate by virtue of the proceedings which had been instituted before it for the appointment of a temporary *mutwalli* who would manage the properties during the infancy of the permanent *mutwalli*. The Court was not only competent but bound to make suitable arrangements for the up-keep and administration of the estate in his custody. The lease granted to the plaintiff was thus in substance an act of the Court in the exercise of its jurisdiction and must accordingly be pronounced valid and operative.

As regards the title of the defendant, it transpires that the lease was granted to him at a time when the *wakf* properties were in the hands of the infant *mutwalli*. The husband of the lady, who was a minor at the time, took it upon himself to grant a permanent lease to the defendant, who had notice that the property was included in the *wakf* estate. It is plain that the husband of the infant *mutwalli* had no



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authority to act in the matter. A question was raised in the Court below as to whether he was the guardian of the person or the property of his infant wife. Under the Muhammadan Law, the answer must plainly be in the negative. But even if the answer had been otherwise, it is plain that, although the guardian of the lady could take charge of her person and of her own personal properties, he would have no authority to act as *mutwalli* of the *wakf* estate held by her. The grant to the defendant was consequently made by a person who had no authority to intervene in the matter, and there can be no dispute that a grant made under such circumstances is void and not voidable. Reference may in this connection be made to the decision of the House of Lords in *President and Governors of Magdalen Hospital v. Knotts* (3) where it was ruled that a lease of land belonging to an eleemosynary Corporation, not in conformity with the provisions of the third section of the Statute of Elizabeth (13 Eliz. O. 10), is absolutely void and not merely voidable. The principle enunciated in that case, though ignored in *Shama Charan Nandi v. Abhiram Goswami* (4), which was reversed by the Judicial Committee in *Abhiram Goswami v. Shyama Charan* (5), has been repeatedly followed in this Court; *Chaitan Singh v. Sadhari Monin* (6), *Mathewson v. Sri Ram Kanai Singh* (7), *Krishna Pramada Dasi v. Dwarka Nath Sen* (8) and the same conclusion was reached in *Madhu Sudan Mandal v. Radhika Prosad Das* (2) and *Ishwar Shyam Chand Jiu v. Ram Kanai Ghose* (9). The defendant, consequently, has no title and cannot successfully resist the claim of the plaintiff.

The defendant finally contends that he has acquired a good title by adverse pos-

session. The burden clearly lay upon him to allege and establish such title. That burden has not been discharged. This much is known that when his title as lessee commenced, the estate was held by an infant *mutwalli*, and at the present moment also the estate is in the hands of another infant *mutwalli*. Whether during the interval, the disability of the first minor ever ceased and if it ceased, at what time it terminated, has not been investigated. The defendant has invited us to remand the case to the Court of first instance for investigation of this point. We are unable to accede to his request. The litigation has already lasted for six years and the point now taken was not the ground urged in the Courts below to defeat the claim of the plaintiff. His contention, on the other hand, was that he had a valid title to the *wakf* property under the lease granted to him on the 16th November 1898. That defense has completely failed.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

FLETCHER, J.—I agree.

*Appeal dismissed.*

# ALLAHABAD HIGH COURT.

CIVIL REVISION No. 9 OF 1920.

January 24, 1921.

Present:—Mr. Justice Tudball.

SARJU PRASAD—JUDGMENT-DEBTOR—  
APPLICANT

*versus*

RAM SARUP—DECREE-HOLDER—  
OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), O. XXII, r. 3*

—Execution of decree—Decree in favour of two partners  
—Death of one partner, effect of.

Where in a suit by two partners, a decree is passed for the recovery of a sum of money, the mere fact that one of the partners was dead at the date of the decree does not render the decree incapable of execution. The effect of the death of one of the partners is, that, under Order XXII, rule 3, of the Civil Procedure Code, the suit abates so far as he is concerned. [p. 754, col. 1.]

Civil revision from an order of the Judge of the Court of Small Causes at Cawnpore, dated the 27th August 1919.

(3) (1879) 4 App. Cas. 324; 48 L. J. Ch. 579; 40 L. T. 486; 27 W. R. 602.

(4) 33 O. 511; 3 O. L. J. 306; 10 O. W. N. 738

(5) 4 Ind. Cas. 442; 36 I. A. 148; 36 C. 1003; 10 O. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1 (P. C.).

(6) 5 O. L. J. 62.

(7) 1 Ind. Cas. 626; 9 O. L. J. 523; 36 C. 675.

(8) 20 Ind. Cas. 654; 19 C. L. J. 360; 17 C. W. N. 1092.

(9) 10 Ind. Cas. 683; 38 O. 526; 33 I. A. 76; 15 O. W. N. 417; 9 M. L. T. 448; 8 A. L. J. 528; 13 Bom. L. R. 421; 14 O. L. J. 239; (1911) 2 M. W. N. 231; 21 M. L. J. 1145 (P. C.).

KAMINI KUMAR CHANDRA V. REBATI RAMAN DAS.

Mr. M. L. Agarwala, for the Applicant.

Mr. Damodar Das, for the Opposite Party.

**JUDGMENT.**—This is an application in revision. The facts are these:—Two persons, Ram Sarup and Manni Lal, were partners in a shop. A debt was due to the shop from the present applicant, Sarju Prasad. The two partners brought a suit against him and against another person. The applicant admitted the justice of the claim but the case had to continue as against the other defendant. It was finally withdrawn as against the latter and a decree was passed in favour of Ram Sarup and Manni Lal on the 17th of July 1917. Ram Sarup has now put the decree into execution as a surviving partner of the firm. An objection was taken by the judgment-debtor that the other partner of Manni Lal had actually died on the 7th of July 1917, that is, prior to the date of the decree and, therefore, the decree could not be executed. The Court below did not go into the question of fact as to whether Manni Lal did or did not die prior to the 17th of July 1917. It has held that, assuming that he did die on the 7th of July 1917, it is not open now to the defendant to object to the execution of the decree. The point taken before me is that a decree in favour of a dead person is null and void and cannot be executed. Order XXII, rule 3, shows that, where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, and where within the time limited by law no application is made under sub rule (1), the suit shall abate so far as the deceased plaintiff is concerned. Assuming that Manni Lal was dead, the fact remains that Ram Sarup, one of the plaintiffs, continued the case, and a decree was passed in his favour as against the present applicant, and that decree is capable of execution. Attention has been called to the decision of a Bench of this Court in *Imamuddin v. Sadarat Rai* (1). That case does not apply to the facts of the present case. That was a suit in which there was a decree for pre-emption of the whole property which was in favour of certain plaintiffs against two defendants instead of three, all three being

owners of the property. There being no decree against the representatives of the deceased defendant, the decree remained clearly incapable of execution as it was impossible for the Court to put the pre-emptors into possession of the whole of the property, but in the present case, however, even assuming that Manni Lal was dead before the decree was passed, his death wiped him out of the case. There remains the fact that Ram Sarup obtained a decree against the present applicant for the recovery of a certain sum of money and that decree is capable of execution. I, therefore, see no ground for interference in revision. The application is dismissed with costs.

*Application dismissed.*

**CALCUTTA HIGH COURT.**  
**APPEAL FROM APPELLATE DECREE No. 1546**  
**OF 1918.**

June 1, 1920.

*Present* :—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice  
Sir Ernest Fletcher, Kt.

**{ KAMINI KUMAR CHANDRA, THE**  
**{ CHAIRMAN OF THE SILOCHAR MUNICI-**  
**PALITY—DEFENDANT—APPELLANT**

*versus*

**REBATI RAMAN DAS—PLAINTIFF—**  
**RESPONDENT.**

*Master and servant—Servant, suspension and removal of, without reason—Master, liability of, for wages for period of suspension—Service, termination of—Notice, period of, necessary.*

Where an employee of a Municipality is suspended without any reason being assigned therefor, and is subsequently removed from service, his removal not being due to any misconduct alleged or proved, he is entitled to his wages for the whole of the period for which he was under suspension. [p. 767, col. 2; p. 768, col. 1.]

Appeal against the decree of the Subordinate Judge, Cachar, dated the 6th of May 1918, affirming that of the Extra Assistant Commissioner and Munsif, Silchar, dated the 31st of January 1918.

**FACTS** appear from the judgment.

*Babur Jyoti Prasad Sarbadhikari (with him Babur Jnanendra Nath Dutt and Sudhir*

(1) 5 Ind. Cas. 567; 7 A. L. J. 228; 32 A. 201.

KAMINI KUMAR CHANDRA V. REBATI RAMAN DAS.

*Chandra Dutt*), for the Appellant.—The defendant is the appellant. The appeal arises out of a suit for recovery of balance of pay for a certain period due to the plaintiff from the Municipality. The plaintiff's case is that he was the Head Clerk and Accountant on a salary of Rs. 50 p. m.; that he was suspended on the 25th November 1915, under order of the then Vice-Chairman without any sufficient cause, and was at first allowed subsistence allowance at the rate of one-fourth of the pay per month; that the plaintiff was ordered not to go out of Silchar, without permission of the Municipality; that he was removed from service on the 27th April 1917, but that they did not allow the plaintiff his pay for the period of suspension less that amount of allowance already paid to him. The defense was that the suit was barred by limitation; that the Municipal Commissioners have got full powers under the law to dismiss an officer under it at any time without giving any reason whatever, and that the present suit did not lie. The Courts below have decreed the suit. My point is that the plaintiff, at best, might have claimed damages or compensation. He cannot claim pay. He is not entitled to get anything by way of damages or compensation as that was not his pleading. Refers to *Mohammad Zahoor Ali Khan v. Musmmat Thakooranee Rutta Koor* (1), *Jugul Kishore Lal Sing v. Kartic Chunler* (2). Farther, the Municipal Commissioners had every good reason to suspend the service of the plaintiff. He had been proceeded against criminally though unsuccessfully. There were strong reasons for believing that he was guilty of misappropriating money. All these and other reasons justified the dismissal without assigning any reason whatever for such action which the Municipality had full powers to do.

Dr. Sarat Chandra Basak (with him Babu Birendra Chandra Das), for the Respondent, was not called upon to reply.

## JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal by the Chairman of the Silchar Municipality in a suit instituted against the Municipality by the plaintiff for recovery of wages. The

plaintiff accepted an appointment under the Commissioners on the 25th July 1895, and held various offices from time to time, till ultimately he was appointed to be the Head Clerk and Accountant on a salary of Rs. 50 a month. While he held such appointment, he was suspended on the 25th November 1915 under orders of the Vice-Chairman. He remained under suspension till the 27th April 1917, i.e., for a period of one year, five months and two days, when he was removed permanently from this post. No reasons were assigned for his suspension or removal. In the present suit, he sues to recover his wages from the 25th November 1915 till the 27th April 1917, less the amounts which were paid to him by way of compassionate allowance for five months and five days during the period of suspension. In our opinion, there is no answer to the claim.

It is not necessary for us to investigate the powers of the Municipality to dismiss servants, because the plaintiff does not seek to recover damages for wrongful dismissal. It is perfectly plain that as the plaintiff was not dismissed till the 27th April 1917 and as no reasons were assigned for that removal from his office, he is entitled to his wages during the whole of the period for which he was under suspension.

It was contended for the appellant that the Municipality was entitled to remove the plaintiff without notice and without assignment of reason. We are unable to uphold this contention as well founded on reason and principle. It has been held in England that if no custom or stipulation as to notice exists, and if the contract of service is not one which can be regarded as a yearly hiring, the service is terminable by reasonable notice. In support of this proposition, reference may be made to the case of *Fairman v. Oakford* (3) where Pollock, C. B., pointed out that in the case of clerks in superior positions three months is regarded as the period of reasonable notice [see also the observations of Abbott, C. J., in *Huttman v. Boulnois* (4)]. The same view has been taken in the cases of *Perill v. International Land Credit Co.* (5), *Gardal v. Fontigny* (6), *Oriental Bank Corporation, In re, MacDowall's* (3) (1860) 5 H. N. 66 at p. 635, 29 L. J. Ex. 45; 157 F. R. 134, 120 R. R. 747. (4) (1827) 2 Car. & P. 510. (5) (1867) 16 L. T. 647. (6) (1816) 1 Stark. 198; 4 Camp. 375.

(1) 11 M. I. A. 468; 9 W. R. P. C. 9; 2 Sath. P. C. J. 107; 2 Sat. P. C. J. 320; 20 E. R. 177.

(2) 21 C. 116 10 Ind. Dec. (N. S.) 710.]



MUNNA SINGH v. KUAR DIGBIJAYA SINGH.

case (7). It is further stated in the judgment of the Court of first instance, and that finding has not been disturbed by the Subordinate Judge, that no reasons were assigned for the removal of the plaintiff; it has not been found that he was removed for misconduct alleged and proved.

In these circumstances, the suit has been rightly decreed, and this appeal is dismissed with costs.

FLETCHER, J.—I agree.

*Appeal dismissed.*

(7)(1886) 32 Ch. D. 368; 55 L. J. Ch. 620; 54 L. T. 667; 34 W. R. 529.

# ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 150 OF 1920.  
January 31, 1921.

*Precent:*—Mr. Justice Piggott and  
Mr. Justice Walsh.

Chaudhry MUNNA SINGH—PETITIONER  
—APPLICANT

*versus*

Kuar DIGBIJAY SINGH AND OTHERS—  
OPPOSITE PARTIES.

*Provincial Insolvency Act (V of 1920), s. 10 (1) (a)*  
—Rent Court decree, whether "debt".

A Rent Court decree is a 'debt' within the meaning of section 10 (1) (a) of the Provincial Insolvency Act of 1920.

First appeal from an order of the Additional Judge, Moradabad, dated the 24th July 1920.

Mr. Rama Kant Malhotra, for the Appellant.

Mr. Raza Ali, for the Respondents.

## JUDGMENT.

PIGGOTT, J.—The question for determination in the Court below was, whether certain money due from the appellant Munna Singh under the decree of a Rent Court, was or was not a "debt" within the meaning of section 6 (3) of the Provincial Insolvency Act, No. III of 1907, or section 10 (1) (a) of the present Act, No. V of 1920. The learned Additional Judge, with-

out giving any reasons, has said that he does not think that a decree passed by a Rent Court can be considered as a "debt" for the purposes of the Insolvency Act. We cannot conceive of any definition of the word "debt" which would exclude the decree in question from the operation of the provisions of the Provincial Act above referred to. The respondent apparently relies on section 193 of the Local Tenancy Act, No. II of 1901, read with section 56 (2), the repealing section of the Provincial Insolvency Act, No. III of 1907. A question might conceivably arise, as, for instance upon an application by the holder of the Rent Court decree for the ejectment of the tenant under section 17 (a) of the Tenancy Act, as to whether or not the leave of the Insolvency Court was necessary before such an application could be made. That question, however, is not before us. The debtor has brought his case within the provisions of the Provincial Insolvency Act; he has committed an act of bankruptcy by presenting his petition and he has proved the existence of a "debt", namely, this Rent Court decree, far in excess of the prescribed minimum of Rs. 500. He was entitled to his order of adjudication the legal consequences of the same to be left to work themselves out.

WALSH, J.—I entirely agree. I think I can understand the learned Judge's reason. I think, he regarded the Insolvency Act as a method of execution. As a matter of fact, it is a method of evading execution.

BY THE COURT.—We set aside the order of the Court below and adjudicate the appellant an insolvent. We return the record to that Court in order that proper proceedings in the insolvency may be taken.

*Order set aside.*

REAJUDDIN v. SHAHANUTULLA MIA.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1718  
AND 2294 OF 1918 AND 14 OF 1919.

June 30, 1920.

Present:—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and

Justice Sir Ernest Fletcher, Kt.

IN NOS. 1718 OF 1918 AND 14 OF 1919

REAJ-UD-DIN DALAL—DEFENDANT—

APPELLANT

IN No. 2294 OF 1918

THE SECRETARY OF STATE FOR INDIA

IN COUNCIL—DEFENDANT—APPELLANT

versus

IN No. 1718 OF 1918

SHAHANUTULLA MIA—PLAINTIFF AND

OTHERS—RESPONDENTS.

IN NOS. 2294 OF 1918 AND 14 OF 1919.

BHABY MAHMUD SARKAR AND

OTHERS—RESPONDENTS.

*Bengal Public Demands Recovery Act (III of 1913 B. C.), s. 37—Sale, holding of, without notifying date, time and place—Suit for declaration that sale is a nullity, maintainability of.*

A sale held ostensibly under the Public Demands Recovery Act, by order of a Certificate Officer, without notifying the date, time and place of the sale is a nullity, and section 37 of that Act is no bar to a suit to obtain a declaration that the sale is null and void. [p. 760, col. 1.]

Appeals against decrees of the District Judge, Rungpur, dated respectively the 19th of September and 8th of May 1918, reversing and affirming decrees of the Subordinate Judge of that District, dated respectively the 26th of January and 27th of July 1917.

FACTS appear from the judgment.

Babu Bepin Chandra Ghose (Jr.) (with him Babu Surat Chandra Khan), for the Appellants. —The Public Demands Recovery Act, III of 1913, is a self-contained Act. The procedure for sales under the Act is laid down in the rules. In the present case the place and the hour of sale was not specified. The sale under such circumstances can at most be only an irregular sale. The remedy of the aggrieved party was in the Act itself. He cannot come to the Civil Court to get a declaration that the sale was a nullity. Such a suit is barred under the provisions of section 37 of the Public Demands Recovery Act. I admit that the sale was held in contravention of rule 32 of the rules appended to the Public Demands Recovery Act, but still, the sale was a

sale under the Statute and can be set aside only by the Certificate Officer. Refers to *Tasadduk Rasul Khan v. Ahmad Husain* (1) and *Surno Moyee Debi v. Dakhina Ranjan Sanyal* (2). The present suit is, therefore, clearly barred under section 37 of the Act.

Babu Atul Chandra Gupta (with him Babu Dinesh Chandra Ray, for the Deputy Registrar, and Biraj Mohan Mojomdar), for the Respondents, was not called upon to reply.

### JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal by the defendant in a suit for declaration that a sale held under the Public Demands Recovery Act, 1913, on the 12th September, 1913 was a nullity. The Courts below have decreed the suit.

On the present appeal it has been contended that the suit is barred under the provisions of section 37 of the Public Demands Recovery Act. In our opinion, this contention cannot possibly be sustained, as, in the events which have happened, the sale cannot be regarded as a sale under the Statute.

It appears that a date had been fixed for the sale of the property, but no sale took place on that date. Thereupon, on the 5th September 1913, the Certificate Officer passed the following order: "Put up for sale, but no bid in Court, Nazir or Naib-Nazir to sell locally within 12th September." At the sale which actually took place on the 12th September, there were no bidders, and the property in suit was sold along with five other properties for an aggregate sum of Rs. 55. The allegation of the plaintiffs is, that the particular property now in suit is worth at least Rs. 3,000. The appellant has contended that, although the sale was held in contravention of Rule 32 of the rules appended to the Public Demands Recovery Act, 1913, the sale was a sale under the Statute and can be set aside only by the Certificate Officer, and in support of this proposition he has referred to the cases of *Tasadduk Rasul Khan v. Ahmad Husain* (1) and *Surno Moyee Debi v. Dakhina Ranjan Sanyal* (2). These cases are clearly distinguishable. In the first case, the sale was held before the expiry of the 30 days which should intervene between the publica-

(1) 21 C. 66 (P. O.); 20 I. A. 176; 17 Ind. Jur. 534; 6 Sar. P. O. J. 324; Rafique and Jackson's P. C. No. 13; 10 Ind. Dec. (N. S.) 676.

(2) 24 C. 291; 12 Ind. Dec. (N. S.) 861.

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tion of the sale proclamation and the actual sale. In the second case, there was no hour fixed for the sale as required by the provisions of the Civil Procedure Code. The present case, however, is very unlike the two cases mentioned. Here no date was fixed for the sale; no time was fixed for the sale; no place was fixed for the sale; for, although it was stated that the sale was to be held locally, this was meaningless, because the property to be sold was situated in six different places. Consequently, neither date, nor hour, nor place of sale was specified. Now, the Statute clearly contemplates a public auction, that is to say, an auction where members of the public will be in a position to offer bids in competition against each other. But if a sale is held, as was held in this case, without date, hour and place previously fixed it is clearly impossible for the public to attend and to bid. Under such circumstances, we cannot hold that this was a sale as contemplated by the Legislature; the sale was in substance a colourable exercise of the powers conferred on the Certificate Officer by the Statute. A sale of this description cannot be held to be a sale under the Statute, and section 37 is consequently not a bar to the suit. If the suit is not barred, then it is conceded that on the facts proved and undisputed, the decree of the Court of Appeal below must be sustained. The appeal is consequently dismissed with costs. The other two appeals also are dismissed with costs.

FLETCHER, J.—I agree.

*Appeals dismissed.*

## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1351 OF 1917.

January 21, 1921.

Present:—Mr. Justice Ryves and  
Mr. Justice Gokul Prasad.Mirza Saïd AHMAD BEG AND ANOTHER  
— PLAINTIFFS—APPELLANTS

versus

DHARMUN RAI AND OTHERS—DEFENDANTS  
—RESPONDENTS.*Transfer of Property Act (IV of 1882), s. 88—  
Mortgage, usufructuary—Redemption, date of—Money**payable in a certain month—Deposit on last day of  
that month, effect of—Suit for redemption—Decree, form  
of,*

A deed of usufructuary mortgage provided for redemption on payment by the mortgagor of the mortgage-debt in the month of Jeth in any year. The mortgagor deposited the amount due in Court on the 22nd June 1910, the last day of Jeth, but as notice could not be served on the mortgagee within the month of Jeth, the mortgagee did not appear and the proceedings fell through, but the money deposited remained in Court. In 1916 the mortgagor brought the present suit for redemption and for damages for the last three years preceding the institution of the suit. The suit was dismissed on the ground that, as notice of the deposit could not be given to the mortgagee in the month of Jeth, the tender was not a valid tender. On second appeal:

*Held*, that the suit had been wrongly dismissed; that as the amount deposited was sufficient to discharge the mortgage, there should have been a decree for redemption from the last day of Jeth next succeeding the deposit, and that the mortgagors were entitled to a decree for possession and damages for three years preceding the suit. [p. 761, col. 2.]

Second appeal from the decision of the Additional Subordinate Judge, Ghazipur, dated the 24th of July 1917.

Dr. S. M. Sulaiman, Messrs. Iqbal Ahmad and Mukhtar Ahmad, for the Appellants.

Mr. M. L. Agarwala, for the Respondents.

**JUDGMENT.**—This is an appeal by the plaintiffs in a suit for redemption. The facts are not at all complicated and are shortly these:—The predecessors in title of the plaintiffs made a usufructuary mortgage of certain property on the 15th of July 1862. On the 22nd of June 1910, the last date of Jeth, the plaintiffs deposited in Court the requisite amount of the mortgage-money for payment to the mortgagees-defendants that being the last date of Jeth as stated above, notice could not be served on the mortgagees within the month of Jeth. The mortgagees did not appear and those proceedings fell through. The money, however, remained in Court all along. The plaintiffs-mortgagors brought a suit in the year 1915 for redemption of the mortgage and they claim damages for the last three years preceding the institution of the present suit. The defendants contended *inter alia* that the amount of the tender in the proceedings under section 83 of the Transfer of Property Act was not enough and they further contended that the tender was not made at the proper time. The first Court came to the



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conclusion that the tender was a right one both as regards the amount and the time. It accordingly decreed the suit for redemption and for three years' mesne profits preceding the institution of the present suit. The mortgagees went up in appeal. The learned Judge of the lower Court, without entering into the question whether the amount tendered by the mortgagors was sufficient or not, came to the conclusion that, because notice of the deposit made by the mortgagors in Court on the last day of the month of Jeth could not have been given to the mortgagees in the month of Jeth, therefore, the tender was not a valid tender and, being as such inoperative, he dismissed the suit. The plaintiffs-mortgagors come here in second appeal and their contention is that the tender on the last day of Jeth by deposit in Court was a valid tender and that the suit has been wrongly dismissed. It was further contended on their behalf in argument that, in any event, they should have been allowed a decree for redemption from the beginning of the year succeeding the next month of Jeth. Before deciding this point we asked the Court below to submit to us a finding on the question whether the amount tendered by the mortgagors-plaintiffs by deposit in Court was sufficient or not, inasmuch as the lower Appellate Court had failed to decide this particular point. The finding has now come back and is to the effect that the amount deposited by the plaintiffs in Court was sufficient to discharge the mortgage. The only point which now remains for us to consider is, whether the amount deposited by the plaintiffs-mortgagors in Court on the last day of Jeth was or was not a sufficient tender within the meaning of section 83 of the Transfer of Property Act to enable them to obtain possession of the property and damages up to next Jeth. A large number of cases have been cited to us but we do not think it necessary to discuss all of them as they are not strictly in point. There is no doubt that a suit for redemption can lie even without a tender as required by section 83 of the Transfer of Property Act; see *Hait Singh v. Pehari Lal* (1). Of course,

at whatever time the suit might be instituted in such a case, the decree for redemption would only take effect from the time fixed in the decree, or in case of mortgages where any particular period of the year is fixed from which a mortgagee is to give up possession, from such a date next following the decree. In the present case, however, the money was to be paid on the last day of the month of Jeth in any year. The money, as we have stated above, was deposited on the last day of Jeth 1910. The argument placed before us is that, as the mortgagees could not be served with notice of this deposit in Court in the month of Jeth, therefore, the tender was not a valid one and, therefore, the suit for redemption was to fail. This is the ground on which the Court below has dismissed the suit. In our opinion, this ground was not sufficient for the dismissal of the suit. As we have stated above, even if this tender was not enough to warrant the Court in passing the decree for redemption from the date of the deposit it was certainly proper and legal for the Court to have passed a decree from the last day of Jeth next succeeding the date of the deposit. In the present case, having regard to the fact that the plaintiffs have claimed damages for the three years next preceding the institution of the present suit only and not from the date of the deposit, it is not necessary for us to decide this point. The plaintiffs would in either view be entitled to a decree for possession as claimed and damages for three years preceding suit. As the suit has been dismissed by the Court below on a preliminary point this case must go back for the trial of the issues left undecided according to law. We, therefore, set aside the decree of the lower Appellate Court, remand this case to that Court under Order XLI, rule 23 of the Civil Procedure Code with directions to re-admit the appeal to its original number on the register and to dispose of it according to law. Costs of this appeal including in this Court-fees on the higher scale will be costs in the cause.

*Case remanded.*

(1) 59 Ind. Cas. 92; 181A. J. 947.

DURGA CHARAN V. ENAMOL HUQ.

CALCUTTA H.GH COURT.

APPEAL FROM APPELLATE DECREE NO. 704  
OF 1919.

June 24, 1920.

*Present:*—Mr. Justice Walmsley and  
Mr. Justice Buckland.

DURGA CHARAN ACHARJEE—  
DEFENDANT NO. 3—APPELLANT

*versus*

Khandakar ENAMOL HUQ AND OTHERS

—PLAINTIFFS—RESPONDENTS.

*Partition—Portion of estate treated as separate—  
Partition of separate portion, whether inequitable.*

Where a portion of the land comprising an estate is treated as a separate entity from the remainder of the estate, it is not inequitable to allow that portion to be partitioned. [p. 764, col. 2.]

Appeal against the decree of the Subordinate Judge, Third Court, Hooghly, dated the 25th of November 1918, affirming that of the Munsif, Additional Court, at Serampore, dated the 26th of July 1913.

FACTS appear from the judgment.

Babu Nogendra Nath Ghose, for the Appellant.—The defendant is the appellant. The appeal arises out of a suit for partition. The defence in substance was that the suit was for a partial partition and that a certain other property should have been included in the plaint for partition. The case once came up before this Court in Second Appeal No. 342 of 1915 which was remanded. The present appeal is against the order passed on remand. The facts are briefly these. The plaintiffs were entitled to a 3-annas-4-gandas share in the entire *towzi* and amongst other co-sharers defendant No. 4 Karim Bux who is my vendor owned an 1-anna-12-gandas share. In 1903 all the co-sharers of the *towzi* instituted a suit for recovery of a plot of land within this *Mouza* against defendants Nos. 1 and 2 and obtained a decree. Then, subsequently, the plaintiffs are purported to have purchased in specific plots a share amounting to 11 annas-4-gandas of the plot. So that they say they have 14 annas-8-gandas share in this plot and 3-annas-4-gandas in the rest of the entire *towzi*. One case is that subsequently to the suit I purchased an 1-anna-12-gandas from the defendant Karim. Before I purchased, Karim represented to me that there was a partition of his share in the *towzi*, that certain plots were allotted to him, and that he obtained a separate account under

section 13 of Act XI of 1859. Then Karim professed to sell these specific plots and then in the sale-deed there occurs a passage which shows that the idea was that if for any reason it turned out that I shall not be entitled to a separated share, then I shall be entitled to an undivided share. Hence the present suit. My point is that I am the owner of an 1-anna-12-gandas of the entire *Mouza*. They cannot ask for a partition of the specific plot only. They must bring the entire *towzi* into the hotchpot.

[BUCKLAND, J.—Supposing A. sells his share to B., then could not B. sue for partition for his only bit in that entire property?]

I do not concede that, because the vendor can never say that that portion particularly will ever come to him on partition. The entire property will have to be brought into the hotchpot on equitable consideration to partition an undivided share. Refers to *Koer Hasmat Rai v. Sunder Das* (1).

Babu Prokash Chandra Pakran, for the Respondents.—The Munsif on the first occasion found that the point was not pressed. The Court below has on remand found that both the points referred to it for decision were in my favour. It is possible that by arrangement they have been possessing particular plots. In such a case I submit partial partition is permissible. Refers to *Hem Chandra Chowdhury v. Hemanta Kumari Debi* (2).

Babu Nogendra Nath Ghose replied in brief.

JUDGMENT.—This appeal arises out of a suit for partition and is preferred by the third defendant. The plaintiffs are the owners of one fifth share in a certain *towzi* and Karim Bux, the predecessor in interest of the appellant, owned one tenth share of the same *towzi*. In 1903, the plaintiffs and Karim Bux and other co-sharers joined in bringing a suit to recover some lands from defendants Nos. 1 and 2 and they obtained a decree and were put in possession of the land. After possession had been delivered, Karim Bux sold his interest in the *towzi* to defendant No. 3, the present appellant. The plaintiffs have now brought this suit for partition of the decretal lands. They say

(1) 11 O. 346; 10 Ind. Jur. 26; 5 Ind. Dec. (N. S.) 1023.

(2) 23 Ind. Cas. 442; 19 O. W. N. 356.

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that in addition to their 3-annas-4-gandas share in the whole *towsi* which extends over the decretal land they have acquired a further share of 11-annas-4-gandas in the decretal land making their total interest in that portion, 14-annas-8-gandas, and that the defendant No. 3 as the successor in interest of Karim Bux owns the remaining 1-anna-12-gandas.

The appellant set up a two-fold defence; one is, that the suit was one for partial partition and, therefore, could not be maintained, and the second, that after the suit in 1903 and before his purchase, there was an amicable division among all the co-sharers, by virtue of which Karim Bux became entitled to the separate possession of certain specific plots of land, one of which was the plot obtained by the suit of 1903 and that the appellant was similarly entitled to hold separate possession of the land now in suit.

The first Court gave a decree for partition. Defendant No. 3 preferred an appeal, but that was dismissed. He then preferred a second appeal and the case was remanded to the Subordinate Judge for re-consideration. The learned Judges referred to the first line of defence set up by the appellant and then turned to the second line and remarked, that if the allegation of an amicable partition were true, it might furnish a complete answer to the claim for partition and they said that the plaintiffs must establish that in respect of the land in suit they and the third defendant were not only joint owners but were also entitled to joint possession. When the case went again to the lower Appellate Court, the learned Judge said that "in order to determine whether the plaintiffs were entitled to joint possession, it must be found whether the vendor of the third defendant (that is, the appellant), was entitled to exclusive possession or to joint possession. The point for determination, therefore, is, was defendant No. 4, the vendor of defendant No. 3 by mutual arrangement with his co-sharers, placed in exclusive occupation of the land in suit as representing his share of the estate." After examining the evidence on this point, he came to the conclusion that there was nothing to show that the land in suit was ever in the exclusive possession of defendant No. 4 or that the other co-sharers had any specific land

in their exclusive possession, and he implied that, in consequence, the plaintiffs were entitled to joint possession.

The argument now put forward on behalf of the appellant is, that the case is one in which a partial partition should not be allowed. It is conceded that there is no hard and fast rule prohibiting a partial partition under any circumstances; but it is said that the present case is one in which a partial partition should not in equity be allowed.

It appears to me, however, that this argument has no substance in it. The learned Subordinate Judge finds with regard to this land now in suit that after the decree was obtained in the suit in 1903 all the co-sharers except Karim Bux sold their interests in the lands obtained in that suit to the predecessor of the plaintiffs because he had borne the expenses of the suit and they were unable to repay him their shares. It appears, therefore, that the co-sharers treated this decretal land as a separate entity in certain respects from the remainder of the estate, and, in these circumstances, I do not think there is anything inequitable in allowing this separate portion of land to be partitioned.

In my judgment the appeal should be dismissed with costs.

BUCKLAND, J.—I agree.

*Appeal dismissed.*

# ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 132 OF 1920.

January 22, 1921.

Present:—Mr. Justice Piggott and  
Mr. Justice Walsh

THE OFFICIAL LIQUIDATOR OF THE  
KAYSTH TRADING AND BANKING  
CORPORATION, LTD.—JUDGMENT.

DEBTOR—APPELLANT

VERSUS

B. SATNARAIN SINGH AND OTHERS—

DECREE HOLDERS—RESPONDENTS.

*Companies Act (VII of 1913), s. 232—Attol.*



OFFICIAL LIQUIDATOR, KAYASTH TRADING AND BANKING CORPORATION V. SATNARAIN SINGH.

*property of Company—Winding-up, application for, subsequent to attachment—Sale of property thereafter, effect of—Sale, adjournment of—Fresh proclamation of sale, absence of, whether vitiates sale—Appeal by Liquidator—Sanction of Court, whether necessary—Procedure.*

Where, long previously to the presenting of an application for winding-up a Company, the immoveable property belonging to the Company was attached in execution of a decree, and was ultimately sold after a winding-up order had been passed and the Official Liquidator applied to have the sale set aside on the ground that, under section 232 of the Companies Act, the sale of the property was a putting into force of an execution within the meaning of that section :

*Held*, that, for the purposes of section 232 of the Companies Act, the execution was put in force on the date the property was attached, and as that date was long anterior to the date of the application for winding-up, the sale was not invalid. [p. 765, col. 2.]

Where property is repeatedly proclaimed and put up for sale, and no bidders are forthcoming, the fact that the sale is adjourned to, and held on, a subsequent date without issuing a fresh proclamation, although irregular, does not, in the absence of substantial loss suffered by the judgment-debtor in consequence of this procedure, vitiate the sale. [p. 764, col. 2.]

A Liquidator appointed in a winding-up by the Court ought not to appeal in any case without the permission of the winding-up Court, and if he does so, he runs considerable risk, in the event of failure, of having to pay the costs out of his own pocket. [p. 766, col. 2.]

First appeal from the order of the District Judge, Gorakhpur, dated the 16th of April 1920.

Mr. Nehal Ohand, for the Appellant.

Mr. P. N. Banerji, for the Respondents.

#### JUDGMENT.

PIGGOTT, J.—The appellant in this case is the Official Liquidator of a Company, known as the Kayasth Trading and Banking Corporation Ltd. This Company was brought into liquidation on a winding-up application presented to this Court by a creditor on the 26th of February 1920 and winding-up order was made on the 29th of May 1920. Long previously to this, the immoveable property belonging to the Company with which we are concerned in this appeal had been attached at the instance of certain creditors. During the year 1919 the property was repeatedly proclaimed and put up for sale. For reasons with which we are not now concerned the Court had seen fit to fix a reserve price of Rs. 30,000 and at one sale after another no one came forward prepared to bid this price. The judgment-debtor, that is to say, the Company, had, in the meantime, more than once

represented to the Court that there was a reasonable prospect of their being able to dispose of the property to greater advantage by private treaty. The reasonable price suggested in these various petitions to the Court was from Rs. 35,000 to Rs. 40,000; but as a matter of fact the Company, although allowed abundant opportunity by the Execution Court, had not succeeded in finding a purchaser prepared to give even as much as the reserve price of Rs. 30,000 which had been fixed for the auction-sale. Finally, the property stood advertised for sale on the 26th of February 1920, the very day on which the winding-up proceedings were initiated by the presentation of a petition on the part of another creditor, in this Court. Once more, there was no bidder prepared to offer the reserve price and the *amin* reported accordingly. The Court's order on his report was that the decree-holder be allowed 14 days within which to make some further application. On the 1st of March 1920, however, the Court received from the Special Manager, Court of Wards, who is now the principal respondent to this appeal, a communication expressing his willingness to pay Rs. 32,000 for the property under attachment. On this the learned District Judge fixed the 3rd of March 1920 for auction-sale. No fresh proclamation was issued and we understand that no bid was received except the respondent's bid of Rs. 32,000. The sale was concluded upon this basis and has since been confirmed by the execution Court, in spite of protests by the judgment-debtor. The appeal before us is against the order confirming the sale, or the order overruling the judgment-debtor's objections to the sale. Two distinct points are taken, one under the Code of Civil Procedure, and one under the Indian Companies Act. We may take them in this order. It is contended that the learned District Judge in fixing the 3rd of March 1920 for the auction sale, without issuing a fresh proclamation, committed a material irregularity and that, by reason of this irregularity, the appellant has suffered substantial loss. In the view which we take on the question of substantial loss, it is not really necessary for us to discuss the question of the alleged irregularity at any length. We may say simply that, in our

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opinion, there was an irregularity committed in this matter. As we look at the point, the order actually passed by the execution Court on the 26th of February 1920 was in effect an order adjourning the sale *sine die*. No doubt, in passing his subsequent order of March the 1st, 1920, the learned District Judge was actuated simply by a laudable desire to save the executing creditors from having to pay fresh proclamation fees, which they had fruitlessly done over and over again in the course of the previous year. We think, however, that, as a strict point of law, his powers of adjournment were exhausted by the order of the 26th of February 1920 and that his order of March the 1st, 1920, was really an order fixing a new date for the sale and that a proclamation should have been issued. We feel, however, perfectly satisfied that no substantial loss was suffered by the judgment-debtor in consequence of this procedure. The case in favour of the alleged substantial loss begins and ends with the fact that, since these proceedings were concluded, that is to say, in the month of August last, the Municipal Board of Gorakhpur suddenly came to a resolution that they were prepared to acquire this property for Rs. 40,000. Why they should have arrived at this resolution in the month of August 1920, when the property had been advertised for sale over and over again in the year 1919 and could then have been acquired by any one prepared to bid Rs. 10,000 less, it is impossible for us to say; but for the purposes of this appeal it is quite sufficient to make the point that there is not the slightest reason to suppose that, if a fresh sale proclamation had been issued in the month of March 1920, either the Municipal Board of Gorakhpur or any one else would have bid any sum in excess of the sum of Rs. 32,000 actually bid and since paid by the respondent. The Municipal Board of Gorakhpur obviously was not prepared in that month to pay Rs. 40,000, or any other sum, for this property. We, therefore, overrule the objection taken under the Code of Civil Procedure.

The point taken under the Companies Act is based upon the wording of section 232, considered along with section 168, of

the said Act. According to the earlier of these two sections the winding-up proceedings are deemed to commence at the time of the presentation of the petition. In this case, therefore, these proceedings commenced, within the meaning of this section, with the presentation of the creditor's petition to this Court on the 26th of February 1920. The relevant words under section 232 are the following:—

"Where any Company is being wound-up, any attachment, distress or execution put in force without the leave of the Court after the commencement of the winding-up, shall be void."

The appellant asks us to hold that the sale of the property was a putting in force of an execution within the meaning of this section. The expression which we have quoted is taken bodily from the English Law and is not altogether reconcilable with the rules of our Code of Civil Procedure on the subject of execution of decrees. We take note of the fact that, in the Companies Act itself, provision is made for two distinct contingencies. The Court to which the winding-up petition is presented can, if it sees fit to do so, pass an order the effect of which would be to suspend all proceedings, including execution proceedings, against the Company's assets for the period between the presentation of the petition and the passing of the winding-up order. *Secondly*, on the passing of the winding-up order, all proceedings, including proceedings in execution, are automatically suspended unless the leave of the Court be obtained. In the present instance, no *interim* order was passed by the Court in charge of the winding-up, and we may say that on looking into the matter we think it very unlikely that any such order would have been passed if it had been asked for. Looking at the scheme of the Companies Act as a whole, and also at the English authorities in which the expression with which we are concerned has been interpreted, we have no doubt that the words "any attachment, distraint or execution put in force" must be considered as a whole and that in this particular case the execution with which we are concerned had been "put in force" within the meaning of this section long prior to the 26th of February 1920. It was in fact put in force for the purposes of this

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section when this particular property was attached. This plea, therefore, also fails and we dismiss the appeal accordingly with costs, including fees on the higher scale.

With regard to the Official Liquidator, we think it fair to say that the point taken by him under the Companies Act was, in our opinion, so far arguable that it was not improper for him to raise it before this Court, so that we see no objection to his taking the costs of this appeal out of the assets of the Company.

WALSH, J.—I entirely agree. With regard to the point under the Companies Act, there would appear at first sight superficial difficulty in reconciling section 232 with section 168 which says, that the winding-up shall be deemed to commence at the time of the presentation of the petition, and with the provisions vesting in the Court the power to stay or to allow execution proceedings after presentation of the petition or even after the winding-up order. But these sections are lifted verbatim from the English Act and have been substantially in force in England since 1857. It was decided by the English Court of Appeal in dealing with the very question now raised before us, as long ago as 1864, that section 232 of the Indian Companies Act of 1913 must be read with and controlled by sections 169 and 171. In addition to that, in applying this law to India, it must be noted that the words "putting in force" are not strictly applicable to the machinery for issuing execution in this country. After all, they really mean no more than putting in motion, and it has been decided in England that where the writ for possession has been handed to the Sheriff or the Sheriff has actually entered, execution has been "put in force" within the meaning of that section. Moreover, if the matter had come before me sitting as the Judge in winding-up and there had been an application by the Company either before the actual winding-up order, or after it to stay further proceedings by the decree-holder under this decree, I am quite satisfied, after examining the authorities on the subject in England, that it would have been my duty to have allowed the execution to proceed. For example, where a creditor has issued execution *bona fide*, that is to say, applying that term to India, has applied for execu-

tion, which in this case he did as long ago as 1917, and the Sheriff has been put in possession before the presentation of the petition, the creditor will not, except under exceptional circumstances, be restrained from selling. If a sale were shown to be likely to be ruinous to the good will or assets of the Company the creditor would, according to the English practice, be restrained from selling but allowed a first charge on the assets of the Company in the winding-up for his debt and costs as a condition of granting the stay. It has further been held that, where a Company has vexatiously delayed its creditor so that he could not obtain a decree before the presentation of the petition and had to issue execution after the winding-up had taken place, nonetheless he has been allowed to proceed with his execution. *Secondly*, while agreeing with what my brother has said about the costs in this case, I would draw attention to the recognized practice with regard to Liquidators, who are officers of the Court, and not ordinary litigants at all, that a Liquidator appointed in a winding-up by the Court ought not to appeal in any case without the permission of the winding-up Court, and if he does so, he runs considerable risk, in the event of failure, of having to pay the costs out of his own pocket.

*Appeal dismissed.*

# MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 345 of 1919.

March 4, 1920.

*Present:*—Mr. Justice Sadasiva Aiyar and  
Mr. Justice Spencer.

ANGAMUTHU AND OTHERS—DEFENDANTS  
Nos. 5, 6 AND 2—APPELLANTS

*versus*

RAMALINGA PILLAI *alias*  
RAJAMANI PILLAI, MINOR, BY HIS  
NEXT FRIEND AMIRTHALINGAM PILLAI  
AND OTHERS—PLAINTIFFS AND DEFENDANTS  
Nos. 1, 3 AND 4—RESPONDENTS.

*Trust, charitable—Hereditary trustees, right of, to  
appoint managing trustee—Appeal, second—Objection*



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not raised in written statement, whether can be raised in second appeal.

Where there are several hereditary trustees of a public charitable trust, there is nothing improper in one of them being appointed as managing trustee for certain purposes by the other trustees, though so far as acts like the institution of suits, etc., are concerned, they must all be parties and must act after mutual consultation [p. 769, col. 1.]

A defendant is not entitled in second appeal to raise an objection which he omitted to raise in his written statement [p. 769, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Cuddalore, in Appeal Suits Nos 14 and 15 of 1917 (Appeal Suits Nos. 167 and 154 of 1916 respectively on the file of the District Court, South Arcot), preferred against the decree of the Court of the Additional District Munsif, Villapuram, in Original Suit No. 230 of 1915, (Original Suit No. 551 of 1914 on the file of the District Munsif's Court, Cuddalore.)

FACTS appear from the judgment.

Mr. K. Balasubramania Aiyar, for the Appellants.—There was no notice to quit. Any way, the plaintiff alone could not determine the defendant's tenancy without getting the other trustees to join him. It is necessary that all the trustees should act together in such an important matter as the recovery of possession of trust properties. The essence of their function is that all of them should act jointly in any matter relating to the trust after mutual consultations. One trustee cannot substitute his discretion for that of his co-trustees.

The division of management is invalid as it has the effect of splitting up responsibility such a division cannot be made in the case of public trusts. *Sethuramaswamiar v. Meruswamiar* (1).

Mr. T. R. Venkatarama Sastri, for the Respondents.—The question of want of notice was not taken in the lower Court though the plaintiff averred that he gave notice in his plaint.

Notice to quit is a formal matter and does not involve the exercise of discretion where a trespasser has to be evicted. Joint action and mutual consultation are necessary only in graver matters affecting the trust.

(1) 43 Ind. Cas. 806; 41 M. 296 at p. 303; 7 L. W. 22; 4 P. L. W. 91; 34 M. L. J. 130; 16 A. L. J. 113; 27 C. L. J. 231; 22 C. W. N. 457; 20 Bom. L. R. 514; 45 I. A. 1 (P. C.).

The division of management among trustees is not illegal. *Raja Ram v. Ram Ebcy* (2). The observations of the Privy Council in *Sethuramaswamiar v. Meruswamiar* (1) are not opposed to this view. The *razinama* was further sanctioned by Court as beneficial to the parties.

#### JUDGMENT.

SADARIVA AIYAR, J.—The defendants Nos. 5, 6 and 2 are the appellants. The plaintiff and defendants Nos 5 and 6 were minors when this suit was brought. The plaintiff's adoptive father, Srinivasa Pillai, and the father of the defendants Nos. 5 and 6, Annamalai Pillai, were co-trustees of the plaint *choultry* charity. The trusteeship seems to have been hereditary. As regards this custom of hereditary trusteeship I quoted in *Subramania Aiyar v. Lakshmana Goundan* (3) a learned writer who recently said: "The error of decadent India has been to lay too much stress on the law of heredity in connection with national organization, to assert loudly with false claims of degenerate pseudo-religion and pseudo-science that that law is the sole arbiter of pseudo-physical type, and to forget, to ignore and refuse recognition now altogether in theory to the equally important and equally operative law of...the effects of Individual Taras." Further on, I remarked in that case, "the fondness for introducing the hereditary principle even in such matters as succession to trusteeships, succession to priestly functions in a temple and even to the function of a cook or garland weaver in a temple has been due to this perverted and grossly exaggerated worship of the hereditary principle which is the bane of the modern caste system." However, having this anomalous principle of law recognizing hereditary trusteeship to work with, it is no wonder that inconveniences arise when the holders of such offices become numerous in the course of hereditary succession or when they are minors as in this case. To get rid of such inconveniences, the Courts had to employ their ingenuity; and they have held that arrangements which, according to the strict law regulating trusts may not be treated as sound, are not improper when we have to deal with these hereditary trusteeships.

(2) 18 Ind. Cas. 77; 24 M. L. J. 75; 13 M. L. T. 106; 1913) M. W. N. 176.

(3) 54 Ind. Cas. 177; 27 M. L. T. 11; (1919) M. W. N. 899.

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It appears from the findings of the lower Appellate Court that the two former trustees, namely, the plaintiff's father and the father of the defendants Nos. 5 and 6 were, for convenience of management, agreed each to be sole manager of half a dozen out of the dozen or so shops belonging to the trust. The present suit is for the recovery of possession of two of these half a dozen shops which the plaintiff's father was separately managing. They had been leased in 1898 under Exhibit G to the 1st defendant, the rent deed having been executed in favour of both the trustees. The plaint, as I understand it, alleged that the plaintiff's father alone had been receiving the rents of those two shops notwithstanding, that the document was executed in favour of both trustees just as the father of the defendants Nos. 5 and 6 was receiving the rents of other shops separately by arrangement between the two trustees. Till 1909, the first defendant was recognizing the plaintiff's father and the plaintiff's guardian was entitled to receive the rents and was paying them the rents. Then he wanted the right to hold the shops in possession thereafter, no longer as a tenant but as a usufructuary mortgagee. In the year 1910, therefore, under Exhibit T, which was executed by the father of the fifth and sixth defendants (the plaintiff's father having then died), he obtained the shops as usufructuary mortgagee. That mortgage has been found by the lower Courts to be invalid against the trust. The plaint alleges that the first defendant thereafter has been withholding the rent and, notwithstanding notice given to the defendants to quit, they have not given up possession. The first defendant has assigned over his mortgage-right (which, as I said, is worth nothing) to the second defendant and remained *ex parte* in this litigation. The second defendant did not deny the allegations in the plaint that the first defendant was attorning to the plaintiff's father till about 1909 and paying rents for these shops to them nor the fact that notice to quit was given. He relied upon the authority of this usufructuary mortgage in favour of the first defendant executed by the father of the defendants Nos. 5 and 6 and assigned over to the second defendant.

The lower Appellate Court decided the case on these pleadings and on the facts found by it in favour of the plaintiff. One fact more

has to be stated, namely, that in 1911 a suit was brought by the plaintiff against his father's elder brother (the father of the defendant's Nos. 5 and 6) who died pending the suit and against other persons in respect of some other shops. In that suit, the guardian of the plaintiff and the guardian of the defendants Nos. 5 and 6 with the permission of the Court, entered into a *razinamah* in January 1913, Exhibit B, whereby among other things, it was agreed that the two guardians of the plaintiff and the defendants Nos. 5 and 6 should receive the rents of separate shops just as the fathers of the minors had been doing previously. Of course, the guardian of the plaintiff was not intended to receive the rent after he ceased to be the guardian of the plaintiff, that is, after the plaintiff attained majority. As I understand the *razinamah*, it was to be in force so long as all the minor parties to it represented by their respective guardians remained minors. The Court evidently thought that such a *razinamah* was in the interests of the minors and was not against the interest of the institution. It was, however, argued that such a division of management (which, of course, did not absolve the managers from joint and several liability to the endowment, for acts of malfeasance or misfeasance by any of the managers) was invalid and could not be recognized. There seems to be some support afforded to this contention in the observations of their Lordships of the Privy Council in *Sethuramaswamiar v. Meruswamiar* (1), where their Lordships seem to be inclined to confine such a division of management to private and family trusts, whether religious or charitable. In *Raja Ram v. Ram Bhoj* (2) Benson and Sundara Aiyar, JJ., no doubt held that such a division of management (even a division of properties for management) was not improper in the case of public charitable trusts also like the present. As I think that the decree of the lower Appellate Court, if the other contentions of the appellant are found against, might be modified by giving a decree with possession to the plaintiff's next friend on behalf of all the trustees including the fifth defendant who has now become a major and the sixth defendant who is now under the guardianship of the fifth defendant (as co-trustees of

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the institution) it is unnecessary to express any final opinion on the question whether *Raja Ram v. Ram Bhoy* (2) must be deemed to have been overruled by the observations of their Lordships of the Privy Council in *Sethuramaswamiar v. Meruswamiar* (1) already referred to. As to the other objections raised by the second defendant, he is not entitled to raise it in second appeal as he has not denied the plaintiff allegation of notice to quit. Even assuming that he is entitled to notice to quit, I think that when the first defendant obtained his mortgage, and professing to hold under that mortgage assigned it over to the second defendant, he repudiated his status as tenant and was not entitled to notice to quit and his assignee the second defendant standing in his shoes was a *fortiori* not also entitled to notice. However, even if they were entitled to notice, what has not been denied in the written statement ought to be treated as admitted.

As regards the question whether the notice given by one of the trustees is sufficient, I do not think there is anything improper in one of the several trustees being appointed as managing trustee for certain purposes by the other trustees though so far as acts like the institution of suits, etc., are concerned, they must all be parties and must act after mutual consultations. As regards the cases in which it has been held that, in a matter of discretion, one trustee cannot act without consulting the others I do not think those cases apply to matters where no question of discretion is involved. Discretion has to be used as regards the propriety of redeeming a Kanom of the trust properties or renewal of a mortgage and other similar acts, but no such question of discretion arises where, in the interests of the trust, a trespasser has to be ejected.

In the result, I would confirm the decree of the first Court with the modification that, instead of plaintiff, the words "plaintiff and fifth defendant for himself and as guardian of the sixth defendant" shall be substituted and that, instead of "defendants," it shall be "defendants Nos. 1, 2, 3 and 4." Also, after the words "plaintiff and fifth defendant on behalf of himself and as guardian of sixth defendant" and "as trustees of the institu-

tion." The appellants will pay the plaintiffs cost in the second appeal.

SPENCER, J.—I agree to the proposed modification of the decree. I also agree with my learned brother that in other respects the appeal should be dismissed with costs. It was asserted in the plaint and not denied in the written statements that the first defendant was paying rent at Rs. 3 a month till 1909 and that he had not paid it subsequently. It was also found by the District Munsif that the usufructuary mortgage-bond executed by the father of defendants Nos. 5 and 6 in favour of the first defendant of which the second defendant obtained an assignment was not binding on the plaintiff, and this finding was not contested in the arguments before the lower Appellate Court. This is sufficient to dispose of the case of the first and second defendants.

Three main objections were raised on behalf of the appellants, who are defendants Nos. 2, 5 and 6 represented by the same Vakil. They are, (1) that the plaintiff was not competent to determine the tenancy without the concurrence of defendants Nos. 5 and 6 who are co-trustees, as trustees are bound to act together in such matters as recovering properties belonging to the trust; (2) that as regards the *razinamah*, Exhibit B, the guardian of a minor trustee cannot enter into an arrangement for the management of a trust estate which involves the exercise of the personal discretion of the trustees; and (3) that there was no valid notice to quit for the determination of the 1st defendant's tenancy.

As regards the first objection, there is the authority of a case in *Raja Ram v. Ram Bhoy* (2), where it was held that there was nothing illegal in an arrangement among the hereditary trustees of a charity that each should be in exclusive possession of different portions of the trust properties for the separate management and accounting for the income without any diminution of their joint responsibility for the proper discharge of their duties as regards the whole charitable institution. This authority has not, so far as I am aware, been shaken by any subsequent decision. The Privy Council decision in *Kamanathan Chetti v. Murugappa Chetti* (4) which gave sanction to an arrangement

(4) 29 M. 283; 10 C. W. N. 825; 33 I. A. 139; 1 M. L. T. 327; 3 A. L. J. 707; 4 C. L. J. 189; 16 M. L. J. 265; 8 Bom. L. R. 498 (P. C.).



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for the management of a temple trust by terms is not opposed to *Raja Ram v. Ram Bhoj* (2). I do not mean for a moment to suggest that any amount of consent would justify the sanctioning of a transaction that would be opposed to public policy : but there is nothing in the terms of the arrangement in the compromise to suggest that this separate management of a certain number of shops was contrary to public policy. *Sethuramaswamiar v. Meruswamiar* (1) was a case of administration of certain religious charities by the head of a *mutt*. Their Lordships of the Privy Council in their judgment make a distinction between private charities, that is, endowments for the charities of a family idol, and certain endowments such as those involved in that suit. They observed that Indian Courts had no jurisdiction to settle a scheme the effect of which would be to take away the sole power of management from the eldest son of the last head of the *mutt*. I can see no analogy between the position of the head of a *mutt* and that of the trustees who are managing the charity concerned in this suit, so that decision has no bearing on the facts of the case before us. Secondly, as regards the *rasinamah*, Exhibit B, it received the sanction of the Court and was embodied in the decree in Original Suit No. 211 of 1911. Even if the guardian of a minor is not capable of exercising that degree of discretion which is necessary for the purpose of consenting to a compromise, it has been held that a Court can supply the defect arising out of the minor's incapacity and, therefore, when the District Munsif gave his sanction to the *rasinamah* decree, the appellants' objection as to the guardian's capacity to act for the minor trustee is no longer tenable. Lastly, on the question of notice, the first defendant did not object to the want of notice. In paragraph 14 of the plaint, the plaintiff asserted that he had given two notices demanding delivery of possession of the shops. There is no denial of this assertion in the written statements. This objection, therefore, also fails.

M. C. P.

*Decree modified.*

ALLAHABAD HIGH COURT,  
SECOND CIVIL APPEAL No. 1271 of 1918.  
January 27, 1921.

Present:—Mr. Justice Piggott and  
Mr. Justice Walsh.

PARAM HANSMAN TEWARI AND  
ANOTHER—DEFENDANTS—APPELLANTS

versus

DASRATHMAN TEWARI AND ANOTHER—  
PLAINTIFFS—RESPONDENTS.

*Agra Tenancy Act (II of 1901), ss. 4, 58, 63—Jurisdiction of Civil and Revenue Courts—Suit for possession of pasture land, nature of—Ejectment—Revenue Court, jurisdiction of.*

A suit for possession of land of which the defendant had the use for grazing cattle and for arrears of rent, is in effect a suit for ejectment against a tenant who is such by reason of his enjoying a right of pasturage in respect of the land, and as such the suit is cognizable only by a Revenue Court. [p. 771, col. 2; p. 772, col. 1.]

Second appeal, from a decree of the Additional Subordinate Judge, Gorakhpur, dated the 12th August 1918, modifying a decree of the Munsif, Deoria.

Mr. U. S. Baspai, for the Appellants.

Mr. S. P. Ghosh, for the Respondents.

JUDGMENT.—This suit was brought in the Court of the Munsif of Deoria. The plaintiffs claimed, between them, to be the holders of the proprietary rights in respect of a particular plot of land 16 *biswas* in area. They said that this land had never been brought under cultivation, but grew from year to year a crop of tall grass known locally as *khar*. They alleged that the defendants had the use of this plot of land for many years by grazing their cattle over it, and cutting the tall grass if they saw fit to do so. They claimed that the defendants' enjoyment of this land gave them no status higher than that of a licensee, although they admitted that rent was annually paid by the defendants. Bringing the suit, therefore, in the Civil Court, they claimed a decree for possession and arrears of rent for three years at the rate of Rs. 5 a year. The defendants pleaded that the suit as brought was not cognizable by the Civil Court, but should have been brought as a suit for the ejectment of a non occupancy tenant in the Court of an Assistant Collector. They raised other pleadings upon which issues were framed regarding the length and nature of the defendants' possession, the amount of the rent and the necessity or otherwise for the issue of notice by the plaintiffs to the defendants.

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prior to the institution of a suit for ejectment. The Court of first instance found in favour of the plaintiffs on every point, except as regards the amount of the rent, and passed a decree in their favour for possession over the land by ejectment of the defendants and for three years' rent at the rate of Rs. 1 a year. In appeal the Additional Subordinate Judge has held that the claim for arrears of rent was not maintainable in the Civil Court, but that the claim for possession by ejectment of the defendants was so maintainable, and had been rightly decreed. He amended the decree of the first Court accordingly. The appeal before us is against the decision of the lower Appellate Court. Various points have been taken and argued with much keenness. It is contended that the land in suit is in fact held by the defendants for agricultural purposes within the meaning of section 4 clause (2) of the Local Tenancy Act, II of 1901. Further, that whether this be so or not, the defendants have been paying rent on account of rights of pasturage within the meaning of the definition of the word "rent" in clause (3) of the same section, and are, therefore "tenants" within the meaning of clause (5). From this it is further argued that, if the defendants be held to be tenants upon this basis, they can only be non-occupancy tenants, and are, therefore, liable to ejectment, if at all, by means of a suit brought under section 63 of the aforesaid Tenancy Act, read with section 58, of the same. If the suit is one which should have been brought in the Court of an Assistant Collector the cognizance of the Civil Court is barred by section 167 of the same Tenancy Act. A farther point has been taken that the position of the defendants is in any case not that of mere licensees, that they have a prescriptive right to the enjoyment of this land which cannot be revoked at the will and pleasure of the plaintiffs and that, if the suit is treated as one cognizable by the Civil Court, then it is a suit against lessees, so that notice was necessary under the appropriate provisions of the Transfer of Property Act, IV of 1882. This case has been referred to a Bench of two Judges because of a conflict of authority in this Court on the question of the definition of agricultural land and as to the effect of sections 58 and 63 of the Local Tenancy Act. The authority of Mr. Justice Chamier in *Abdul Qayum v. Fida*

*Husain* (1) is quoted for the proposition that a suit against a tenant of grazing land or in respect of ejectment from land solely used for the purposes of pasturage is not entertainable by the Revenue Court. This decision is based on an older decision by the same learned Judge, which was not called in question before him in *Abdul Qayum v. Fida Husain* (1), and that again purports to follow a reported case of the Board of Revenue. Mr. Justice Chamier obviously read section 51 of the Tenancy Act as if the words "from his holding" were to be understood after the word "ejectment" from the previous section. He says, in the case in which he first dealt with this question, that both sections 57 and 58 obviously refer to ejectment from a holding. There is clear authority of this Court to the contrary in the decision of a Bench of two Judges as *Rameshar Singh v. Madho Lal* (2). According to the practice of this Court, the decision of a Bench of two Judges should be followed rather than that of a single Judge, if there appears to be conflict between them. We agree, moreover, with the reasoning of Mr. Justice Ryves in *Rameshar Singh v. Madho Lal* (2). One thing seems to be put quite beyond question by the wording of the definitions of the words "land" and "tenant" in section 4 of the Local Tenancy Act, II of 1901, and this is, that a man may be a "tenant", subject to the provisions of that Act, without being the tenant of a "holding". It seems clear, therefore, that we ought not to import into section 58 of the Tenancy Act any reference to a "holding" from the previous section. On the general principles governing the interpretation of Statutes, the more correct view would seem to be that the omission of all reference to a "holding" in section 58 was intentional, and was due to the fact that the framers of the Act recognized the point to which we have already called attention, namely, that a non-occupancy tenant need not necessarily be the tenant of a holding. The decision of the Board of Revenue, which weighed with Mr. Justice Chamier, proceeded upon a very peculiar and unusual state of facts and we very much doubt whether it could be applied to a case like the present, where the defendants are in the enjoyment for grazing purposes

(1) 30 Ind. Cas. 551; 13 A. L. J. 854.

(2) 52 Ind. Cas. 141; 17 A. L. J. 971; 12 A. 55.



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of a specified and limited plot of land. It is clear, moreover, from the recital of the facts in the judgment of Mr. Justice Ryves in the case of *Rameshar Singh v. Madho Lal* (2) that the Board of Revenue is quite prepared to entertain a suit in ejectment against a tenant who is such only by reason of his enjoying a right of pasturage in respect of a particular area. We do not say that the question is altogether free from difficulty, but both the weight of authority in this Court and our own opinion as to the correct interpretation of section 53 and of the definitions in section 4 of Local Act, II of 1901, are clearly in favour of the appellants. On this ground alone the order of the lower Appellate Court should be set aside. It seems, in any case, a wholly anomalous and undesirable result that the plaintiffs should be referred to one Tribunal for the decision of a claim to rent in respect of this land and to a different Tribunal in respect of their claim to possession over this land. We, therefore, allow this appeal and set aside the decisions of both the Courts below and, giving effect to the objection of the defendants on the question of jurisdiction, substitute for the decree of the first Court an order returning the plaint for presentation to a Court having jurisdiction, namely, the Court of an Assistant Collector. The appellants are entitled to their costs of this litigation.

*Appeal allowed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 56 OF 1919.  
October 11, 1920.

Present:—Mr. Justice Chevis and Mr.  
Justice Scott-Smith.

PARMESHRI DAS AND ANOTHER—  
PLAINTIFFS—APPELLANTS

versus

FAKIRIA AND OTHERS—DEFENDANTS—  
RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. VII, r. 6, scope of—Limitation, ground of exemption from law of, stated in plaint—Another ground, whether can be subsequently relied on,*

The provisions of Order VII, rule 6, of the Civil Procedure Code should be construed in a reasonable and liberal spirit and where the plaint in a suit does not state the ground of exemption from the

law of limitation, the Court should, save in very exceptional circumstances, allow the plaintiff to amend his plaint by adding the ground of exemption. [p. 773, col 2]

Where a ground of exemption from the law of limitation is stated in the plaint, the requirements of Order VII, rule 6, are satisfied, but this does not preclude the plaintiff from taking another ground to get over the bar of limitation, if he believes that the latter is the true ground. [p. 773, cols. 1 & 2.]

Appeal from the decree of Mr. Justice Abdul Raoof, dated the 19th November 1919, reported as 59 Ind. Cas. 71, affirming that of the District Judge, Hoshiarpur, dated the 28th April 1919, dismissing the plaintiffs' claim.

Mr. Fakir Chand, for the Appellants.

Mr. Nanak Chand Pandit, for the Respondents.

JUDGMENT.—The facts of the case out of which this present appeal arises are given in the judgment of Raoof, J., dated the 19th November 1919, in Civil Appeal No. 1426 of 1919, and in the order of the Full Bench in the present appeal, dated the 2nd June 1920\*.

The Trial Court and the District Judge held that the plaintiffs' suit for possession of the land mortgaged was barred by time and by the provisions of Order II, rule 2, Civil Procedure Code. Raoof, J., held that the suit was barred by Order II, rule 2, Civil Procedure Code, and upheld the orders of the lower Courts on that ground alone without deciding the question of limitation. The Full Bench of this Court having held that the suit is not barred by Order II, rule 2, it remains to decide whether it is barred by limitation. We proceed now to decide this point.

The plaintiffs in their plaint said that the suit was in time on account of certain payments alleged to have been made by the defendants, but the Courts below held that these payments were not proved. In the lower Appellate Court the plaintiffs further urged that the defendants' admission in their written statement, dated the 25th June 1906, in the former suit was an acknowledgment of liability within the meaning of section 19 of the Limitation Act which saved limitation. The District Judge, however, said that this was not mentioned in the plaint filed in the present suit as it ought to have been in accordance with the provisions of Order VII, rule 6

\*See 59 Ind. Cas. 71.—[Ed.]



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Civil Procedure Code. He relied on *Gobinda Mal v. Santa* (1) and, holding that this admission could not be relied upon in arguments, agreed with the Trial Court that the suit was barred by time. *Gobinda Mal v. Santa* (1), followed *Jogeshwar Roy v. Raj Narain Mitter* (2) and held that under Order VII, rule 6, Civil Procedure Code, the plaintiffs were bound to show in the plaint the grounds upon which exemption from the law of limitation was claimed and that, as there was no mention in the plaint of the alleged acknowledgment of liability by the defendants, plaintiffs could not be allowed to rely on it. It was pointed out in the course of the judgment (see page 295 of the record) that in that case the plaint did not even remotely suggest that any acknowledgment of whatever description had been made by the defendants so as to make section 19 of the Act applicable. The Judges, therefore, had no hesitation in following the principle underlying the Calcutta case. The present case is distinguishable, inasmuch as one ground of exemption was mentioned in the plaint, and, therefore, the provisions of Order VII, rule 6, Civil Procedure Code, were complied with. In *Hingu Miah v. Heramba Ohandra* (3) it was pointed out that the case of *Jogeshwar Roy v. Raj Narain Mitter* (2) did not lay down any inflexible rule of law, and it was held that if the plaint shows the ground of exemption the requirements of the Code were satisfied, but this does not preclude the plaintiff from taking another and an inconsistent ground to get over the bar of limitation if he believes that the latter is the true ground; and the Court allowed the plaintiff to urge that the suit was not barred by limitation for a reason different from the one assigned in the plaint (see page 147\*). A ruling to the same effect is that in the case of *Yakub Ebrahim Sayani v. Bai Rahimat-bai* (4), where it was held that where a plaintiff does satisfy the requirements of section 50 of the Civil Procedure Code of 1882 by stating what is in his opinion

the ground upon which he intends to get over the bar of limitation he ought not to be precluded from taking another and not inconsistent ground should he be later advised that the latter is the true ground. *Jogeshwar Roy v. Raj Narain Mitter* (2) was dissented from in *Ram Sukh Das v. Ghulam Muhammad* (5), where it was held that the provisions of Order VII, rule 6, should be construed in a reasonable and liberal spirit and, save under very exceptional circumstances, the Court of first instance should allow the plaintiff to amend his plaint so as to state the ground of exemption from the law of limitation. *Jogeshwar Roy v. Raj Narain Mitter* (2) and *Gobinda Mal v. Santa* (1) were distinguished. In our opinion, the present case is also distinguishable from the two latter cases. Here a ground of exemption was stated in the plaint, though the plaintiffs subsequently sought to rely upon another ground. We agree with the interpretation put upon the law in *Yakub Ebrahim Sayani v. Bai Rahimat-bai* (4) and *Hingu Miah v. Heramba Ohandra* (3) and consider that the plaintiffs should not be debarred from putting forward the admission of the defendants made by them in their written statement of the 25th June 1906. We note that a copy of that statement was filed in the Trial Court on the 11th January 1919, the case being decided one month after that date. The list which was filed with the copy makes it clear that the object of the plaintiffs was to show that the defendants had admitted the plaintiffs' right to possession of the land mortgaged. It is, therefore, clear that in the Trial Court they attempted to rely on this statement. A perusal of the statement shows that it clearly amounts to an acknowledgment of liability within the meaning of section 19 of the Indian Limitation Act, and the present suit, having been brought within 12 years of the date of that acknowledgment, is within time under Article 135 of the Limitation Act.

It is also urged by Counsel for the appellants that the plaintiffs in the previous suit having elected to sue for interest only had no right to sue for possession, and that, when a fresh default

(5) 43 Ind. Cas. 495; 102 P. R. 1918; 116 P. W. R. 1918; 120 P. L. R. 1918.

(1) 26 Ind. Cas. 441; 83 P. R. 1914; 232 P. L. R. 1915; 192 P. W. R. 1914.

(2) 31 C. 195; 8 C. W. N. 168.

(3) 8 Ind. Cas. 81; 13 C. L. J. 139.

(4) 10 Bom. L. R. 346.

\*Page of 13 C. L. J.—[Ed.]

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was made thereafter by the mortgagors, a fresh cause of action accrued to them and time began to run afresh under Article 135. We have heard arguments on this point, but having regard to our decision that the suit is within time on other grounds we find it unnecessary to decide it.

We accept the appeal and setting aside the order dismissing the plaintiffs' suit give them a decree for possession of the land mortgaged with costs throughout against the defendants.

*Appeal accepted.*

# ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 649 OF 1918.

January 25, 1921.

Present :—Mr. Justice Tudball and

Mr. Justice Lindsay.

SAHEB RAM—DEFENDANT—APPELLANT

*versus*

Musammât GOBINDI—PLAINTIFF—

RESPONDENT.

*Succession Certificate Act (VII of 1889), s. 4—Suit against person who is not a debtor—Succession Certificate, whether necessary.*

A succession certificate is not necessary in a suit by a Hindu widow against a person for the recovery of debts due to the estate of her husband wrongly collected by him and withheld from her. [p. 775, col. 2.]

Such a certificate is necessary only where a debtor to the estate of a deceased person is sued as such. [p. 775, col. 2.]

Second appeal from a decree of the Second Additional Judge, Aligarh, dated the 27th of February 1918, confirming a decree of the Additional First Subordinate Judge.

Mr. Panna Lal, for the Appellant.

Mr. Banerji, for the Respondent.

JUDGMENT.—Second Appeals Nos. 649 and 650 of 1918 are between the same parties and arise out of the same suit. On the 18th of November 1891 one Har Narain executed a mortgage-deed for a sum of Rs. 900 in favour of three persons, Sahab Ram and his brother, Ajai Ram, and their cousin Har Prasad. On the 30th of July 1911 Sahab Ram and Ajai Ram brought a suit for sale against the mortgagor on the basis of the deed. At that time Har Prasad

was dead. He left a widow, Govindi, and there was one Brij Narain, the son of Ajai Ram, on whose behalf a claim was put forward by Sahab Ram that he was the adopted son of Har Prasad. Therefore, he and Musammât Govindi were made *pro forma* defendants to the suit. She applied to be made a plaintiff, claiming to be the heir of Har Prasad. Sahab Ram took no exception to this application, in fact, he agreed on the condition that she would pay "half" the costs of the suit. She agreed to do this and was made a plaintiff. An application was also made on behalf of Brij Narain to be made a plaintiff to the suit and he was made a plaintiff but without any condition as to the payment of costs. On the 23rd of November 1911 the suit was dismissed on the ground that the whole of the debt had been paid to Sahab Ram. Those payments apparently were found to have been made in the years 1897 and 1903. Har Prasad had died in the year 1892, so these payments were made to Sahab Ram subsequent to the death of Har Prasad. On the 2nd of December 1914, Musammât Govindi, respondent to the present appeals, brought this Suit No. 318 of 1914 to recover from Sahab Ram Rs. 1,950, a half share of the money which he had recovered from the mortgagor Har Narain, plus Rs. 100. The plaintiff claimed that the cause of action had accrued to her from the date of the decision of the suit when it had come to her knowledge that Sahab Ram had collected the money from the mortgagor. Sahab Ram raised four points in defense—

(1) He first of all pleaded that he had not received the money from the mortgagor

(2) He next pleaded that the suit was barred by time.

(3) He then pleaded that the plaintiff was not entitled to more than a one-third share in the amount recovered, and, lastly,

(4) He pleaded that Musammât Govindi was not the heir as Brij Narain was the adopted son of Har Prasad and in his presence she had no title.

During the pendency of the suit Musammât Govindi applied to the District Judge for a succession certificate to enable her to recover this sum of Rs. 1,950 from Sahab Ram as being a debt due to the estate of her husband. The District Judge granted her a succession certificate and she produced it in Court. The Court of first instance held against Sahab Ram

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on all points except one, i. e., as to the share to which *Musammat Govindi* was entitled. It held that she was entitled to one third and not one-half of the sum recovered by *Sahab Ram*. Both parties appealed. *Musammat Govindi* urged on appeal that she was entitled to a one half share. The defendant pleaded that she was not entitled to anything at all. Whilst the appeals were pending, an appeal was preferred in the Succession Certificate case on behalf of *Brij Narain* to the High Court and, finally, the succession certificate granted to *Musammat Govindi* was withdrawn. It appears that in the year 1894 *Sahab Ram* had, as guardian of *Brij Narain*, applied for a succession certificate in respect to other debts which were due to the estate of *Har Prasad*. After the decision of the High Court an application was made for extension of the certificate of 1894 in respect to a sum of Rs. 1,950 which was said to be due to the estate of the deceased, *Har Prasad*, under a decree in a Suit No. 318 of 1914 by the Second Additional Subordinate Judge of *Ali-garh*. Now, this decree was the decree which was passed by the Court of first instance in this very suit No. 318 of 1914 in favour of *Govindi* against *Sahab Ram*. On appeal, the District Judge held that *Musammat Govindi* was entitled to a one-half share in the amount collected by *Sahab Ram*. He held that the suit was not time barred, and that *Brij Narain* was not the adopted son of *Har Prasad*. He, therefore, decreed the plaintiff's claim in full and dismissed the appeal of *Sahab Ram*. *Sahab Ram* now comes to this Court. He practically presses all the same points again.

It is urged, firstly, that the succession certificate granted to *Musammat Govindi* having been withdrawn, she is no longer entitled to a decree against *Sahab Ram*. In our opinion, section 4 of the Succession Certificate Act does not apply to the facts of the present case. That section says that, "No Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person or any part thereof or proceed upon an application of person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt except on the production by the person so claiming of a succession certificate, etc." In the present case *Musam-*

*mat Govindi* is suing not a debtor of the estate of her husband but a person who has wrongfully collected debts due to that estate and is holding them as against her. The collection of the debts was made long after the death of *Har Prasad*. The money in *Sahab Ram's* hands is due to the heir of *Har Prasad* but *Sahab Ram* in no sense can be said to have been a debtor to the estate of *Har Prasad*. Section 4 of the Succession Certificate Act was clearly adopted to protect a debtor when called upon to pay a debt due by him to a deceased person. *Har Narain*, the original mortgagor, if he had not paid off the debt, would have been a debtor such as is contemplated under section 4. *Sahab Ram*, in the circumstances of the present case, is no such debtor and in our opinion *Musammat Govindi* had no necessity whatever to produce a succession certificate in this litigation. The decision of this Court in the matter of the succession certificate and relating to *Brij Narain's* alleged adoption, is in no way final or binding between the parties. Section 25 of the Act is very clear indeed on this point.

It is next pleaded that the question of adoption is *res judicata* by reason of an award passed in the year 1901. This award was passed in a suit brought by *Musammat Govindi* against *Brij Narain* in respect to the estate of *Har Prasad*. The matter was referred to arbitration. The decree which was ultimately passed in the case is not upon the record. The award of 1901 shows that, by an agreement of parties the arbitrators maintained each of the parties in possession of those portions of the estate of which they were already possessed. There is no decision in the award of the disputed question of adoption. It is true that in certain places in the award the word '*muthanna*' (adopted) has been entered after the name of *Brij Narain* but above the line. This entry, according to the finding of the Court below, is a subsequent interpolation and not a genuine entry but in any case there is no decision in the award that *Brij Narain* is the adopted son. The arbitrators merely cut the knot without untying it. The decree passed on the basis of the award is not produced and there is no decision before us by any competent Court on the disputed question of adoption. The finding by the Court below on the evidence before it that the adoption



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has not been established is a finding of fact and as such is binding on us. The whole evidence has been discussed by that Court and we are bound by that finding.

In regard to the question of limitation, it is urged that limitation began to run as against Sahab Ram from the moment he collected the debt, that is, from the years 1897-1903, and the suit having been brought more than three years after the money was received by him is now barred by time. The plea comes very badly out of the mouth of Sahab Ram who, in the year 1910, instituted a suit against the original mortgagor to recover the mortgage-money on the ground that it had not been paid. If ever a fact is clearly proved it is beyond doubt in the present case that Sahab Ram, having collected the money, concealed that fact from *Musammât Govindi* who was entitled to a share therein; not only that, but he brought a suit (a suit which must have been false to his knowledge) to cover his tracks, and *Musammât Govindi* is fully justified in law in stating that it was not until the 23rd of November 1911 that she was aware of the collections of the money by Sahab Ram. Section 18 of the Limitation Act clearly would apply to the facts of the present case. When *Musammât Govindi* applied to be made a plaintiff in the suit Sahab Ram actually allowed her to be made a plaintiff and made her responsible for half the costs of the suit. The plaint was filed on the 2nd of December 1914. It was within time because the 23rd November 1914 fell on a holiday and the Courts did not re-open till the 2nd of December 1914. The claim was, therefore, within three years of the 23rd of November 1911 and is within time.

Finally, there remains the question of the share to which *Musammât Govindi* is entitled. We think the decision of the Court below on this point is quite correct, specially in view of the fact that when *Musammât Govindi* was made a plaintiff in the suit of 1910 Sahab Ram allowed her to be made a plaintiff on condition that she would pay half of the costs of the litigation, thereby tacitly admitting that she was entitled to half of the amount collected. There is no force in this

appeal. We, therefore, dismiss it with costs including fees on the higher scale.

*Appeal dismissed.*

LAHORE HIGH COURT.  
MISCELLANEOUS FIRST CIVIL APPEAL NO. 1516  
OF 1920.

November 30, 1920.

*Present:*—Mr. Shadi Lal, Chief Justice,  
and Mr. Justice Leslie Jones.

GANESH DAS ISHAR DAS

—DEFENDANTS—APPELLANTS

*versus*

DURGA DAT-JAGAN NATH—PLAINTIFFS  
—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), Sch. II, para. 18—Agreement to refer dispute to arbitration—Stay of suit—Discretion of Court—Burden of proof.*

When a Court is apprised that a suit has been instituted in contravention of an arbitration agreement the Court has a discretion to stay the suit, and the burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be so referred, and not on the defendant to show that no such reason exists. [p. 777, col. 1.]

Miscellaneous first appeal from the order of the Senior Subordinate Judge, First Class, Delhi, dated the 1st April 1920, refusing to stay the case for arbitration.

Lala Moti Sagar, R. S., for the Appellants.

Mr. Falir Chand, for the Respondents.

JUDGMENT.—The plaintiff in this case, a firm of Delhi merchants, sued the defendant, another Delhi firm, for a large sum as damages, alleging that the defendant had contracted to supply 75 cases of long cloth at certain rates, which are not in dispute, but had given delivery of 38 cases only.

On the 8th January 1920 the defendant put in pleas and, at the same time, an application under Schedule II, paragraph 18, that the suit might be stayed on the ground that clause 15 of the contract between the parties contained a provision to the following effect:—

"Any claim or dispute arising in connection with this contract, unless an amicable

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settlement can be arrived at, must be referred to arbitration in Delhi in accordance with the Survey and Arbitration Rules of the Delhi Hindustani Mercantile Association."

The Senior Subordinate Judge, following *Ohaiju Mal and Company v. Gurmukh Singh-Bhagwan Das* (1), a Single Bench judgment of the Chief Court, declined to stay the suit and the defendant has filed the present appeal in this Court.

*Ohaiju Mal and Company v. Gurmukh Singh Bhagwan Das* (1) is not an independent authority but follows another unreported Single Bench judgment which has been printed as *Charles Louis Drefus v. Jai Chand* (2), in which it appears to have been held that, despite an agreement to refer, a dispute arising from total non-delivery could not be treated as one for arbitration. The case, however, was heard on a petition for revision, no authority was cited, and it was considered that it would be inequitable in the circumstances to compel a merchant carrying on business at Lahore to submit to arbitration in Karachi.

Counsel for the plaintiff-respondent has not been able to cite any other authority in support of his position and we are not prepared to draw the distinction for which he contends, as it is clear that there are both a claim and a dispute arising out of the contract between the parties. There is nothing invalid in the agreement to refer, and it has been held in *Dinabandhu Jana v. Durga Prasad Jana* (3), which follows *Hodgson v. Railway Passengers' Assurance Company* (4), that when a Court is apprised that a suit has been instituted in contravention of an arbitration agreement the Court has a discretion to stay the suit, and that the burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be so referred and not on the defendant to show that no such reason exists.

We hold, therefore, that the reason given by the Court below for declining to stay

the suit was incorrect and we allow the appeal. We do not, however, deal with the application on its merits, but remand it to the lower Court for decision in accordance with the provisions of paragraph 18 of the Second Schedule. Costs will be costs in the cause.

*Appeal accepted.*

## ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 148  
OF 1920.

January 31, 1921.

*Present:*—Mr. Justice Piggott and  
Mr. Justice Walsh.

Srimati PRAMILA DEVI—PETITIONER—  
APPELLANT

*versus*

CHANDER SHEKHAR CHATTERJI

AND ANOTHER—OPPOSITE PARTIES—

RESPONDENTS,

*Hindu Law—Dayabhaga School—Succession—Succession certificate—Daughter, widowed, whether to be preferred to grandsons.*

A childless widowed daughter of a deceased Hindu is not to be preferred to the sons of another daughter in the matter of obtaining a certificate for the collection of debts due to the deceased, notwithstanding that, under the Hindu Widow's Re-marriage Act, there is a probability of the widow re-marrying. [p. 778, col. 1.]

First appeal from an order of the District Judge, Allahabad, dated the 25th of May 1920.

Mr. S. N. Mukerji, for the Appellant.

Messrs. H. K. Mukerji and Vishun Nath, for the Respondents.

JUDGMENT.—The Court below had to decide about the granting of a succession certificate for the collection of certain debts due to a deceased Bengali Brahmin, Babu Karnamoy Banerji. The rival applicants were a widowed daughter with no children and two sons by another daughter previously deceased. The learned District Judge has given preference to the sons. He had only to determine *prima facie* which of the parties before him had a preferential claim. We think his deci-

(1) 42 Ind. Cas. 95; 72 P. R. 1917; 139 P. W. R. 1917.

(2) 18 Ind. Cas. 316; 54 P. W. R. 1913; 124 P. L. R. 1913.

(3) 51 Ind. Cas. 80; 46 C. 1041; 29 C. L. J. 399; 23 C. W. N. 716

(4) (1852) 9 Q. B. D. 168.

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sion was clearly right. It has been contended before us, as it was in the Court below, that the daughter, who was a childless widow, should not be postponed to the sons of the other daughter in the matter of inheritance, because, under the provisions of the Hindu Widow's Re-marriage Act, XV of 1856, there was always the possibility of her marrying again. In support of this, one case in the Calcutta High Court has been laid before us, as it was before the Court below. It is that of *Sreemutty Bimola v. Dangoo Kansaree* (1). The point in question is dealt with in a brief and summary manner at the close of a judgment dealing mainly with another matter. It is not referred to in a standard book, like Trevelyan's Hindu Law, where three other authorities of the Calcutta High Court are quoted for an interpretation of the law against the claim of this appellant. As long ago as the 14th of February 1865, in *Binode Zomares Dabee v. Purdhan Gopal Sahee* (2), the learned Judges of the Calcutta High Court said that daughters who were barren, or widows without male issue, or mothers of daughters only, *suo*, under no circumstances, inherit. The same principle was followed in a later case to be found in *Radha Kishen Manjhee v. Rajah Ram Mundul* (3). The point has been recently re-considered by a Bench of the Calcutta High Court in *Mukunda Lal Chuckerbutty v. Manmohini Debi* (4), where the judgment expressly refers to the provisions of section 4 of the Hindu Widows' Re-marriage Act, XV of 1855. The terms of that section, to which we have referred, seem to bear out the view of the learned Judges of the Calcutta High Court in the latest reported decision. The Court below, in a proceeding of this sort, was clearly right in accepting the view of the law which seems to have been generally acted upon in the Calcutta High Court where cases under the Dayabaga Law are likely to come up for decision. Something has been said about a point taken as to the respondents, that is to say, the daughter's sons, not having performed the funeral ceremonies; but we can find no authority bearing out

the contention of the appellant on this point. On the materials before him the learned District Judge was right in granting the succession certificate to the respondents. We dismiss this appeal accordingly with costs, including fees on the higher scale:

*Appeal dismissed.*

### CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1503  
OF 1919.

August 18, 1920.

*Present:*—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice Sir  
Ernest Fletcher, Kt.

BHAGIRATH MALO AND OTHERS—  
DEFENDANTS—APPELLANTS

*versus*

ANNADA PROSUNNA MUKHAPADHYA.  
DHAYA—PLAINTIFF AND OTHERS—  
DEFENDANTS—RESPONDENTS.

*Fishery, right of, proof of—Public navigable river—  
Burden of proof.*

Where in a suit for a declaration of right to a *khal* and for recovery of possession by eviction of the defendant, the latter asserts that the disputed *khal* is a public navigable river, wherein he has a right to fish, either on the basis of prescription or by immemorial custom, it is necessary to determine, in the first instance, whether it is or is not a public navigable river, and it is for the plaintiff to prove that there was a grant of the bed of the river to the Zemindar at the time of the Permanent Settlement, or that, although the channel was a public navigable river, there was in reality a grant of several fishery in favour of the Zemindar. [p. 780, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Khulna, dated the 7th of May 1919, reversing that of the Munsif, First Court, at Bagerhat, dated the 27th of May 1918.

FACTS appear from the judgment.

Babu Mohendra Nath Roy (with him Babu Peari Mohan Chatterjee) for the Appellants.—The defendants are the appellants. The appeal arises out of a suit for declaration of plaintiff's *patni* right and for recovery of possession and eviction of the defendants. The plaintiff's case is that he is a *patnidar*

(1) 19 W. R. 189.

(2) 2 W. R. 176.

(3) 6 W. R. 147.

(4) 26 Ind Cas. 803; 19 O. W. N. 472.



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under the Government, that the *khal* in dispute belonged to him by virtue of the *patni* settlement from the time of the Permanent Settlement, and that the defendants had no right of fishery therein. The defence was that the defendants had a right to fish by prescription and that the river was a public navigable river. The Court of first instance gave a partial decree. The Court of Appeal below decreed the suit in full. I submit the learned Munsif was right in finding the river to be a public navigable and tidal river. His finding was based on inspection. The lower Appellate Court also seems to have accepted that finding. It does not find that there was any grant by the Government of the bed of the river at the time of the Permanent Settlement. The evidence of such a grant must be clear and conclusive. Refers to *Srinath Roy v. Dinabandhu Sen* (1). The quinquennial papers are inadmissible to prove such grant. The first Court's finding that the plaintiffs had not exclusive user of the fishery and that the public used to fish in the river which was public, navigable and tidal, has not been displaced.

Babu Dwarkanath Chakraborty (with him Babu Frobodh Chandra Chatterjee), for the Respondents.—The appeal is wholly concluded by the findings of fact. The lower Appellate Court has found that the plaintiff had title to fish and that the defendants had no title thereto by prescription or immemorial custom. Refers to *Attorney-General v. Emerson* (2). I submit the defendants have not made out any good case for second appeal.

Babu Mohendranath Roy replied in brief.

## JUDGMENT.

MR. JUSTICE, ACB. C. J.—This is an appeal by the defendants in a suit for declaration of a *patni* right to what is described in the plaint as the disputed Sashikhali *khal* and for recovery of possession on eviction of the defendants.

The plaintiff is *patnidar* of an estate known as Perganna Rangdia, which bears No. 235 on the Revenue Roll of the Jessore Collectorate, and No. 163 on the

Revenue Roll of the Khulna Collectorate. His case is that the disputed *khal* was settled with the Zemindar at the time of the Permanent Settlement and that the defendants have unlawfully exercised a right of fishery therein.

The defendants repudiated the claim and asserted that the disputed *khal* was a public navigable river, wherein they had a right to fish, either on the basis of prescription or by immemorial custom.

The Trial Court found that the river Sashikhali belongs to the plaintiffs as appertaining to the Perganna Rangdia, and made a decree in his favour for exclusive possession of a portion of the disputed stream. Thereupon, an appeal and a cross-appeal were preferred to the Subordinate Judge. The Subordinate Judge has decreed the claim in full. He has devoted a considerable portion of his judgment to the investigation of the question whether the defendants had established their alleged right to fish in the *khal* on the basis of either prescription or immemorial custom. His conclusion is, that the defendants have acquired no such right. This determination, in our opinion, is not liable to be challenged in second appeal. But the decision of the Subordinate Judge upon the question of the alleged title of the plaintiff is defective and cannot be supported.

The Subordinate Judge refers to the decisions in *Hori Das Mal v. Mohamed Jaki* (3) and *Satcowri Ghosh v. Secretary of State for India* (4) as authorities for the proposition that, in certain circumstances, a tidal and navigable river may become private property. But he has not found the nature of the stream in this particular case, which is a matter of vital importance for the determination of the controversy between the parties. If the stream was a public navigable river at the time of the Permanent Settlement, it is extremely improbable, as was pointed out by the Judicial Committee in the case of *Jagadindra Nath Roy v. Secretary of State for India* (5), that its bed could have

(1) 25 Ind. Cas. 467; 42 C. 488; 18 C. W. N. 1217; (1914) M. W. N. 654; 1 L. W. 733; 18 M. L. T. 319; 12 A. L. J. 1193; 29 C. L. J. 385; 16 Bom. L. R. 901; 41 I. A. 221 (P. C.).

(2) (1891) A. C. 649; 61 L. J. Q. B. 79; 65 L. T. 564; 55 J. P. 709.

(3) 11 C. 434 (F. B.); 5 Ind. Dec. (N. S.) 1049.

(4) 22 C. 252; 11 Ind. Dec. (N. S.) 170.

(5) 30 C. 291 (P. C.); 30 I. A. 44; 7 C. W. N. 193; 5 Bom. L. R. 1.

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been settled with the Zamindar, as part and parcel of his grant. On the other hand, although the bed may not have been so settled, it is conceivable that a several fishery of a public navigable river which passed through the ambit of his Zamindari might have been granted to him. It is consequently necessary to determine, in the first instance, the nature of the stream, whether it was or was not a public navigable river. If the question is answered in the negative, the plaintiff may succeed by proof of a grant of a several fishery. As was pointed out by the Judicial Committee in the case of *Srinath Roy v. Dinabandhu Sen* (1), such a grant of several fishery need not be established by a direct proof of the grant. The judgment delivered by Lord Sumner in the case just mentioned describes the various kinds of evidence which may be adduced in proof of an original grant of this description. The decision in *Attorney-General v. Emerson* (2) points to the same conclusion; Lord Herschell observed in that case that "the possession of a right of several fishery is evidence of the ownership of the soil over which it is exercised." It has undoubtedly been laid down in more than one case that the ownership of a several fishery raises a presumption that the freehold is in the grantee of the several fishery. And Baron Parke, in delivering the judgment of the Exchequer Chamber in *Holford v. Bailey* (6), said, "a several fishery is, no doubt, *prima facie*, to be assumed to be in the soil of the defendant." It is consequently necessary for the plaintiff to prove either that there was a grant of the bed itself of the Zamindari at the time of the Permanent Settlement (which would be consistent with the theory that the disputed channel was not a public navigable river but a *khal* as alleged by the plaintiff) or that, although the channel was a public navigable river, there was in reality a grant of a several fishery in favour of the Zamindar. On this point, evidence furnished by the *thak* map and the quinquennial papers will be of great value. Their weight must be determined along with such evidence as there may be on the record of exclusive

user of a several fishery by the plaintiff or his predecessor. The respondents have urged that the case is concluded by the findings contained in the judgment of the Subordinate Judge on this point, but we are unable to accept that contention as well founded. On the other hand, there are expressions in the judgment of the Subordinate Judge which indicate that he did not realise the distinction between the different points of view from which the case should be approached.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remitted to him to be re-heard in accordance with law. The question of the alleged right of the defendants will not be open for re-consideration, it must be taken to have been finally decided against them; the only point for consideration will be the title of the plaintiff.

Costs will abide the result.

FLETCHER, J.—I agree.

Appeal allowed;  
Case remanded.

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1501 of 1919.

September 20, 1920.

Present:—Justice Sir William Ayling, Kt., and  
Mr. Justice Odgers.

R. SINGARIAH CHETTY—DEFENDANT  
No. 3—APPELLANT

versus

CHINNABBI alias MUNI REDDI AND  
OTHERS—PLAINTIFFS AND DEFENDANTS Nos. 2, 4  
AND 5—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63  
—Attachment—Claim based on mortgage disallowed—  
Suit for declaration of right dismissed—Subsequent suit  
to enforce mortgage, whether maintainable.

Where property is attached in execution of a decree, and a claim to the property by a third party based on a mortgage is disallowed, and a suit by him for declaration of his mortgage-rights and that these would not be affected by the attachment is dismissed, the order disallowing his claim is conclusive under Order XXI, rule 48, of the Civil Procedure Code, and he is debarred from re-agitating his rights by means of a regular suit to enforce the mortgage. [p. 782, col. 1; p. 788, col. 1.]

(6) (1849) 13 Q. B. D. 426 at p. 434; 18 L. J. Q. B. 109; 18 Jur. 278; 116 E. R. 1325; 78 R. R. 432.

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Second appeal against the decree of the Court of the Subordinate Judge, North Arcot, in Appeal Suit No. 153 of 1917, (Appeal Suit No. 364 of 1917, on the file of the District Court, North Arcot), preferred against the decree of the Court of the District Munsif, Tirupathi, in Original Suit No. 198 of 1916.

FACTS appear from the judgment.

Mr. O. V. Ananthakrishna Iyer, for the Appellant.—The present suit of the plaintiff is not maintainable. The plaintiff put in a claim based on this mortgage when fifth defendant attached the hypotheca before judgment in Original Suit No. 872 of 1913. The claim having failed, he filed Original Suit No. 919 of 1914 to set aside the order on the claim-petition which was also dismissed owing to plaintiff's failure to comply with an order as to payment of costs. The effect is that the order on the claim-petition has become conclusive within the meaning of Order XXI, rule 63, Civil Procedure Code. Plaintiff cannot now, under the guise of enforcing his mortgage, re-agitate the same matter in contravention of the provisions of Order XXI, rule 63. *Velu Padayachy v. Arumugamy Pillai* (1) and *Ramasami Chetti v. Atigiri Chetti* (2). What was practically decided in the order on the claim-petition was the fifth defendant's right to treat the hypotheca as the property of 1st and 2nd defendants' was established in opposition to the plaintiff's right. That has been conclusively decided. The plaintiff's rights cease to exist.

Mr. O. Padmanabha Iyengar (with him Messrs. T. K. Srinivas Thathachariar and N. O. Vijayaraghava Iyengar, for the Respondents.—The claim order did not go beyond the proceedings in which it was passed. It is not conclusive against the auction-purchaser in another proceeding. The order does not affect the plaintiff's right to enforce his mortgage. See *Umash Chunder Roy v. Rui Bullubh Sen* (3), *Ibrahimhai v. Kabulabhai* (4) and *Kamini Kant Roy v. Ram Nath Chuckerbutty* (5).

#### JUDGMENT.

AYLING, J.—This appeal arises out of a (1) 56 Ind. Cas. 481; 33 M. L. J. 397; 11 L. W. 343; 27 M. L. T. 312.

(2) 27 Ind. Cas. 800.

(3) 5 O. 279; 10 O. L. R. 204; 4 Ind. Dec. (N. S.) 178.

(4) 13 B. 72; 7 Ind. Dec. (N. S.) 49.

(5) 21 O. 265; 10 Ind. Dec. (N. S.) 809.

suit on a mortgage-bond executed by the guardian of defendants Nos. 1 and 2 in favour of plaintiffs. Before its institution, the mortgaged property had been brought to sale by fifth defendant in execution of a decree obtained by him against defendants Nos. 1 and 2 (Original Suit No. 69 of 1914 on the file of the District Munsif of Tirupati) and purchased by defendants Nos. 3 and 4. The latter opposed the suit alleging (1) that the suit mortgage was only a fictitious document without consideration, and (2) that the suit was otherwise not maintainable. The first defence, though successful in the Court of first instance, was found against by the Subordinate Judge in appeal; and we are not now concerned with it. The Subordinate Judge, however, in giving a decree for plaintiffs omitted to consider the objections to the maintainability of the suit; and it is with these, which have been pressed on us by Mr. Ananthakrishna Aiyar on behalf of third defendant, the present appellant, that we have to deal.

The main objection is based on Order XXI, rule 63, Civil Procedure Code, and was considered and rejected by the District Munsif on issue No. 2.

The facts are these. Prior to Original Suit No. 69 of 1914, fifth defendant had instituted another suit against defendants Nos. 1 and 2, Original Suit No. 872 of 1913, and had effected an attachment before judgment of the suit property under Order XXXVIII, rule 6. Plaintiffs preferred a claim based on their mortgage. This was dismissed. Thereupon, plaintiffs filed a suit, Original Suit No. 919 of 1914, for a declaration of their mortgage-rights and for a declaration that these would not be affected by the attachment.

This suit (Original Suit No. 919 of 1914) was eventually dismissed. The plaintiffs were first granted leave to withdraw it conditionally on payment of the costs of defendants; but, as they failed to do this within the time allowed, the suit stood dismissed.

Appellants contend that on the dismissal of this suit, the order on the claim petition became conclusive under Order XXI, rule 63; and that the result is to preclude plaintiffs from enforcing their mortgage



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against the suit, property under any circumstance whatever.

It has been held by a Full Bench of this Court in *Mallikharjuna Prasada Naidu v. Matlapalli Virayya* (6) that Order XXI, rule 63, applies to orders on the claims preferred to property attached before judgment, and if appellant had purchased the property in execution of the decree in Original Suit No. 872 of 1913, there could be no room for doubt.

This is, of course, a suit to enforce the mortgage, not to contest the order on the claim petition under Order XXI, rule 63. But that makes no difference. If plaintiffs are concluded from setting up their mortgage in connection with any proceedings taken against the property in pursuance of Original Suit No. 872 of 1913 and this effect, at least, must be given to the word 'conclusive' in rule 63 then it would be ridiculous to contend that they might, nevertheless, enforce it against a purchaser of the property in execution of the decree. *Vide Sadasiva Aiyar, J., in Velu Padayachi v. Arumugam Pillai* (7). Mr. Padmanabha Aiyangar, however, for plaintiffs, seems to distinguish the case on the ground that appellant purchased in execution of another decree altogether, and that the order on the claim-petition is only conclusive as regards the parties to the same and for the purpose of the suit or execution in connection with which the claim was preferred. The correctness of this argument, of course, depends on the meaning to be attached to the word 'conclusive' in rule 63 of Order XXI.

On behalf of the respondents we are referred to *Umesh Chunder Roy v. Raj Bullubh Sen* (3), *Ibrahimhai v. Kabulabhai* (4) and *Kamini Kant Roy v. Ram Nath Chuckerbutty* (5). The first of these certainly appears to be authority in respondent's favour. The learned Judges say "the finding of the Court in the execution department that the sale was invalid, only meant that the sale was invalid as against the judgment-creditor, and as against any purchaser who might purchase at a sale held in execution following that attachment." The other two cases have no direct bearing on the point. In *Kamini Kant Roy v. Ram Nath Chuckerbutty* (5) the learned Judges

(6) 47 Ind. Cas. 1000; 41 M. 849, 24 M. L. T. 134; 35 M. L. J. 231; 8 L. W. 197; (1918) M. W. N. 682.

only consider sections 13 and 373 of the old Civil Procedure Code. Not section 283, which corresponds to Order XXI, rule 63. In the Bombay case the decision turned on the necessity of bringing a suit to contest a claim-order on an attachment which was raised. So also in a case of this Court [*Gollanipalli Subbayya v. Sankara Venkataratnam* (7)]. In both these cases the learned Judges may be said to discuss the matter as if the effect of the claim-order did not go beyond the proceedings in connection with which it was passed, but the dominating factor of their decision is the release or withdrawal of the attachment.

On the other hand, we are referred to a decision of this Court *Ramasamy Chetty v. Aligiri Chetti* (2), which is just as strong an expression of opinion as *Umesh Chunder Roy v. Raj Bullubh Sen* (3), but the other way. The learned Judges say:—

"The statutory suit under Order XXI, rule 63, is to establish the right which the attaching plaintiff claims in the property in dispute. This, in our opinion, is the right to attach the property in question as the property of the defendant whenever it may be his interest to do so and the effect of not suing would be to debar him from claiming to attach such property at any future time."

As far as the cases go, we have, therefore, practically a decision of our own Court against one of the Calcutta High Court; and we should by preference follow the former. I think, moreover, that a consideration of the rule with reference to the facts of the present case leads to the same conclusion. The right in litigation in the claim petition and in Original Suit No. 919 of 1914 was the right of fifth defendant to treat this suit-property as the property of defendants Nos. 1 and 2 in opposition to the mortgage-right therein set up by plaintiffs. The dismissal of plaintiffs' claim-petition, followed by the dismissal of their suit, Original Suit No. 919 of 1914, had the effect of conclusively settling the question as between plaintiffs and 5th defendant. It seems to me unreasonable to suggest that the result was only conclusive as regards the particular suit (Original Suit No. 872 of 1913) out of

(7) 42 Ind. Cas. 683; (1917) M. W. N. 851; 22 M. L. T. 496.

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which the decision arose, and that it was open to the plaintiffs, in spite of this decision, again to contest the same person's right of proceeding against the same property in another suit. If they could not do so, then neither could they seek to enforce their mortgage against an auction-purchaser in the second suit. For, as Sadasiva Aiyar, J., has so clearly pointed out in the case already quoted (*Velu Padayachi v. Arumugam Pillai* (1)), the one is a necessary consequence of the other. "The conclusive establishment of the decree-holder's right to bring the property to sale free from the claimant's alleged encumbrance involves the right of the purchaser at the sale to get a title to the property free from such encumbrance".

I would, therefore, hold that the order on plaintiffs' claim-petition is conclusive and that the suit-mortgage is not enforceable against the items of property dealt with therein. The decree of the lower Appellate Court should be modified accordingly. Plaintiffs should pay the costs of defendants Nos. 3, 4 and 5 throughout.

ODGERS, J.—The facts are fully set out in the judgment of my learned brother, and I agree that Mr. Ananthakrishna Aiyar's contention that the rights of the plaintiffs are now gone, must prevail by the terms of Order XXI, rule 63, Civil Procedure Code. The effect of this rule, combined with the fact that the Suit No. 9.9 of 1914 was dismissed as the plaintiffs did not pay the costs, will, in my opinion, debar the plaintiffs from re-agitating their rights again even though the proceeding be, as here, a regular suit on the mortgage. In other words, once the order became conclusive in the words of the rule, a suit on the mortgage is barred at any time. It is, however, strenuously contended by Mr. Padmanabha Aiyangar for the plaintiffs that the order is not conclusive against the auction-purchaser in another proceeding, and he relies on *Umash Chunder Roy v. Raj Bullabh Sen* (3). There a claim was rejected in attachment in execution of a decree for rent; the judgment-debtor paid off the decree and no sale was held. The effect of this was that the attachment ceased and any rights of the claimant became valid and she had no need to bring a suit to establish them. The learned Judges based

their decision on the fact that the decree was paid off and in fact differed on that ground from the lower Court. Were it otherwise, the case may be said to be conclusive only as to the proceedings to which it relates. Reference may here be made to the passage in the judgment of Sadasiva Aiyar, J., in *Velu Padayachi v. Arumugam Pillai* (1). He says, at page 402\*: "The auction-purchaser is entitled to take advantage of the order against the claimant in such a case" (if it is not set aside by a suit within one year) not because the purchaser is the representative of the decree-holder but because the order which established the right of the decree-holder to bring the property to sale against the claim of the claimant cannot be given effect to otherwise and was clearly intended by the Legislature to have the effect of precluding the claimant from putting forward his claim in opposition to the auction-purchaser at the sale held in pursuance of the order against the claimant." In the case reported as *Ramasamy Chetty v. Aligiri Chetty* (2) it is clearly laid down by Wallis, C. J. and Seshagiri Aiyar, J., that the effect of omitting to bring a suit is to bar the remedy. That was a case of attachment before judgment and the learned Judges say: "The statutory suit under Order XXI, rule 63, is to establish the right which the attaching plaintiff claims in the property in dispute. This, in our opinion, is the right to attach the property in question as the property of the defendant, whenever it may be his interest to do so, and the effect of not suing would be to debar him from claiming to attach such property at any future time. The fact that the attachment effected by him would, if it had not been raised previously, have come to an end by the dismissal of the suit does not affect his right to sue under Order XXI, rule 63."

I agree with my learned brother in preferring to follow the Madras decision, especially having regard to the grounds on which, in my opinion, the Calcutta decision was based. It is not necessary to discuss the point taken as to limitation and I, therefore, agree with the order proposed.

M. C. P.

*Appeal allowed ;  
Decree modified.*

KANDHAI PANDE v. DACHCHINA MISIRAIN.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 646 OF 1918.

January 25, 1921.

Present:—Mr. Justice Tudball and  
Mr. Justice Lindray.

KANDHAI PANDE—DEFENDANT.  
APPELLANT

versus

Musammât DACHCHINA MISIRAIN AND

ANOTHER—PLAINTIFFS-RESPONDENTS.

*Specific Relief Act (I of 1877), s. 42—Hindu Law—Widow, transfer by—Declaration, suit for, by transferee against reversioner, maintainability of.*

A transfer by a Hindu widow of her rights, being a valid transfer, the transferee is entitled to a decree as against the reversioners declaring his right to obtain possession as owner of the property transferred so long as the widow remains alive.

Second appeal from the decision of the District Judge, Gorakhpur, dated the 27th of February 1918.

Mr. Jang Bahadur Lal, for the Appellant.

Dr. S. N. Sen, for the Respondents.

#### JUDGMENT.

This is a defendant's appeal. The two plaintiffs are the daughters of one Jagdeo Pande who died leaving two widows, Musammât Phul Kunwar and Musammât Hansrani. After his death these two widows on the 2nd of September 1913, made a gift of part of their estate in favour of the two daughters of Jagdeo conditional on the two daughters agreeing to support them, the two widows. There was a condition in the gift that if the widows were not supported they would have a right to set aside the gift and to take possession of the gifted property. The two daughters applied to the Revenue Court for mutation of their names. They were opposed by Mandeo, the first cousin of Jagdeo Pande, and the mutation was refused. Thereupon the plaintiffs brought a suit out of which this appeal has arisen for a declaration that they were the owners in possession of the shares specified in the deed of gift. Mandeo resisted the suit. He pleaded that Jagdeo had left a son Jamna who died two years after him, that the deed of gift was a conditional gift, that there had been no total surrender of the estate and that, therefore, the title to the estate had not passed to the donees. He also pleaded that section 42 of the Specific Relief Act was

a bar to the suit as brought. The Court of first instance granted a modified declaration. It held that Jagdeo was entirely separate from Mandeo, also that the gift was not a gift of the total estate and that the gift was also conditional. But it held that the plaintiffs were entitled to possession of the estate during the life time of the widows. The widows were made *pro forma* defendants to the suit but the real defendant was Mandeo alone. He has since died and he is now represented by the present appellant, Kandhai Pande. On appeal the decree was upheld by the District Judge. Three points have been taken before us:

(1) That section 42 of the Specific Relief Act is a bar to the suit,

(2) That there has been no total surrender of the estate and that, therefore, the plaintiffs are not entitled to a decree at all, and

(3) That the gift was conditional, void and not binding.

So far as section 42 of the Specific Relief Act is concerned, Mandeo, it is clear, was the only opposing defendant in the suit and as against Mandeo the plaintiffs could only obtain a declaration. In these circumstances, they could have asked for no further relief as against him. It is clear, therefore, that there is no force in this plea. So far as the other points are concerned, the declaration granted by the Courts below is a declaration that the plaintiffs are entitled to possession of the property gifted so long as the two widows remain alive. Whatever the nature of the gift may be, it is quite clear that the widows at least were entitled to part with their own rights as such widows, and Mandeo had no ground whatsoever to take any exception to such a transfer. The widows do not oppose the plaintiffs' claim and Mandeo is not in a position to contest the declaration that has been granted. The transfer by the widows of their rights as such was a valid transfer. It is clear, therefore, that there is no force in this appeal. We dismiss it with costs including fees on the higher scale.

*Appeal dismissed.*



RAMLAL V. EMPEROR.

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 128 OF 1920.

September 7, 1920.

*Present*:—Mr. Batten, Offg. J. C.

RAMLAL—ACCUSED—PETITIONER

*versus*

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), ss. 28, 260—Counterfeiting stamps, what amounts to.*

Accused, a stamp vendor under the Forest Account Rules, altered some used stamps so as to resemble genuine un-used stamps, and affixed them to licenses issued to licensees for grazing cattle:

*Held*, that the alteration of the stamps amounted to counterfeiting within the meaning of section 28 of the Penal Code, and that the accused was guilty of an offence under section 260 of that Code. [p. 786, col. 1.]

Application for revision of the order of the Sub-Judge, Sangor, dated the 31st May 1920.

**JUDGMENT.**—This is an application in revision made from Jail. No one appears in this Court in support of the application, though the revision application was drawn up by a legal practitioner. The applicant was convicted by the Sub-Divisional Magistrate, Sangor, under section 260, Indian Penal Code, and the conviction, and sentence of rigorous imprisonment for one year, and a fine of Rs. 200 or in default further rigorous imprisonment for six months, have been upheld in appeal by the Sessions Judge. The charge against the applicant was that he used as a genuine stamp, namely, a forest stamp of the value of Rs. 2, on Exhibit P VII and six stamps of the value of Rs. 6-14 on Exhibit P-VI, knowing them to be counterfeit of stamps used by Government for the purpose of Forest Revenue. The fraud disclosed by the evidence is a most ingenious one.

The applicant used to issue licenses for cattle grazing in triplicate, in form given in Appendix C to Appendix XIV of the Central Provinces Forest Manual. These licenses are paid for by stamps affixed to the licenses, and the applicant was the licensed stamp-vendor under the system of forest stamps described in the Forest Account Rules. He was licensed vendor of the third class; that is to say, he purchased supplies of stamps from the Treasury for cash and received a discount on his purchases of one-anna in the rupee. The stamps, like the licenses, are in triplicate, and are pasted on the back of the licenses, so

that the first part of the stamp is affixed to the third part of the license, the second portion of the stamp to the second part of the license and the third part of the stamp to the first part of the license. After the stamps are affixed the vendor tears off the second and third parts of the license bearing the first and second parts of the stamp and gives them to the purchaser, keeping the first part of the license with the third part of the stamp in the book of counterfoils which is periodically submitted to the Range Officer. The middle part is recovered, as far as possible, from the licensee by the Forest Checking Officer, while the licensee retains the third part bearing the first part of the stamp. A licensee will not pay the fees unless he sees that the proper number of stamps of the right value are issued to him on his license and the stamps are distinctively marked so as to be easily recognised by illiterate persons, so it would seem as if fraud were impossible. But the applicant devised a scheme with the connivance of some Forest Checking Officer. The Forest Checking Officer necessarily gets hold of a number of middle part licenses and stamps. As the middle part stamps are almost identical in appearance with the first part issued, the applicant, according to the prosecution case, got hold from some Checking Officer of some used middle part stamps and affixed them to the licenses issued to licensees, receiving payment in full as if the stamps had been new. In this way the applicant received from the licensees money for stamps for which he had paid nothing to Government, or rather he sold the stamps twice and paid for them only once.

The evidence shows that license, Exhibit P-6, was issued to one Ramlal Teli. Exhibit P-6 bears eight stamps of the aggregate value of Rs. 9 covering sixteen heads of cattle. The counterfoil, Exhibit P-9, bears only two stamps of the aggregate value of Rs. 2-2 covering eight heads of cattle. Two of the stamps on Exhibit P-6 are genuine, first part stamps corresponding with the third part stamps on Exhibit P-9. The remaining six stamps on Exhibit P-6 are middle part stamps, which should not have been affixed to the third part of the license issued to the licensee. Of these six stamps three are in their original condition, but three have been altered; the printed boundary line which is then in the middle part stamps has been

## GANGA RAM v. EMPEROR.

thickened with ink so as to resemble the thick printed boundary line of a first part stamp.

Similarly, Exhibit P-7 is the license, third part, issued to one Darai Teli. It bears four stamps of the aggregate value of Rs. 2.13 covering seven heads of cattle. Its counter-foil, Exhibit P-10, bears only two stamps of the aggregate value of 13 annas, covering five heads of cattle. Two stamps on Exhibit P-7 are genuine, corresponding with those on Exhibit P-10. The extra two stamps on Exhibit P-7 are middle part stamps which have been altered to resemble first part stamps by thickening the boundary line with ink.

In the applicant's possession were found a number of old middle part stamps. The applicant denied this, but it is fully proved, as are all the other facts establishing the case against the applicant.

Not only have the two extra stamps on Exhibit P-7 been altered with ink, and three of the six extra stamps on Exhibit P-6 been similarly altered, but all eight extra stamps have been cut down to the size of first part stamps, the middle part stamps being longer than first and third part stamps. This is not easy to follow from a description, but a glance at Exhibit P-13 which contains a complete stamp in all three parts will make it plain. The eight extra stamps on Exhibit P-6 and Exhibit P-7 were thus counterfeited within the meaning of section 28, Indian Penal Code, since they were middle part stamps altered to resemble first part stamps in order to deceive the licensees, who were in fact deceived. They were sold to the licensees as genuine first part stamps, though they were in reality second part stamps altered to resemble first part stamps. Under section 28, Indian Penal Code, the imitation need not be exact. The applicant's conduct amounts to an offence under section 260, Indian Penal Code, though he might have been charged and convicted under other sections of the Penal Code. This disposes of the 6th and main ground of the revision application which is to the effect that, as the stamps used were genuine Government stamps they were not counterfeited; as the Sessions Judge says, the facts are quite different from those in *Queen v. Shuroop Ohunder Dass* (1).

(1) 2 W. R. 85, Cr.

The remaining grounds of the revision application do not call for detailed notice. The alleged illegality of the search by the Range Officer has been adequately discussed by the Sessions Judge, and I do not find that any evidence has been illegally admitted. The application is dismissed.

*Application dismissed.*

LAHORE HIGH COURT.  
CRIMINAL CASE No. 697 of 1920.  
February 8, 1921.

Present:—Mr. Justice Scott-Smith and  
Mr. Justice Leslie-Jones.

GANGA RAM AND ANOTHER—CONVICTS—  
APPELLANTS  
*versus*  
CROWN—RESPONDENT.

*Confessions by co-accused, whether corroborate each other.*

The confession of one co-accused cannot be said to be corroborated by the confession of another accused as against an accused person who has not confessed at all; but the confession of one co-accused may furnish the corroboration of the confession of another accused as against the latter and vice versa [p 789, col 1.]

*Gangapa Kardepa v. Emperor*, 2 Ind. Cas. 878, 83 B. 156; 15 Bom. L. R. 975; 14 Cr. L. J. 625, distinguished.

Appeal from the order of the Sessions Judge, Hoshiarpur, dated the 7th September 1920.

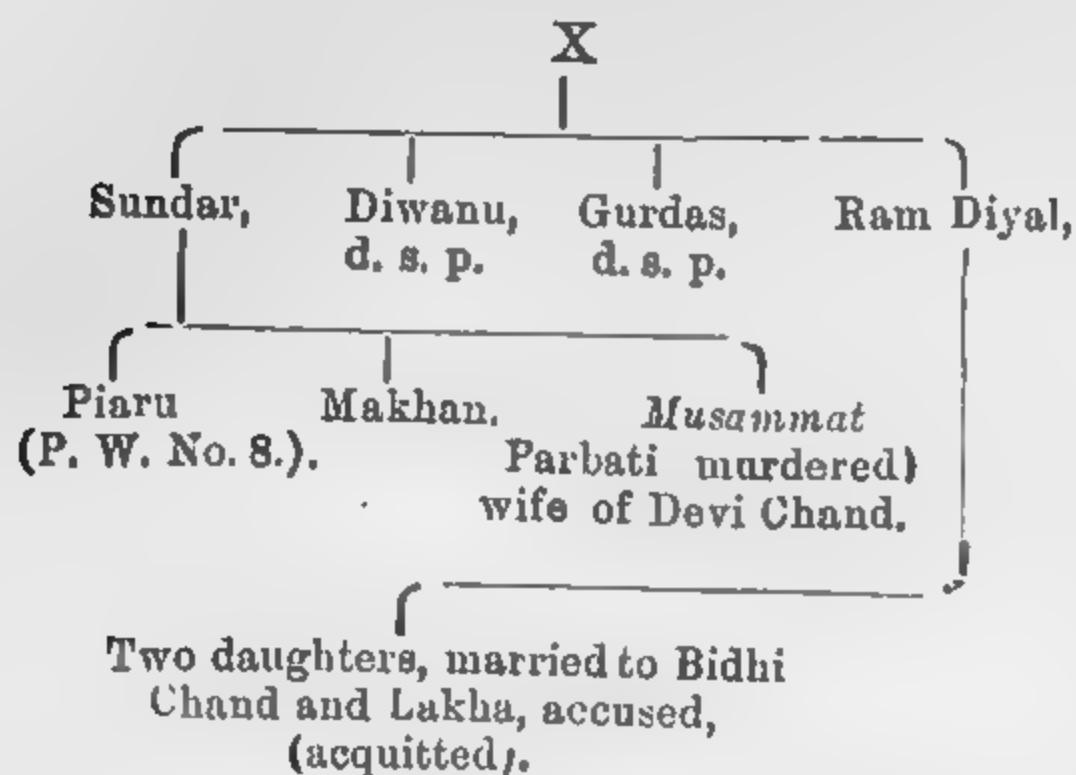
Lala Mehr Chand Mahajan, for the Appellants.

Mr. Ram Lal, for the Government Advocate, for the Respondent.

JUDGMENT.—Ganga Ram and his son, Dammun, have been convicted by the Sessions Judge of Hoshiarpur of the murder of Musammatt Parbati, wife of Devi Chand, at village Chatwal, on the night between the 16th, 17th of July 1920, and have been sentenced to transportation for life. They have filed a joint appeal to this Court through Counsel.

## GANGA RAM v. EMPEROR.

The following pedigree-table will be of use for the proper understanding of the facts of the case.



Sundar and his brothers having died, the whole of the land owned by them has become the property of Piarn and Makhan both of whom were employed in the army. During their absence, the land was managed by Lakha, the husband of their first cousin. Piarn has given evidence to the effect that Bidhi Chand, who is married to another first cousin of his, wrote and told him that Lakha was wasting his property. Upon this Piarn secured his discharge from his regiment, came to his village and sent Lakha away to his own home. Bidhi Chand, however, remained in the village but a dispute arose between him and Piarn which resulted in Bidhi Chand also leaving Piarn's house. Lakha and Bidhi Chand are said to have resented the fact that they had lost control of the land. Ganga Ram was a tenant of the greater part of Piarn's land and it is in evidence that, in the month of *Jeth* before the murder, Piarn told Ganga Ram that he intended to cultivate the land in future himself and that Ganga Ram's tenancy was, therefore, to come to an end. There was admittedly no formal ejection proceeding, and, according to Piarn, Ganga Ram made no protest at his ejection, but merely said that he would see how long Piarn's new arrangement for the cultivation of his land would continue. Part of the new arrangement was that *Musammât Parbati*, whose husband was in the Forest Department, came from the village of Guranwara and began to keep house for Piarn and to help him generally in the management of his affairs.

The theory for the prosecution is that, in consequence of the resentment felt by them

at losing control of Piarn's land, *Musammât Parbati* was murdered by Ganga Ram, his son, Dammun, Bidhi Chand and Lakha. On the night of the murder Piarn was, according to his own statement, which is not corroborated by any other evidence, absent from home, having gone to Guranwara. Though his statement that he was absent is uncorroborated, there is no evidence to contradict it and we see no reason for not accepting it. Kithu (P. W. No. 15) a boy of 12 years of age, is said to have been the first person who discovered that *Musammât Parbati* had been murdered. He says he told *Musammât Dhalli*, a neighbour, who told him to keep quiet and he accordingly did not inform anyone of what he had found. The next person, so far as is known, to discover the murder was Piarn himself on his return to the village at about 9 or 10 A. M. (one *pahar* of the day had passed, according to his own statement). He informed the *lambardars* and a report was made at the Police station in which it was not stated that any person in particular was suspected.

On the 20th of July Ganga Ram made a confession which was duly recorded by Raja Gajindar Singh, Honorary Magistrate, whose residence is two miles from the scene of the occurrence. On the 21st of July Dammun's confession was also recorded by the same Magistrate. On the 25th of July the case was taken up by the Committing Magistrate who, after recording most of the evidence for the prosecution, examined Ganga Ram who retracted his confession, alleging ill-treatment on the part of the Police. After Ganga Ram had been examined Dammun was also examined by the Committing Magistrate and adhered to the confession made by him to the Honorary Magistrate. There was, however, one discrepancy between the confession and the subsequent statement which has been referred to in detail by the learned Sessions Judge. In the Court of Session, Dammun retracted his confession and the reason he gave for making the statement which he did before the Committing Magistrate was that the Public Prosecutor had told him that, unless he repeated the statement which he made to the Honorary Magistrate, he would be made over to the Police constables to be beaten to death. This explanation the learned Sessions Judge



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considered to be quite absurd and we entirely agree with his view that the Public Prosecutor would never have made use of such a threat to a prisoner, and also that he would not have held out any inducement or hope of pardon in order to make an accused person confess. The confessions implicated not only the two present appellants but also Bidhi Chand and Lakha. The two latter have never confessed and have all along strenuously protested their innocence, and as there was no sufficient corroboration of the retracted confessions as against them, the Sessions Judge acquitted them.

At the time of the murder of *Musammât Parbati*, her 2½ year old female child was sleeping with her. She was found next morning in the house of Ganga Ram, appellant, which is at a distance of more than 100 *karams* from the scene of the murder. On the road between the two places there are two stiles and it is admitted that the child could not have crossed these stiles without assistance. In the confession it was stated that Ganga Ram took the child away to his own house immediately after the murder and there is evidence on the record to the effect that she was seen in the court-yard of Ganga Ram's house early on the morning after the murder. *Musammât Devko* (P. W. No. 12) says that she saw the child before sunrise wearing what she describes as an *ulta kurta*. This means that the child was wearing her *kurta* either inside out or back to front. The matter is of importance in view of the fact that Ganga Ram in his confession says that at the time of the murder Dammun gagged *Musammât Parbati* by thrusting the child's *kurta* into her mouth. Some stains of blood were found upon this *kurta* and it is probable that it got these stains at the time of the murder. It is also very improbable that *Musammât Parbati* put the child's *kurta* on her inside out or back to front, and the evidence of *Musammât Devko* makes it highly probable that it was one of the murderers who put the child's *kurta* on her after the murder and took her from that place to the house of Ganga Ram. This point has not been noticed by the learned Sessions Judge, but, in our opinion, it is important corroboration of Ganga Ram's confession.

Counsel for the appellants has commented upon certain discrepancies between the con-

fessions of Ganga Ram and Dammun. The first of these is that, whereas Ganga Ram says that his son gagged *Musammât Parbati* with the child's *kurta*, Dammun himself says that he used his own *chaddar* for this purpose. In our opinion, this discrepancy is not of much importance. The murderers must have been in a great hurry and must have been much excited at the time of the murder and it is quite possible that Dammun may have forgotten with what article he gagged *Musammât Parbati*, or that Ganga Ram may have made a mistake as to what article was used for this purpose. The story of Piar Singh (P. W. No. 2) and the statement made by him to the Police which led to the discovery of the bangles and bracelets of the murdered woman have been fully detailed in the judgment of the Court below and we do not propose to discuss it. We agree with the learned Sessions Judge in his view that Piar Singh, who is the son of Ganga Ram, appellant, and the brother of Dammun, has made a false statement in order to help the appellants. We see no reason to doubt that it was he who produced the murdered woman's ornaments; but he may, however, easily have learnt where they were from either of the appellants, or it is possible that he may have got them back from Talsi to whom they are said to have been given by Dammun and have himself hidden them.

The second discrepancy in the confession commented on by Counsel is connected with these ornaments. In the confession before the Honorary Magistrate Dammun said that he made these ornaments over, just as they were, to Talsi; whereas in his statement before the Committing Magistrate he said that he broke them first before handing him over. It is impossible to say why Dammun changed his statement in this respect. The ornaments when found were not broken and Counsel urges that this fact contradicts Dammun's statement before the Committing Magistrate. No doubt, it does, but it does not contradict his original confession; for some reason or other, he thought it necessary to introduce this change. We are unable to say why he did so, and we agree with the learned Sessions Judge that it is not a sufficient reason for rejecting his confession.

The next point urged was that Ganga Ram gave no details as to how or where the

## BIHARI ADRAKI v. EMPEROR.

murderers met. He proceeded at once to state how the murder was committed, whereas Dammun does give such details. Ganga Ram's statement was recorded first and that of Dammun one day later. Ganga Ram was probably allowed to make his confession in his own words, whereas it may have been thought necessary to get further details on the following day when that of Dammun was recorded. The omission of these details by Ganga Ram does not amount to a discrepancy.

The Sessions Judge has referred to the confession of one of the accused as corroborating that of the other. In connection with this, Counsel for the appellants has referred to *Gangapri Kardepi v. Emperor* (1) wherein it was held that the confession of one co-accused could not be said to be corroborated by the confession of another co-accused. In that case, however, there were eleven accused, seven of whom confessed, each one implicating himself and all the rest. These seven men were convicted on their own confessions, and the question which arose was, whether the remaining four accused who had not confessed could be convicted solely on the confessions of their co-accused when they were not corroborated by any independent evidence. It was held that, as against the persons who did not confess, the confession of one of their co-accused could not be said to be corroborated by the confessions of others. The facts here are different, for here we have both the accused confessing, and in such circumstances we see no reason why it should not be said that the confession of one of them corroborates the confession of the other.

After the appellants were examined by the Committing Magistrate on the 28th of July, there were two further hearings before him, one on the 17th of August and another on the 26th of August, but on neither of those occasions did Dammun, though he appears to have been represented by Counsel, retract his confession. Under these circumstances, we agree with the learned Sessions Judge that there are no reasons for holding that his confession was other than a voluntary one. As regards independent corroboration of the confessions, we do not think it can be

said that there is any except the evidence as to the child's presence in Ganga Ram's house on the morning after the murder, but the corroboration furnished by this evidence is, in our opinion, extremely important and we hold that it is quite sufficient to support the convictions.

We accordingly dismiss the appeal.

*Appeal dismissed.*

## PATNA HIGH COURT.

CRIMINAL APPEAL No. 204 of 1920.

January 11, 1921.

*Present:*—Mr. Justice Adami and  
Mr. Justice Das.

BIHARI ADRAKI—APPELLANT

*versus*

EMPEROR—RESPONDENT.

*Confession, retracted, value of—Conviction, legality of.*

Although a retracted confession is always open to some suspicion, yet if the Court is satisfied that it was voluntarily made and is true, it is bound, in the absence of coercion by the Police, to act on that belief so far as the person making it is concerned. [p 790, cols. 1 & 2.]

Criminal appeal against the order of the Sessions Judge, Gaya, dated the 2nd September 1920, convicting the accused and sentencing him to transportation for life.

Mr. Akbari, for the Appellant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The appellant Behari Adraki has been convicted by the Sessions Judge of Gaya under section 302, read with section 149, and sentenced to transportation for life.

\* \* \* \* \*

The conviction of Behari has been based on his retracted confession and on two pieces of circumstantial evidence which the learned Sessions Judge accepts, namely, that Behari was seen at a well near the place where the body was buried at about midnight, and that he returned to his house after midnight, and was displeased when asked where he had been. Neither of these pieces of evidence can be said to directly corroborate the confession, for there is no mention in the confession either that

(1) 21 Ind. Cas. 673; 38 B. 156; 15 Bom. L. R. 975; 14 Cr. L. J. 625.

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Behari went to the well to get water or that he returned home after it, but they are no doubt circumstantial evidence supporting the likelihood of the confession being true.

There is nothing to show that the confession was made otherwise than voluntarily, as shown by the Sessions Judge. The appellant failed to show that there was any coercion employed by the Police or any one else, or that there was any irregularity in recording the confession. The motive for the murder is well proved, and the confession makes out that the appellant took an equal share with all the rest in causing the death of Ragho, he did not attempt to minimize the part he took in any way.

It is contended that Jagan was named as an assailant out of enmity because Jagan had named the appellant as one of the murderers; even if this is the case, the appellant still stated that he himself was one of the murderers, as stated by Jagan.

A confession made and retracted must always be open to some suspicion. *Deputy Legal Remembrancer on behalf of the Government of Bengal v. Karun Baiyobi* (1), *Reg. v. Thompson* (2) but it is sufficient for a conviction if the Court is satisfied that it was voluntarily made and true. *Queen v. Sreemutty Mongola* (3), *Queen v. Bhuttun Rujurun* (4), *Queen v. Musammatt Jema* (5), *Queen Empress v. Gharya* (6), *Queen Empress v. Maiku Lal* (7), *Queen Empress v. Raman* (8), *Queen Empress v. Gangia* (9).

When the appellant asserted that the confession was due to Police influence the learned Sessions Judge made careful inquiry and found that there was no such influence or coercion.

In *Queen Empress v. Maiku Lal* (7) it was decided that a retracted confession should not necessarily be rejected if there

is no evidence on record to support the confession.

The credibility of such confession in each case is a matter for the Court to decide according to the circumstances of each particular case. If the Court is of opinion that the confession is true, it is bound to act, so far as the person making it is concerned, on that belief.

In *Raghu Bhumi v. Emperor* (10) it was held by this Court that, even a retracted confession may be acted upon so far as the confessing accused is concerned if, after applying the proper tests, the Judge is convinced of its truth.

In *Ohheria v. Emperor* (11) Ohamier, C. J., held the conviction on a retracted confession to be bad because the accused was a weak person who was likely to be easily influenced; the Court in fact was not satisfied that the confession was voluntarily made.

In *Guja Majhi v. Emperor* (12) this Court held that a conviction based on a retracted confession which was the only evidence connecting the accused with the murder was sustainable and in *Emperor v. Kehri* (13), the Allahabad High Court decided that, as regards the person making it, a retracted confession may even without any corroborative evidence form the basis of a conviction.

In *Sheo Prasad Koei v. Emperor* (14) Mullick and Atkinson, JJ., laid down that a conviction based on an uncorroborated confession is not bad if the surrounding circumstances point to the confession having been the outcome of a voluntary act on the part of the confessor and in absence of coercion by the Police or others. The fact of the retraction would not deprive the confession of its voluntary character. It is for the Court to decide whether it believes the confession or not, [*Emperor v. Dhani* (15)].

In the present case the Sessions Judge

(1) 23 C. 164; 11 Ind. Dec. (N. S.) 110.  
 (2) (1893) 2 Q. B. 12; 62 L. J. M. O. 13; 69 L. T. 22; 41 W. R. 525.  
 (3) 6 W. R. 81 Cr.  
 (4) 12 W. R. 49 Cr.  
 (5) 8 W. R. 40 Cr.  
 (6) 19 B. 728; 10 Ind. Dec. (N. S.) 487.  
 (7) 20 A. 133; A. W. N. (1897) 224; 9 Ind. Dec. (N. S.) 446.  
 (8) 21 M. 83; 2 Weir; 46; 374 and 503; 7 Ind. Dec. (N. S.) 415.  
 (9) 23 B. 316; 12 Ind. Dec. (N. S.) 210.

(10) 58 Ind. Cas. 49; 5 P. L. J. 430; 1 P. L. T. 241; 21 Cr. L. J. 705.  
 (11) 39 Ind. Cas. 999; 1 P. L. W. 474; 15 Cr. L. J. 631.  
 (12) 38 Ind. Cas. 1005; 2 P. L. J. 80; 18 Cr. L. J. 445.  
 (13) 29 A. 431; 4 A. L. J. 310; A. W. N. (1907) 140; 5 Cr. L. J. 380.  
 (14) 52 Ind. Cas. 50; 20 Cr. L. J. 162.  
 (15) 52 Ind. Cas. 881; 20 Cr. L. J. 731.



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found the confession to be voluntary and believed it to be true. He noted certain other evidence which supported the likelihood of its being true. The two Assessors also found the confession to be true.

We see no good ground for finding that the lower Court and the Assessors were not right in the decision they came to as to the truth of the confession.

We, therefore, dismiss the appeal and confirm the conviction and sentence passed upon the appellant.

*Appeal dismissed.*

# CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 454 OF 1920.

July 30, 1920.

*Present:*—Justice Sir N. R. Chatterjee, Kt.,  
and Mr. Justice Cuming.

KRISHNA LAL DHAR, ADMINISTRATOR  
TO THE ESTATE OF THE LATE  
MOHENDRA NATH DHAR—  
PETITIONER

*versus*

PROFULLA KUMAR DHAR, ON BEHALF OF  
HIMSELF AND HIS BROTHER PROBODH  
KUMAR DHAR—OPPOSITE  
PARTY.

*Penal Code (Act XLV of 1860), s. 403—Criminal breach of trust—Administrator, whether can be proceeded against without sanction of Court—Accounts passed by Court—Administrator, liability of.*

Where an estate is entrusted to an Administrator by the Court in the exercise of its intestate jurisdiction, a complaint charging him with criminal breach of trust under section 406 of the Penal Code in respect of the goods entrusted to him cannot be entertained without the sanction of the Court appointing him. [p. 793, col. 2.]

The mere fact that accounts have been filed in the Probate Court, or even the fact that the accounts have been passed by the Court, does not absolve the Administrator from his liability for any particular sums of money which may have been misappropriated by him, and he may be sued in the ordinary way for such sums [p. 793, col. 1.]

Criminal revision against the order of the Presidency Magistrate, Calcutta (N. D.), dated the 23rd April 1920.

FACTS appear from the judgment.

Babu Dasrathi Sanyal (with him Babu Sarat Chandra Mukerjee), for the Petitioner.

—The accused is the petitioner. He has been charged under sections 406 and 409 of the Indian Penal Code under the following circumstances. On the death of the petitioner's elder brother who had left behind him two minor sons, Prafulla and Probodh, your petitioner obtained Letters of Administration in August 1906 limited until the attainment of majority by the minor sons. The Letters of Administration were issued on the furnishing of two sureties and executing a bond for proper rendering of accounts as ordered by the High Court, in June 1907. Then the troubles began when Probodh, the eldest nephew, became major in 1913. It was at his instance in June 1917 that this Court, in its testamentary and intestate jurisdiction, ordered me to file an inventory and account of the estate and effects of my deceased brother. The order, however, did not reach me through proper notices and neither could I take any steps on that behalf. In the meantime, on 31st August 1917, an order of arrest was procured and on the 12th September 1917 I was arrested and brought to Court. On my furnishing proper inventory and accounts, as ordered by the Court, I was discharged, though my troubles did not cease here. The nephews then challenged my accounts as being false. On the 19th January 1920 Prafulla lodged a complaint against me under section 406, Indian Penal Code, on the allegation that the accounts filed by me in the High Court contained false items and numerous fraudulent entries out of which three were selected for the purpose of the said complaint. I was summoned to answer the charge and the case was transferred by the Fourth Presidency Magistrate, Calcutta, to the file of J. P. Bonnerjee, Esq., Honorary Presidency Magistrate, for trial. On the 26th March 1920, Prafulla again lodged another complaint against me on the allegation that he had found out on further enquiries into the accounts submitted by me other instances of criminal breach of trust as an Administrator. This case also was transferred to the file of Mr. Bonnerjee for trial. On the 19th April 1920 I objected to this sort of harassing prosecutions and contended the illegality of these proceedings as being *ultra vires*. My petition was summarily rejected and summons were ordered to issue on 23rd April 1920.

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Against these two last orders the present Rule was obtained. I submit the charges brought against me are based upon the inventory and accounts submitted by me in compliance with the order of this Hon'ble Court. That being so, no prosecution could be started against me on those materials except with the sanction of the High Court. Refers to section 195 of the Code of Criminal Procedure. The High Court does not find any fault with the inventory and accounts I have submitted. The complainant, therefore, has no right in law to usurp the power of Court by starting prosecutions against me. Refers to section 98 of the Probate and Administration Act. That section provides for a prosecution under section 193 of the Penal Code with sanction of the Court granting administration. Express sanction of the Court is, therefore, a condition precedent to a prosecution of this sort. I submit, therefore, that in the absence of any sanction of the High Court, the present prosecutions are clearly unsustainable in law. Refers to *Santok Chand v. Sujan Chand* (1). That case clearly covers the present case.

Babu *Frebodd Chanda Chatterjee* (with him Babu *Asutosh Ghosh*), for the Opposite Party.—I submit the Court had jurisdiction to entertain the present case. The Court granting administration as well as the beneficiaries may prosecute an Administrator for his fraud. Criminal offences committed at any time are triable by all Criminal Courts and no want of express sanction would render the prosecution *ultra vires*. The complainant is, of course, bound to prove his case and satisfy the Court as to offence. My allegations were pressed before the High Court. I submit the mere failure on my part to obtain its sanction would not deprive me of my right to prosecute.

Babu *Dasarathi Sanyal* replied in brief.

JUDGMENT.—The question for consideration in this case is, whether the Criminal Court can take cognizance of an alleged offence under section 406 of the Indian Penal Code against an Administrator appointed under the Probate Act, without the sanction of the Civil Court, when such Administrator has submitted his accounts to the Court.

(1) 46 Ind. Cas. 836; 46 C. 432; 22 O. W. N. 910; 28 C. L. J. 116; 19 Cr. L. J. 820.

It appears that the petitioner was appointed Administrator to the estate of his deceased brother by the High Court in its original jurisdiction on the 30th August 1905, the administration being limited until either of the two minor sons of the deceased, on attaining majority, would apply for a grant of Letters of Administration to himself. The elder minor attained his majority in 1913 and upon his application the High Court in its testamentary and intestate jurisdiction, ordered the petitioner to file an inventory and account of the estate and effects of the deceased. Subsequently, on his failure to comply, the petitioner was arrested by an order of the High Court in September 1917 and he filed the accounts of the estate and effects of the deceased and an inventory of the properties of the deceased which came into his hands, and it is alleged that he was thereupon discharged. On the 19th January 1920, Prafulla Kumar (the younger brother) lodged a complaint against the petitioner under section 406, Indian Penal Code, on the allegation that the accounts filed by the petitioner in the High Court contained false items and numerous fraudulent entries out of which three were selected by the complainant. On the 25th March 1920 the complainant made a further petition alleging that, on further enquiry, he had found out other instances of criminal breach of trust by the petitioner as Administrator.

The petitioner submitted a petition to the Magistrate praying that the proceedings might be quashed on the ground *inter alia* that he having rendered accounts to the High Court, the proper Court for making an enquiry as to the falsity or otherwise of the same, which covered a period of about 14 years, was the High Court, and that the Criminal Court was incompetent to go into such accounts. The petition was, however, rejected by the Magistrate and the petitioner thereupon moved this Court and obtained this Rule.

It is contended on behalf of the petitioner that the prosecution is based upon the inventory and accounts filed by the petitioner in the High Court and the items in respect of which he has been charged in the Criminal Court being included in the accounts and inventory filed, the Criminal Court cannot entertain the

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complaint, at any rate, without a sanction under section 195 of the Criminal Procedure Code. Reliance is placed upon the provisions of section 98 of the Probate Act. That section provides for filing of inventory and account by an Executor or Administrator, and sub-sections (3) and (4) of that section lay down:—

"(3) If an Executor or Administrator on being required by the Court to exhibit an inventory or account under this section intentionally omits to comply with the requisition he shall be deemed to have committed an offence under section 176 of the Indian Penal Code.

"(4) The exhibition of an intentionally false inventory or account under this section shall be deemed to be an offence under section 193 of that Code."

Sub-section (3) has no bearing upon the present case. It provides that the non-compliance with the requisition to exhibit inventory and accounts would constitute an offence under section 176, Indian Penal Code. Sub-section (4) lays down that the exhibition of an intentionally false inventory or account shall be deemed to be an offence under section 193 of the Code and, no doubt, the High Court, in its testamentary and intestate jurisdiction, if it were satisfied that a false inventory or accounts had been exhibited, might have granted sanction to prosecute. No objection, however, appears to have been taken to the inventory or accounts in the High Court and the complainant did not apply to the High Court for sanction. The question, therefore, is whether, in these circumstances, the Criminal Court is competent to entertain a complaint without sanction in respect of certain items which were included in the accounts filed in the High Court.

Now, the mere fact that accounts have been filed in the Probate Court or even the fact that the accounts have been passed by the Court, does not absolve the Administrator from his liability for any particular sums of money which may have been misappropriated by him and he may be sued in the ordinary way for such sums. See the case of *Khitish Ohandra Acharya v. Osmond Feeby* (2) the case of an Administrator *pendente lite* whose accounts had been passed by the Court. And if a suit

(2) 14 Ind. Cas. 4; 39 C. 587; 16 C. W. N. 516.

can be maintained against an Administrator for sums misappropriated by him, even though his accounts might have been passed by the Court, it is difficult to see why he cannot be criminally prosecuted without the sanction of the Court.

The complaint, however, made against him is one for criminal breach of trust. The estate was entrusted to the petitioner not by the complainant, nor by any one through whom he claims, but by the Court in its intestate jurisdiction. In a recent case *Santok Ohand v. Sujan Ohand* (1) Chitty and Beauchroft, J.J., quashed the proceeding against the Receiver under section 406, on the ground (among others) that it was the Court and not the complainant who entrusted the goods to the accused. A charge of criminal breach of trust, therefore, cannot, under the circumstances, be maintained against the petitioner except with the sanction of the Court which appointed him Administrator. The present proceedings under section 406 against him must accordingly be quashed, and we direct accordingly.

*Proceedings quashed*

PATNA HIGH COURT.  
CRIMINAL REFERENCE No. 70 OF 1920.  
December 10, 1920.  
Present:—Mr. Justice Jwala Prasad.  
BISWANATH SINGH AND OTHERS  
—ACCUSED  
versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), ss. 413, 423, 437, 438—Appealable sentences against some accused—Appeal—Sessions Judge, whether can deal with case of all accused—Procedure.*

When dealing with the appeal of accused persons who have received appealable sentences, a Sessions Judge is competent to deal with the applications made by the co-accused who have received non-appealable sentences [p. 794, col. 1]

*Pheku Jha v. Emperor*, 51 Ind. Cas. 833, 4 P. L. J. 43 at p. 444; (19.9) Pat. 265; 20 Cr. L. J. 515, approved.

Criminal reference under section 438, Criminal Procedure Code, by the Sessions Judge, Darbhanga, dated the 9th October 1920.



FRANCIS DARAH v. MUHAMMAD BAKSH.

Messrs. S. P. Sen and Baikunthanath Mitra,  
for the Accused.

The Assistant Government Advocate, for  
the Crown.

**JUDGMENT.**—This is a reference by the Sessions Judge of Darbhanga, under section 438 of the Code of Criminal Procedure, recommending that the convictions and sentences passed upon the petitioners be set aside. With the petitioners many others were convicted. The petitioners received non-appealable sentences and the others received appealable sentences. Of the accused convicted, those who had received appealable sentences appealed before the Sessions Judge and the petitioners filed an application in revision under section 435 of the Code for recommendation to this Court. The learned Sessions Judge held that the case led by the prosecution was not proved and set aside the conviction and sentences as against those who had received appealable sentences. He has now referred the case of these who had received non-appealable sentences. The reasons for this recommendation are those contained in the judgment delivered in the appeals by the other accused persons.

I have carefully considered the evidence in the case and the judgment, and I agree with the view taken by the Court below and hold that the convictions of the present petitioners must also be set aside.

The reference is opposed by the learned Assistant Government Advocate. He contends that the Court below was wrong in setting aside the conviction and in holding that the prosecution case was not proved. I had, therefore, to go into the merits of the case in order to satisfy myself whether the learned Judge had committed an error in his finding by taking a perverse view of the evidence in the case. I have also considered the arguments addressed by the learned Assistant Government Advocate, with the result that I agree with the view taken by the learned Sessions Judge, though it is possible that in some respects the learned Judge has been hypercritical.

But the reference discloses the anomaly pointed out by me in the case of *Pheku Jha v. Emperor* (1); if I had differed with the view

taken by the learned Sessions Judge upon the evidence in that case the result would have been that the conviction of the petitioners would have been upheld. Whereas the convictions of those who had received appealable sentences and had taken more serious part in the occurrence would have been set aside. The anomaly would have been still graver, for the order in the reference upholding the conviction may have been passed, as in the present case, after the term allowed for the Government to move and present an appeal against the order of acquittal passed by the Court below.

In the present case the anomaly would have been still more serious, for the learned Assistant Government Advocate intimated that the Government intended to appeal against the order of acquittal passed by the learned Sessions Judge. I am, therefore, confirmed in my view taken of law on the subject in the aforesaid case, that the learned Sessions Judge himself, when dealing with the appeal of persons who had received appealable sentences, was competent to deal with the applications made by persons who had received non-appealable sentences. In my view, he was dealing with the whole case though the case came to him upon appeal by some of the accused persons. This used to be the practice, particularly in the District of Muzafferpur from where this case has come. The practice has been referred to in some of the cases which I quoted in the aforesaid case of *Pheku Jha v. Emperor* (1). That appears to me to be the right procedure.

The reference is accepted and convictions and sentences passed upon the petitioners are set aside.

*Reference accepted.*

LAHORE HIGH COURT.  
CRIMINAL REVISION PETITION No. 1649  
OF 1920.

February 14, 1921.

Present :—Mr. Justice Scott-Smith.

M. FRANCIS DARAH—

PETITIONER

versus

MUHAMMAD BAKSH—

RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 195 (6)*

(1) 51 Ind. Cas. 833; 4 P. L. J. 435 at p. 444;  
(1919) Pat. 265; 20 Cr. L. J. 545.

## FRANCIS DARAH V. MUHAMMAD BAKHSH.

—Sanction to prosecute—Application to superior Court—Court, power of, to make enquiry.

An application under section 195 (6), Criminal Procedure Code, to a superior Court to revoke a sanction granted by a Subordinate Court is not an appeal and should not be dealt with as such [p. 795, col. 2.]

There is nothing, however, in the Criminal Procedure Code which would prevent a Court, acting under section 195 (6) of the Code, from making a preliminary inquiry before deciding whether it should revoke the sanction which has been granted by a Subordinate Court. [p. 795, col. 2.]

Petition, under section 439, Criminal Procedure Code, for revision of the order of the Senior Subordinate Judge, Amritsar, dated the 30th August 1920, reversing that of the Munsif, First Class, Amritsar, dated the 16th December 1918.

Babu M. N. Mukerji, for the Petitioner.

Sayad Mohsin Shah, for the Respondent.

**JUDGMENT.**—The facts out of which the present application for revision arises are as follows:—Muhammad Bashir, minor, through his next friend, Muhammad Baksh, obtained a decree for Rs. 150 in the Small Cause Court, Lahore, against Mr. Francis Darah. He applied for execution in the Small Cause Court but his application was infructuous. He then obtained a transfer certificate from the Lahore Court and applied for execution of the decree in the Court of Lala Gokal Chand, Munsif, Amritsar. The application which was filed in the Amritsar Court on the 3rd October 1918 was supported by an affidavit in which Muhammad Baksh stated *inter alia* (1) that a notice to show cause why he should not be arrested was served upon Mr. Darah at Lahore; (2) that upon the service being effected, Mr. Darah had run away from Lahore to Amritsar; and (3) that upon receiving another notice from the Amritsar Court Mr. Darah would again abscond. A warrant of arrest was issued against Mr. Darah and he paid up the amount due under the decree and applied for sanction to prosecute Muhammad Baksh for false statements alleged to have been made in the affidavit. Notice in regard to this application was sent to Muhammad Baksh but no personal service upon him was effected. Eventually, substituted service was effected and on the 16th December 1918 Lala Gokal Chand Munsif granted the

sanction applied for. Muhammad Baksh, it appears, was absent in Australia when this sanction was granted and on his return he applied to the District Judge that the sanction should be revoked. The District Judge held that the Subordinate Judge was the proper officer to deal with his application. The Subordinate Judge has held that, at the time when the Munsif granted the sanction, there were no sufficient materials before him for arriving at the conclusion that the affidavit contained false allegations. He was of opinion that Mr. Darah should be given a further opportunity to show that the affidavit was a false one. He accordingly treated the proceedings before him as an appeal under the Civil Procedure Code and passed an order under Order XLI, rule 23, thereof remanding the case to the Munsif with a direction that he should give an opportunity to Mr. Darah to make out his case and hear the objections, if any, of Muhammad Baksh, and then decide the application for sanction according to law. Both parties have applied for revision of this order.

It is quite clear that the Subordinate Judge was wrong in considering the application before him as if it was an appeal under the Code of Civil Procedure. It was an application to the Court to which the Munsif was subordinate under section 195 of the Criminal Procedure Code, and under sub clause (6) of that section the Subordinate Judge had power to revoke the sanction. The proceedings before the Subordinate Judge were by way of revision and not by way of appeal at all. It is pointed out that Lala Gokal Chand has now been transferred from the Amritsar District, and that his successor could not grant sanction for an offence committed in the Court of Lala Gokal Chand. There is nothing in the Criminal Procedure Code which, in my opinion, would prevent a Court of revision, acting under section 195 (6) of the Code, from making a preliminary inquiry before deciding whether it should revoke the sanction which has been granted by a Subordinate Court. Section 476 of the Code expressly lays down that, when any Civil, Criminal or Revenue Court is of opinion that there is ground for inquiring into any offence referred to in section 195, and committed before it or brought under its

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notice in the course of a judicial proceeding, such Court may make any preliminary inquiry that may be necessary. Mr. Darah presses that he may be allowed to adduce further evidence to show that some of the statements in the affidavit were false. He says that he has been disgraced by being arrested quite unnecessarily at the instance of Muhammad Bakhsh, and seeks redress therefor.

I, therefore, allow the revision and, setting aside the order of the Subordinate Judge, direct him to dispose of the application before him in accordance with law. He should himself make the further inquiry which he ordered the Munsif to make and, after having made it, should decide whether the sanction granted by Lala Gokal Chand should be revoked or not. This order also disposes of the cross-application for revision No. 86 of 1921, filed by Muhammad Bakhsh.

*Revision allowed.*

PATNA HIGH COURT.  
CIVIL CRIMINAL REVISION NO. 11 OF 1920.  
August 9, 1920.

Present:—Mr. Justice Adami.  
WALI MOHAMMAD AND OTHERS  
—PETITIONERS

*versus*

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 476—  
—Penal Code (Act XLV of 1860), ss. 183, 186—  
Warrant of attachment signed "By Order" by Serishtadar—Warrant addressed to Nazir—Nazir, power of, to delegate it to peon—Procedure, legality of.*

A warrant for the attachment of property in execution of a decree was signed by the *Serishtadar* of the Court "By order" and was addressed to the Bailiff *Nazir* of the Court, the warrant was delegated to a peon and the accused resisted him in executing the warrant: the Court directed the prosecution of the accused, under section 476, Criminal Procedure Code, for offences under sections 183 and 186 of the Penal Code, and that order was attached in revision on the ground that the warrant was neither legally made and signed, nor legally made over to the peon:

*Held*, that there was no illegality in the warrant, as the words "By order" showed that the Court had

authorised the *Serishtadar* to sign it, and the *Nazir* had power to delegate it to a peon. [p. 797, col. 2.]

Civil criminal revision against the order of the Munsif, Kishanganj, dated the 8th May 1920, directing the prosecution of the petitioners.

FACTS.—On 8th May 1920 the petitioners were directed to be prosecuted by the Munsif of Kishanganj under section 476, Criminal Procedure Code. The order, in brief, was as follows: "Whereas the men named below obstructed the peon, being a public servant, on 20th December 1919, in execution of a writ of attachment, dated the 18th December 1919, and snatched away from his custody the moveables and live stock *&c.*,...and thereby committed the offences enumerated in sections 183 and 186, Indian Penal Code..."

The writ referred to above was headed "in the first Court of the Munsif at Kishanganj."

"Money Execution Case No. 1994 of 1919."

It was addressed to "The Bailiff of the Court." It was signed as "By order—Udit-narayan *Serishtadar*, Munsif's Court." It was issued on 18th December 1919, and made returnable on or before 16th January 1920.

On the back of the writ the entries showed that it was made over to the *Nazir* on 18th December who made it over to the peon by name: the latter returned it after service on 22nd December and the *Nazir* returned it to Court on the same date with the following remarks thereupon: "Sir, It appears from the peon's report that the accused persons snatched away the property which was attached by him."

Mr. Athar Butain, for the Petitioner.—The writ of attachment, purporting to have been issued under Order XXI, rule 30, Civil Procedure Code, was not signed by the Munsif. The *Serishtadar* had no authority to sign it and, therefore, no offence has been committed. This is the settled Calcutta practice. Relies upon *Deputy Legal Membrancer v. Mir Sarwar J. n* (1).

The writ was addressed to the Bailiff of the Court and has been executed by the peon. In this case the Bailiff was the *Nazir* and he had no power to delegate to the peon.



HEM CHANDRA DUTTA v. GIRENDRA CHANDRA CHAUDHURY.

*Cites Mohini Mohan Banerji v. Emperor* (2).

Mr. Manohar Lal (Assistant Government Advocate), for the Crown.—*Deputy Legal Remembrancer v. Mir Sarwar Jan* (1) has been dissented from by a Division Bench of this Court: See *Khidir Bux v. Emperor* (3). The onus is on the petitioner to show that the *Serishtadar* had no authority. Here the writ, on the face of it, shows that it is signed "By order" and, therefore, *prima facie* the *Serishtadar* had authority to sign. Whether in fact this is so or not will be determined at the time of the trial.

The question as to the power of delegation was elaborately argued before your Lordship and the matter has been settled now in *Doman Mahto v. Emperor* (4).

JUDGMENT.—This is an application for the setting aside of an order passed under section 476 of the Criminal Procedure Code by the Munsif of Kishanganj, directing the prosecution of the petitioners under sections 183 and 186, Indian Penal Code, and also for the setting aside of an order passed by the Sub-Divisional Magistrate summoning the petitioners under those sections. The order under section 476 is attacked on the ground that the writ of attachment, which the petitioners are alleged to have resisted by seizing the property attached, was neither legally made and signed nor legally made over to the peon who served the writ. In the first place, it is argued that the writ was addressed to the Bailiff *Nazir* of the Civil Court and, therefore, it should have been served by him as Bailiff and not by a peon to whom he delegated it. It is now, I think, clearly settled that the *Nazir* of the Court has the power to delegate. The writ bears upon it the name of the peon to whom the delegation was made. Next, it is urged that the warrant of attachment has not been signed by the Munsif and so is of no effect. The writ is signed by the *Serishtadar* of the Munsif's Court By Order. It is contended that the authority by which the *Serishtadar* signed for the Munsif should have been stated on the writ, and several decisions have been referred to this effect. However, the

ruling of *Mullick and Thornhill, JJ.*, in *Khidir Bux v. Emperor* (3), shows that it was for the petitioners to show that there was no authority, and that it is to be presumed that the authority had been given. In my mind the mere entry of the words "By Order" shows that the *Serishtadar* had the Munsif's order to sign. I am unable to see that the writ of attachment, on its face, was such that the petitioners would be justified in resisting the attachment. The whole case before this Court depends upon whether the Munsif was justified, on the facts before him, in coming to a decision that a prosecution of the petitioners was likely to succeed. It is a question on which he was entitled to form his opinion and *prima facie*, having the writ and the report of the peon before him, he was fully entitled to take proceedings under section 476. The Sub-Divisional Magistrate, too, having received the proceedings from the Munsif who had jurisdiction was justified in issuing summons under sections 183 and 186, Indian Penal Code. The points now put forward by learned Counsel for the petitioners can be urged when the petitioners are put upon their trial. The application is rejected. The application of the Crown for costs is rejected.

*Application rejected.*

# CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 525 OF 1920.

July 29, 1920.

*Present:*—Justice Sir N. R. Chatterjea and Mr. Justice Cuming.

HEM CHANDRA DUTTA—ACCUSED—  
PETITIONER

*versus*

GIRINDRA CHANDRA CHAUDHURY

COMPLAINANT—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1908), s. 345—  
Compromise filed in Court, effect of—Further proceedings, whether can be taken.*

Where the parties to a criminal proceeding file a written compromise in Court under section 345 of the Code of Criminal Procedure, such compromise amounts to an acquittal of the accused, and no further proceedings can be taken against him at the instance of the complainant in respect of the subject-matter of the compromise. [p. 800, col. 1.]

(2) 36 Ind. Cas. 871 1 P. L. J. 550; 18 Cr. L. J. 39; 3 P. L. W. 64.

(3) 49 Ind. Cas. 171; 3 P. L. J. 636; 20 Cr. L. J. 139.

(4) 54 Ind. Cas. 977; 21 Cr. L. J. 193.

HEM CHANDRA DUTTA V. GIRENDRA CHANDRA CHAUDHURY.

Rule against the order of the District Magistrate, Dinajpur.

FACTS appear from the judgment.

Babu Bimal Chandra Das Gupta, for the Petitioner.—The petitioner has been accused of having defamed the complainant, opposite party, under section 500 of the Indian Penal Code. During the pendency of the proceedings the parties made up their complaint and a petition of compromise, wherein the petitioner apologised to the opposite party for the offence done, if any, which was accepted by the latter, was drawn up and filed with the *peshkar* of the Sub-Divisional Magistrate before whom the case was pending. On the petition being put up before the Court, the learned Magistrate sent for the complainant and had a talk with him in his private chamber in course of which the Magistrate expressed his disapproval of the compromise. Thereupon the complainant, who is a pleader of that Court, filed a petition praying for the withdrawal of the petition of compromise "for some special reason" without specifying the same. The Magistrate, accepting that petition, has adjourned the case and the case is being proceeded with. The present Rule has been directed against such course of procedure being followed and for the quashing of further proceedings. I submit, the procedure followed by the Magistrate is wholly illegal. The parties came to an amicable settlement, had a petition of compromise setting out the terms agreed upon and accepted by the parties, and duly signed by them, filed in Court. The Court was bound to accept the compromise under the circumstances. It had no further jurisdiction over the matter and ought to have acquitted the accused under section 345 of the Code of Criminal Procedure. It is solely due to the undue interference of the Magistrate that the complainant resiled from the compromise. A compoundable offence, as in the present case, is compounded in law the moment the apology is tendered and accepted. Refers to *Kusum Bewa v. Bechu Bewa* (1), *Mahomed Ismail v. Faizuddin* (2). A compromise petition once filed cannot be withdrawn and the Court has no jurisdiction over the matter any further. In compoundable cases the

composition is complete and effective even though no compromise petition has been filed in Court. Refers to *Kumarasami Chetty v. Kuppusami Chetty* (3). The allegation that the complainant signed under a misapprehension was not made in the subsequent petition of the complainant neither did he raise any objection on the ground of other terms and conditions of the compromise being omitted from the compromise petition. These are clearly after-thoughts on which no reliance should be placed. Refers to *Emperor v. Gana Krishna Walunj* (4).

Babu Ban Behari Sarkar, for the Opposite Party.—My submission is, that the compromise having been made under a misapprehension the compromise ought not to be acted upon. Further, all the terms upon which I agreed to settle the case were not incorporated in the petition of compromise. One of my terms, for instance, was that the accused must apologise to me for his offence in open Court. That has not been done. I submit, the Court was right in not acting upon that sort of prevaricating compromise. Further, the onus is on the accused to show that there was a lawful compromise. Refers to *Murray v. Queen-Emress* (5). The Court must be satisfied that there has been a compromise in reality. Here the finding is in my favour. A party to a compromise can resile therefrom before the passing of any order thereon by the Court. The case in *Kusum Bewa v. Bechu Bewa* (1) is not against me. The latter part of the head-note of the case is not quite accurate inasmuch as it is not borne out by the judgment. The case in *Mahomed Kanni v. Pattani Inayathulla* (6) is an extreme case and should not be followed. The case in *Kumarasami Chetty v. Kuppusami Chetty* (3) has no application to the facts and circumstances of the present case. I submit, the Court is bound to enquire as to the *bona fides* of a compromise before it can record an acquittal under section 345 of the Code of Criminal Procedure.

(3) 44 Ind. Cas. 583; 41 M. 685; 34 M. L. J. 217; 7 L. W. 274; 23 M. L. T. 240; 19 Cr. L. J. 359; (1918) M. W. N. 493.

(4) 26 Ind. Cas. 1000; 16 Bom. L. R. 939; 16 Cr. L. J. 88.

(5) 21 O. 103; 10 Ind. Dec. (N. S.) 701.

(6) 81 Ind. Cas. 819; 39 M. 946; 2 L. W. 1200; 18 M. L. T. 602; 16 Cr. L. J. 803.

(1) 3 C. W. N. 322.

(2) 3 C. W. N. 548.

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Babu Bimal Chandra Das Gupta replied in brief.

## JUDGMENT.

This is a Rule calling upon the District Magistrate and the opposite party to show cause why the proceedings against the petitioner should not be quashed, or why a further inquiry should not be made into the petition of compromise.

It appears that the opposite party, who is a Pleader of the Thakurgaon Munsif's Court in the Dinajpur District, brought a case for defamation against the petitioner, who is a Muktear's clerk. The parties, however, came to an amicable settlement and a petition of compromise was filed in the case in the Court of the Sub-Divisional Magistrate before whom the case was pending. The petitioner denied that he had defamed the opposite party and said that, if any such defamatory words had reached the ears of the opposite party, the same were absolutely false, that the petitioner was sorry for it and tendered his sincere apology to the opposite party. The opposite party stated in the same petition that the accused having admitted that the defamatory words that he heard were false, and having expressed his regret at the circulation of the false rumour and having apologised in the above manner, he (the opposite party) did not wish to proceed further in the matter and he prayed that the case might be finally disposed of under the provisions of section 345, Criminal Procedure Code. The petition was signed not only by the petitioner but also by the opposite party himself. It was engrossed by his (the opposite party's) clerk, Gopal Chunder Das.

After the petition had been filed with the *peshkar*, the latter put it up before the Sub-Divisional Magistrate. Thereupon the Sub-Divisional Magistrate sent for the opposite party, and there was some talk between them as the result of which the Pleader put in another petition by which he wanted to withdraw from the compromise. That has been given effect to, and the case is being proceeded with against the petitioner.

We are of opinion that there was a lawful compromise under section 345, Criminal Procedure Code, which amounted to an acquittal of the petitioner, and that no further

proceedings ought to have been taken against him.

Under sub section (2) of section 345, certain offenses can be compounded with the permission of the Court before which any prosecution for such offense is pending, and clause (5) also provides for composition where the accused has been committed for trial, or where he has been convicted and an appeal is pending, with the leave of the Court. In the other cases mentioned in section 345, no leave of the Court is required for compounding the offense. The offense for which the petitioner was being prosecuted was defamation, under section 500, and it was compoundable by the person defamed. The latter agreed and himself signed the petition filed in Court having accepted the apology offered by the petitioner. The offense, therefore, was lawfully compounded and the Magistrate ought to have directed an acquittal. Instead of doing that, he sent for the Pleader (the opposite party) and it appears from his report to the District Magistrate that it was he who asked the Pleader to withdraw the petition of compromise, on the ground that the petition was filed under a misapprehension, the misapprehension being that the Sub-Divisional Magistrate had not approved of this compromise when he was informed of it by some Pleaders and Muktears on the morning of that day, whereas the opposite party was given to understand that the Sub-Divisional Magistrate had approved of it.

We do not see what the Sub-Divisional Magistrate had to do with the composition of the offense under section 500, it being a private matter between the Pleader and the Muktear's *Mohurrir*. It is clear that it was after the talk with the Sub-Divisional Magistrate that the Pleader changed his mind.

It is said that there was an understanding with the opposite party that the petitioner would offer an apology in open Court. But the petition does not state that. The petition itself contained expression of apology by the petitioner, and acceptance thereof by the opposite party. That the petition was signed with knowledge of its contents is not, and cannot be, denied by the opposite party. The subsequent petition of withdrawal shows that the petition of compromise filed in Court was made by both parties, and it was prayed by the



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subsequent petition by the opposite party that the petition of compromise might be rejected.

There being no doubt of the opposite party having signed the petition or of compromise with knowledge of its contents and of which the Sub Divisional Magistrate was satisfied when he sent for the opposite party, as appears from his order, he ought to have acquitted the accused under the provisions of section 345, Criminal Procedure Code. See the case of *Kusum Bewa v. Bechu Bewa* (1).

We were referred on behalf of the petitioner, to two cases in the Madras High Court. In the case of *Mohomed Kanni v. Pattani Inayathulla* (6) Abdul Rahim, J., observed as follows: "A composition arrived at between the parties of a compoundable offence is complete as soon as it is made, and it has the effect of an acquittal of the accused under section 345, Criminal Procedure Code, in respect of that offence, though one of the parties, later on, resiles from the compromise and no statement or petition recording the compromise is filed in Court by the parties".

See also the case of *Kumarasami Chetty v. Kuppusami Chetty* (3).

It is unnecessary for us to consider the question whether the compromise of a case outside the Court is a valid compromise and must be given effect to, when no petition was filed in Court, and this was the question in those two Madras cases. Here the petition was filed in Court and signed by both parties, and we think it ought to have been given effect to.

The result is that further proceedings in the case against the petitioner are quashed and the Magistrate directed to record an order of acquittal against the petitioner.

*Rule made absolute.*

## ALLAHABAD HIGH COURT.

CIVIL REVISION No. 44 of 1920.

January 25, 1921.

Present:—Mr. Justice Gokul Prasad.

ABDUL AZIZ—APPLICANT

*versus*

BOHRA TARA CHAND—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 195—Civil Procedure Code (Act V of 1908), s. 115—Order in appeal rejecting application for sanction to prosecute—Material irregularity—Perjury—Sanction, when ought not to be given.*

An order upon an appeal against an order sanctioning the prosecution of the appellant, contained the words: "The application is rejected", amounts to a refusal to consider the question, and is a material irregularity within the meaning of section 115 of the Civil Procedure Code.

Sanction to prosecute for giving false evidence is not justified where there is no documentary evidence, and the question is of oath against oath.

Civil revision, from an order of the District Judge Agra, dated the 9th of March 1920.

Mr. Zahur Ahmad, for the Applicant.

Mr. U. S. Bapat, for the Opposite Party.

JUDGMENT.—This is an application in revision from the decision of the District Judge of Agra, dismissing an appeal against an order of sanction to prosecute the applicant for giving false evidence. The only judgment passed by the learned District Judge in appeal is, "The application is rejected". I do not think that an order like this should be passed. An order like this passed in a sanction for prosecution case amounts to a refusal to consider the question and would, in my opinion, at least amount to a material irregularity amounting to illegality in exercise of its jurisdiction by a Court. In order to assure myself of the correctness of the order passed by the first Court I went through the record of the case. There is no documentary evidence whatever on the record to support the statement of the plaintiff as against the defendant. It is a pure question of oath against oath, and, in my opinion, the order of sanction granted by the first Court was not justified. I, therefore, accept this application in revision and set aside the order of sanction.

*Application accepted.*

BHUSHANMANI DASI D. PRAFULLA KRISTA DEB.

CALCUTTA HIGH COURT.

CIVIL RULE No. 69 of 1920.

May 25, 1920.

Present:—Mr. Justice Tennon and  
Justice Sir Asutosh Chaudhury, Kt.

SM. BHUSHANMANI DASI

—PETITIONER

versus

PRAFULLA KRISTA DEB BAHADUR

AND OTHERS—OPPOSITE PARTIES.

*Civil Procedure Code (Act V of 1908), s. 115, O. XXI,  
r. 90—Execution of decree—Sale, application to set  
aside—Limitation, terminus a quo—Revision—Mate-  
rial irregularity.*

The starting point of limitation for an application to set aside an execution sale on the ground of fraud is, the date when the applicant had knowledge not merely of the factum of the sale, but a clear and definite knowledge of the facts which constitute the fraud, and it is for the other side to show that the applicant had such knowledge at a time from which, taken as a starting point, the application is barred. [p. 802, col. 2.]

P. applied to set aside an execution sale on the ground of fraudulent suppression of process and other irregularities, the Court rejected the application merely upon the deposition of the applicant and without considering all other evidence which he was prepared to give as regards the suppression of processes and other irregularities of which he complained:

*Held*, that the Court acted with material irregularity in the exercise of its jurisdiction. [p. 802, col. 1.]

Rule against the order of the District Judge, 24 Parganas.

FACTS appear from the judgment.

Babu Apurba Oharan Mukherjee for Babu Saroda Oharan Maity, for the Petitioner.—This is an application under section 115 of the Code of Civil Procedure. The petitioner made an application under Order XXI, rule 90, Civil Procedure Code, for setting aside an execution sale on the ground of irregularities, fraudulent suppression of processes and consequent inadequacy of price. The petitioner, who is a *pardanashin* lady, was examined on commission, in the course of which she stated that she had hearsay knowledge of the sale some two or three months before the application to set aside the sale was preferred. Relying upon this deposition, both the Courts below held that the application for setting aside the sale was barred by limitation.

The Courts below should not have shut out all other evidence which the applicant was prepared to give regarding the suppres-

sion of processes and other irregularities of which she was complaining. The fact that she admitted hearsay knowledge of the sale two or three months before the date of her application is not sufficient to bar her application by limitation. She alleged fraud which must be held to have a continuing influence. In such a case, mere knowledge of the factum of the sale is not sufficient, the applicant must have definite knowledge of the facts which constitute the fraud before time can run against her. See *Narayan Sahu v. Damodar Das* (1). See also *Rahimbhoy Habibbhoy v. Turner* (2). This is a fit case in which your Lordships should interfere in the exercise of your revisional powers.

Babu Mohendranath Roy (with him Babus Penoyendranath Ganguly and Parashnath Mukherjee), for the Opposite Party.—An error in applying the Law of Limitation is not an error which can be corrected on revision under section 115 of the Code of Civil Procedure. See *Benode Behari Bhadra v. Ram Sarup Chamar* (3). See also *Ramgopal Jhoonjhoonwalla v. Joharmall Khemka* (4) *Mohim Ohunder Fal v. Ahmad Ali Khan* (5). The provisions of section 115 of the Code of Civil Procedure are not applicable, although there might be an error in the decision touching the question of limitation. Your Lordships should not, therefore, interfere under section 115 of the Civil Procedure Code.

Babu Apurba Oharan Mukherjee replied.

JUDGMENT.—This Rule is directed against an order by which the District Judge of the 24 Pargannas affirms the order made by the Munsif, First Court, at Diamond Harbour. By the said order the Munsif rejected an application for setting aside a sale made on the ground of fraudulent suppression of process, certain irregularities, and insufficiency of price. Both Courts have held that the application was barred by limitation, and in coming to this conclusion they have proceeded merely on the deposition of the applicant

(1) 16 Ind. Cas. 464; 16 C. W. N. 891.

(2) 17 B. 311; 20 I. A. 1; 6 Sar. P. C. J. 256; 17 Ind. Jur. 40; 9 Ind. Dec. (N. S.) 222.

(3) 15 Ind. Cas. 679; 16 C. W. N. 1015 at p. 1018.

(4) 15 Ind. Cas. 547; 39 C. 473.

(5) 33 Ind. Cas. 316; 22 C. L. J. 561.

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who was examined on commission. In the course of this deposition she stated that she had hearsay knowledge of this sale some two to three months before the application was preferred. From the date of this hearsay knowledge of the fact of sale the Courts below are of opinion that limitation should run. We are unable to think that they are right in so holding. The applicant must have knowledge not merely of the factum of the sale, but a clear and definite knowledge of the facts which constitute the fraud before time can run against him or her. This is apparent from a number of reported cases, to one of which we may refer, namely, *Narayan Sahu v. Damodar Das* (1).

This case and other cases show that, when by a fraud of this nature, involving suppression of process and submission of false returns, the applicant is kept out of knowledge of the sale of his property such fraud must be held to have a continuing influence. Indeed, in such a case it is for the other side to show that the injured party had clear and definite knowledge of the facts which constitute the fraud at a time from which, taken as a starting point, the suit is barred.

In this connection we may refer to the decision of their Lordships of the Privy Council in *Rahimbhoy Habibbhoy v. Turner* (2). Relying upon these passages in her deposition in which the applicant admits hearsay knowledge of the sale two or three months before the date of her application, the Courts below shut out all other evidence which the applicant was prepared to give as regards the suppression of processes and the other irregularities of which she complains. Thus, they have not merely fallen into an error but also acted with material irregularity in the exercise of their jurisdiction and this, therefore, gives this Court jurisdiction to interfere under section 115 of the Code of Civil Procedure.

In this view, we must set aside the orders of both the Courts below and remit this case to the Court of first instance in order that it may deal with it and dispose of it in accordance with law.

Costs of this Rule will be costs in the case. We assess the hearing fee at three gold mohurs.

Order set aside.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No 290 OF 1919.

March 2, 1920.

Present:—Mr. Justice Oldfield and

Mr. Justice Seshagiri Aiyar.

KRISHNASWAMI AIYAR—PLAINTIFF

—APPELLANT

versus

APPAVIER AND OTHERS—DEFENDANTS

Nos. 3 TO 6, AND LEGAL REPRESENTATIVES

OF DEFENDANTS NOS. 2 AND 6—RESPONDENTS.

Hindu Law—Partition-deed—Gift—Defeasance clause, validity of.

The principle that an estate once vested cannot be divested is not recognised as a general rule of Hindu Law, even of the Hindu Law of Succession. Therefore, a defeasance clause in a partition-deed of an estate that, if a particular event shall happen,—in this case a default in making certain payments,—the interest of the defaulter shall pass to another person, is not repugnant to any principle of Hindu Law. [p. 804, cols. 1 & 2.]

Second appeal against the decree of the District Court, Tanjore, in Appeal Suit No. 963 of 1917, preferred against the decree of the Court of the Principal District Munsif, Tiruvalur, in Original Suit No. 164 of 1913.

FACTS appear from the judgment.

The Hon'ble Mr. T. R. Ramachandra Aiyar, for the Appellant.—The defeasance clause in the partition-deed providing for the divesting of the estate on the son's not paying *kist* is invalid. An estate once vested cannot be divested. Whether the clause is permitted by the provisions of the Transfer of Property Act or not, under section 2 of the Act it is repugnant to the principles of Hindu Law: See Full Bench judgment in *Krishna v. Sami* (1).

Mr. K. Bashyam Aiyangar, for the Respondents.—The condition is perfectly valid. It is not opposed to any general rule of law nor is it against public policy. The partition was effected after the enactment of the Transfer of Property Act. The provisions of this Act allow of such dispositions subject to such conditions. In *Krishna v. Sami* (1) the Full Bench have stated that the rule that an estate once vested cannot be divested cannot be laid down without exception and that it is nowhere laid down in express terms by the Hindu commentators. Subsequent decisions of the Judicial

(1) 9 M. 64 (F. B.); 3 Ind. Dec. (N. S.) 441.



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Committee have made inroads on this principle, and the cumulative effect of all the rulings is, that the principle is disregarded in practice. Both under Hindu law and the Transfer of Property Act, the condition is valid. See *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (2), *Sreenutty Soorjeemoney Dossee v. Denobundoo Mullick* (3), *Bhoobun Mohini Debia v. Hurrish Ohunder Chowdhury* (4), *Jatendra Mohan Tagore v. Ganendra Mohan Tagore* (5).

## JUDGMENT.

OLDFIELD, J.—The question in this case arises on the construction of Exhibit A, a document drawn by unprofessional hands, and is, whether, under it, the widow of one Srinivasa Aiyar, the vendor of plaintiff appellant, acquired any interest, which she could convey to him. The argument before the lower Appellate Court was apparently based on a translation of Exhibit A, which, like that made here, is inaccurate. It was conducted with reference mainly to the meaning of the expression "with absolute right," not to the general principles affecting the dispositions made. In the application of these principles to what actually occurred there was a mistake as to the contents of one phrase used. Here the argument proceeded on different lines.

By Exhibit A Nannu Aiyar and his sons, first defendant and Srinivasa Aiyar, husband of plaintiff's vendor, effected a partition, but we are concerned only with one portion of the settlement then agreed to, that relating to the property, of which half is claimed under Exhibit A, which was left in the enjoyment of Nannu Aiyar and Annapurni ammal, his wife. The terms on which they were to enjoy it and it was to devolve, are, according to the translation given in the District Munsif's judgment which, with consent of the parties, we adopt, except as to one point to be separately referred to, as follows:—

"(1) the properties shown in list 1 are to be enjoyed by Nannu Aiyar and Annapurni Ammal for their lifetime without any right

(2) 6 M. L. A. 526; 4 W. R. P. C. 114; 1 Ind. Jur. (N. S.) 372; 1 Suth. P. C. J. 291; 1 Sar. P. C. J. 583; 1 Boulr. Rep. 228; 19 E. R. 193.

(3) 9 M. L. A. 123 at p. 135; 1 Sar. P. C. J. 837; 19 E. R. 698.

(4) 5 L. A. 138; 4 C. 23 (P. O.); 3 C. L. R. 339; 3 Sar. P. C. J. 815; 3 Suth. P. C. J. 537; 2 Ind. Jur. 430; 1 Shome L. R. 241; 2 Ind. Dec. (N. S.) 16.

(5) 18 W. R. 359; 9 B. L. R. 377 (P. O.); 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82.

of alienation. (2) Srinivasa Aiyar and first defendant (Appavier) shall pay the *kist* of the properties equally. (3) After spending (for funeral expenses) at the death of each of the two parents. (4) Srinivasa Aiyar and first defendant shall divide equally a 1/16th Pangu (a moiety of the whole) at the death of each of the two parents. (5) If the two do not agree and spend either for the payment of the *kist* of the said lands or for the funeral expenses, the survivor of the two, that is, Nannu Aiyar, and Annapurni Ammal, shall take the 1/8th Pangu of lands (the whole of the lands in list 1) absolutely, and (6) if the two do not agree and pay for the funeral expenses of the survivor and the *kist* of the lands, he who spends shall take absolutely the 1/16th Pangu, which was in possession of the survivor."

The figures in this extract have been inserted for convenience of reference; and, observing that no attempt was made here to dispute the lower Appellate Court's interpretation of the words "with absolute right" as conferring the fullest estate, I give in legal language the result, as it appears to me, with reference to each clause. Under (1) and (4) there is a creation of life-interest in favour of Nannu Aiyar and Annapurni Ammal, in a moiety of property each with remainder as regards each moiety to their sons. There are then conditions for the defeasance of these estates, in remainder, the son's obligation to pay the *kist* on the property throughout and to pay the funeral expenses on the death of each parent being stated generally in clauses (2) and (3), and the defeasances in case of default of the defaulting son's estate in either moiety being provided for later. If the default occurs during the lifetime of both parents, that case is not provided for and it is fortunate that it has not arisen. If default occurs during the lifetime of the surviving parent, under clause (5) such parent shall take an absolute interest in the whole property. If it occurs later after the death of the surviving parent, the non-defaulting son shall take the moiety which is in his or her possession. What is expressed and what I must, therefore, take to have been contemplated, is a life estate of each moiety in each of the parents (we have already decided to that effect in Civil Miscellaneous Appeal No. 310 of 1915)

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with remainder as regards each moiety to the sons, subject to the conditions for defeasance on each of two different dates, those of the deaths of the two parents, at the one of both moieties in favour of the surviving parent, at the other of the moiety still in the parent's possession in favour of the non defaulting son.

There is no question of any defeasance on the death of Nannu Aiyar; and plaintiff, claiming under Srinivasa Aiyar, contends that the latter then acquired an absolute interest, which his legal representatives could convey in Nannu Aiyar's portion, the condition for defeasance in case of subsequent default, such as defendants allege, being unenforceable; and we have to deal with this contention. Exhibit A was subsequent to the Transfer of Property Act, and, if its provisions are applicable, there is nothing in them, against which the conditions for defeasance offend. For, the last sentence of the explanation to section 19 contemplates divesting of an estate once vested; sections 28 and 29 recognize conditions subsequent, as effective, although they must be construed strictly; and there is nothing in these conditions, which offend against public policy, or the rules contained in sections 10, 12, 21 to 25 or 27.

It is further, however, necessary to consider, with reference to section 2 (d), whether the conditions offend against any rule of Hindu Law and, in particular, whether the principle that the estate once vested cannot be divested is such a rule. It does not appear that the expression "rule of Hindu Law" has ever been the subject of comprehensive definition by authority, or that any criterion for the purpose of distinguishing between such rules and the principles deducible from particular classes of cases has ever been laid down. But for the present purpose it is sufficient that, as I shall show, the principle above referred to has been statedly or impliedly disregarded by the Judicial Committee in connection with dispositions of property and has never been recognised as a general rule, even of the Hindu Law of succession.

In *Ramlal Mookerjee v. Secretary of State* (6) the Judicial Committee found it

(6) 7 C. 304 (P. C.); 3 I. A. 46; 10 C. L. R. 349; 4 Ser. P. C. J. 225; 6 Ind. Jur. 327; 3 Ind. Dec. (N. S.) 744.

unnecessary to deal with a plea that certain disqualifications, if they were conditions subsequent, were in violation of Hindu Law. But in *Tarokessur Roy v. Soshi Shikhuressur Roy* (7) it was held that a gift of one-third share to each of the testator's three nephews, with remainder to the survivor, in case any of them died without issue, was valid; *Sreemully Soorjeemoney Dosses v. Denobundoo Mullick* (3) being followed and the ground of decision being that the gift-over was to persons alive, and capable of taking on the death of the testator, to take effect on the death of a person also then alive. And in *Kristoromoni Dasi v. Narendro Krishna Bahadur* (8) the validity of a condition for the defeasance of a prior absolute interest by a subsequent event is assumed and it is added only that (1) the event must happen, if at all, immediately on the close of a life in being at the time of the gift; and (2) a defeasance by way of gift-over must be in favour of some one in existence at the time of the gift; the *Mullick and Tagore cases* already cited being referred to as authority for these requirements. It is clear that in the case before us they are complied with.

To turn to the Hindu Law, it is true that Turner, C. J., in delivering the judgment of a Full Bench composed of all the learned Judges of this Court, referred to the rule that "an estate, which has once vested, cannot be divested by the occurrence of a contingency, which, if it had occurred prior to the period of vesting, would have curtailed or avoided the rights of the person in whom the estate has vested," *Krishna v. Sami* (1). But he went on to say that, "the rule that an estate once vested in a full owner cannot be divested is nowhere stated in so many terms by the Hindu Commentators," and that it could not be "laid down without exception in respect of property governed by the Mitakshara." The decision in the case before the Court, one of removal of a disqualification, was against its application. But in *Narasimha Razu v. Veerabhadra Razu* (9) it was applied, *Krishna v. Sami* (1) being distinguished, on the ground that the prop-

(7) 10 I. A. 51; 9 C. 952 (P. C.); 13 C. L. R. 62; 7 Ind. Jur. 327; 4 Ser. P. C. J. 439; 4 Ind. Dec. (N. S.) 1284.

(8) 16 I. A. 129; 16 C. 383 (P. C.); 13 Ind. Jur. 90; 5 Ser. P. C. J. 285; 8 Ind. Dec. (N. S.) 252.

(9) 17 M. 257; 6 Ind. Dec. (N. S.) 193.

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erty there in question was unobstructed. In the latter case the question was of divesting by a subsequent birth of a son heir, and reference may be made to the analogous cases in connection with subsequent adoptions, as between adopted son and either the absolute estate of a reversioner or the estate of the widow, for instance, *Sri Virad: Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo* (10), *Bhoobun Moyee Debia v. Ram Kishore Achary Ohowdhury* (11), *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (12) and the authorities referred to in the recent Full Bench decision of this Court, *Vaidyanatha Sastri v. Sarithri Ammal* (13). The inference is against the existence of any rule of general application or of any which can be regarded as binding in cases of transfer of property to living persons or in any class of cases other than those to which it has in fact been applied. We have been shown no instance of the application of such a rule to cases resembling that before us, in which there is no question of succession, much less of such a succession as is involved in the authorities, to which reference has been made. In these circumstances, the conclusion must be in favour of the validity of the conditions in Exhibit A.

To apply those conditions to the facts, two breaches of them are alleged. If the decision depended on one of them, the default of Srinivasa Aiyar's heirs in respect of the funeral expenses of Annapurniamma, it might be necessary to call for a finding, because the lower Appellate Court has lost sight of the fact that the liability is, not for the expenses of the funeral, but for those of the obsequies up to the performance of the annual ceremony and it might, if that default were material, be necessary to call for a finding, as to whether plaintiff's tender was in time with reference to the latter. But that default is not material, when the other default relied on is established. The lower Appellate

Court has found, and we must accept its finding, that Srinivasier's legal representatives failed to pay the *kist*, as Exhibit A requires them to do, from 1901 to 1912. No doubt, plaintiff offered to pay it during the proceedings before the lower Appellate Court and he contends here that he should be awarded the property on his making the payment. But there is no doubt that the condition was infringed, because, however strictly it is construed in favour of the person in possession of the estate, it has not been complied with, within a reasonable time; and there is no authority for the application, which plaintiff suggests, to the present facts of the principle on which transfers in favour of an innocent purchaser are avoided, on the advantage received by the transferor being restored.

In these circumstances, the appeal fails and is dismissed with costs.

SESHAGIRI AIYAR, J.—I agree. In this case, we have to construe a partition-deed to determine what its legal effect is in the events that have happened. Exhibit A is the deed of the partition between the father and his two sons. It provides for the reservation of certain property for the father and his wife and for division in equal shares of the rest of the property between their two sons. There can be no doubt, on the language of the document, that the estate reserved to the father and the mother in the first instance was a life interest. Similarly, the estate reserved for the survivor of the two is also a life estate. There are some conditions which have now to be noticed. The first one relates to the sons paying the *kist* upon the reserved property. It states that in case the *kist* is not paid, the parents will have an absolute estate. A provision almost in identical terms is made with reference to the half estate of the survivor. Another clause is to the effect that the two sons should pay the funeral expenses of the father and of the mother. It provides that in case one of the sons alone pays the expenses and the other does not the son who defrayed the expenses should be the sole owner of the reserved property.

What happened is this. The father died in 1898. Soon after, one half of the property was divided between the sons equally. It must, therefore, be taken that the defeasance clause which gave the parents an absolute

(10) 1 M. 69 (P. O.); 3 I. A. 154; 11 Mad. Jur. 189; 25 W. R. 291; 3 Sar. P. C. J. 583; 3 Suth. P. C. J. 262; 1 Ind. Dec. (N. S.) 45.

(11) 10 M. I. A. 279; 3 W. R. P. C. 15; 1 Suth. P. C. J. 574; 2 Sar. P. C. J. 111; 19 E. R. 978.

(12) 4 I. A. 1; 1 M. 174 (P. O.); 1 Ind. Jur. 63; 26 W. R. 21; 8 Sar. P. C. J. 669; 3 Suth. P. C. J. 353; 1 Ind. Dec. (N. S.) 116.

(13) 42 Ind. Cas. 245; 41 M. 75; 33 M. L. J. 387; (1917) M. W. N. 633; 22 M. L. T. 275; 6 L. W. 542 (F. B.).



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estate, if there was a failure to pay the *kists*, was not put into operation. In 1901, one of the sons died. He made a bequest of all his properties in favour of his wife. In that, he specifically refers to the share which would accrue to him on the death of his mother. The mother died in 1912. After her death the predeceased son's widow sold the half share in the property in the possession of the mother-in-law to the present plaintiff. On this title the plaintiff sues for partition and possession. The first defendant is the surviving son and the other defendants are his sons.

It has been found by the District Judge that, after the death of the father, the Government assessment was not paid by the widow of the deceased son. He holds that in consequence of this failure, the property in the possession of the mother was converted into an absolute estate. He has also found that, since the death of the mother, one-half of the funeral expenses have not been met by the daughter-in-law or her vendee. There was, apparently, an offer to pay the *kist* after 1912. In these circumstances, the question arises whether, on the death of the mother, the deceased son's widow acquired any right in the property of the mother-in-law, which would enable her to convey to the plaintiff her interest in it. The point is by no means an easy one. In the first place, we have to consider whether the rules contained in Chapter II of the Transfer of Property Act are applicable to this case. The last portion of section 2 lays down that nothing in the Second Chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist Law. Therefore, if the provisions of the Second Chapter are in any way inconsistent with the provisions of Hindu Law, they should not be applied to this case. I have come to the conclusion that the particular provisions in the Transfer of Property Act, by which this case is affected, do not lay down any rule inconsistent with the Hindu Law. First of all I shall clear the ground by saying that the estate, which the partition-deed secured to the two sons was a vested one. The definition section of Chapter II makes that clear. The explanation to section 19 provides, "that an intention that an interest shall not be vested is not to be in-

ferred from a provision that, if a particular event shall happen, the interest shall pass to another person." This is exactly what has been provided in the partition-deed, and to my mind, therefore, the estate which the two sons took was a vested remainder subject to the life-estate of the parents. The next section to which reference may be made is section 28 which deals with the defeasance of a vested interest. By that section an interest already ascribed may be subjected to a condition subsequent or a limitation, as an English lawyer would say, that in case a specified uncertain event shall happen, such interest shall pass to another person. By the same section this ulterior disposition is made subject to the rules contained in sections 10, 12, 21, 22, 23, 24, 25 and 27. Examining these latter sections, it is clear that the condition in the partition-deed is not obnoxious to any of them. They deal with restraints upon alienation with property being divested in the event of insolvency or of an attempted alienation, with contingent interest, with transfers to members of a class on attaining a particular age and so on; I might also refer to section 31 of the Transfer of Property Act, which lays down a principle identical with the one enunciated in section 28. Therefore, if this case has to be decided under the Transfer of Property Act there cannot be much doubt that the defeasance clause which converted the life estate of the mother into an absolute estate would be regarded as valid. The English Law, to which I shall refer later on, is also to the same effect.

Before proceeding further, I shall have to see whether the rules contained in sections 19, 28 and 31 of the Transfer of Property Act are in any way opposed to the principles of Hindu Law. As far as possible, I shall refer only to the cases decided by the Privy Council. In *Sreemutty Soorjeemoney Dosses v. Denobundoo Mullick* (2) it was laid down that a condition if one of the sons of the testator did not leave male issue, the other sons should take that share was an enforceable one. It was further held that the sons had become divided among themselves and that the widow of the deceased son was entitled to the accumulated income on her husband's

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share; but it was laid down that she was not entitled to the corpus, as, by the defeasance clause, her husband's estate vested in the surviving brothers. In *Sreemuttu Soorjesmoney Dossee v. Denobundoo Mullick* (3) Knight Bruce, L. J., said this: "This being so, we are to say whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu Law in allowing a testator to give property, whether by way of remainder, or by way of executory bequest (to borrow terms from the Law of England) upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not; that there would be great general inconvenience and public mischief in denying such a power and it is their duty to advise Her Majesty that such a power does exist." This is a clear enunciation that a defeasance clause, like the one with which we are concerned, is not repugnant to any principle of Hindu Law. The next case of importance is the well-known *Tagore case* (5). That case dealt with a large number of questions. One of the principles laid down was that it was not competent to a testator to create a new rule of succession; another, that an estate in favour of unborn persons should not be created by a Will. At the same time, their Lordships laid down that "it is competent to a Hindu in making his Will to make a provision that the estate which he creates and gives to the recipient of his bounty may be divested or defeated by some thing which takes place after. This is established by this case. It is admitted by Mr. Evans and Mr. Kennedy, and may be taken as absolute law." In *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhury* (4) the same principle was laid down. Towards the end of the judgment, Sir R. P. Collier says "that their effect is to make the absolute estate before given, defeasible in the event of a failure of issue living at the time of her death, in which event the estate was to revert to the donor and his heirs. That there is nothing in such a condition repugnant to Hindu Law appears from the decision of this Tribunal as to an executory devise." In *Tarokessur Roy v. Soshi Shikhuressur Roy* (7) it was held that the gift-over of a life-estate was competent, it

being to persons alive, and capable of taking on the death of the testator, and to take effect on the death of a person or persons then alive. No doubt, this related to a life-estate, but the principle is the same whether the divesting relates to a life-estate or to a vested remainder. In *Raikishori Dasi v. Debenranath Sircar* (14) a gift-over on the death of the surviving son was held good. The last of the Privy Council cases on this point, so far as I am aware, is *Kristoromoni Dasi v. Narendro Krishna Bahadur* (8). That case affirms the principles enunciated in the earlier decisions to the fullest extent. Lord Hobhouse states thus: "In stating the rule relating to the defeasance of a prior absolute interest by a subsequent event, it is important to add; first, that the event must happen, if at all, immediately on the close of a life in being at the time of the gift, as was laid down in the *Mullick case*; and, secondly, that a defeasance, by way of gift over, must be in favour of somebody in existence at the time of the gift as laid down in the *Tagore case* (5)." Both these conditions are complied with in the present case. The event happened while one of the donees was alive, and the gift over was to the same person who was alive at the time of the gift and is still living. As was laid down in *Sonatan Bysac v. Sreemuttu Jaggutsoondree Dossee* (15), what a Court has to see is, whether the limitation either as regards the person who is to take, or the estate that is to be taken, violates any of the fundamental principles of Hindu Law. I am not aware of any rule of Hindu Law which prevents a donor from adding a limitation to the estate which is to be taken by providing that certain conditions should be complied with. No doubt, if the condition is opposed to public policy, or, in the language of *Moore, In re, Trafford v. Maconochie* (16) is against the policy of the law, the condition will be ignored and the bequest *simpliciter* will be given effect to. Section 23 of the Indian Contract Act recognises this principle as

(14) 15 I. A. 37; 15 C. 409 (P. C.); 12 Ind. Jur. 175; 5 Sar. P. C. J. 100; 7 Ind. Dec. (N. a.) 857.

(15) 8 M. I. A. 66; 2 Suth. P. C. J. 37; 1 Sar. P. C. J. 721; 19 E. R. 455.

(16) (1888) 39 Ch. D. 116; 57 L. J. Ch. 936; 59 L. T. 681; 37 W. R. 83; 52 J. P. 596.

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part of the law of India, if there is no such repugnant condition and if there is no text of Hindu Law, or a course of decisions in India, prohibiting a substantial gift for failure of a condition, there is no reason why the principles which have governed English Courts and which have found expression in the sections of the Transfer of Property Act, to which I have referred, should not be applied to the construction of Hindu dispositions of property. I shall now very briefly refer to the rule of English Law on this point. In *Barchow v. Black, Pattison v. Henderson* (17) it was pointed out: "The position of an absolute unlimited owner subject to a conditional gift-over is unknown to the Law of England but well-known to the Scotch Law. Hence, in Scotland, although a conveyance to a man 'and his heirs and assigns whomsoever' makes him an absolute owner..., there may follow a valid conditional substitution or gift over to which, on the occurrence of the contemplated events, effect will be given." The present day English Law is not as rigid as was believed in the last case. It has gone through various modifications which it is not necessary to refer to at any length now. In *Avelyn v. Ward* (18) the condition was that if the devisee failed to give a release within three months after the testator's decease, then the property should vest in some body else. This condition was enforced. In 28 Halsbury the various cases in the English Courts are summarised in paragraphs 1477 onwards. Numerous clauses of forfeiture or defeasance have been recognised. I may refer to one case in particular, namely, *Oomiskey v. Bowring-Hanbury* (19). The House of Lords in that case held that an absolute estate subject to an executory gift was enforceable. In *Lovell, In re, Sparks v. Southall* (20) Mr. Justice, P. O. Lawrence has come to the conclusion that a defeasance clause of this description should be regarded as a limitation of the estate and not as a condition. What has been referred to in the Scotch Courts as a condition subsequent is dealt with in the English Courts, either as an executory devise or as a limita-

tion of an estate. When one remembers the tenacity with which precedents are adhered to, it is not surprising that the new nomenclatures should be utilized to get away from obvious inconvenient positions. However, if certain fundamental notions are not departed from it is clear that conditional dispositions of property will be given effect to, even by English Courts. The language employed by Mr. Justice P. O. Lawrence in the latest case suggests that he is inclined to accept the Scotch view of the law within proper limits without totally ignoring English precedents. The limits are approximately these:—(a) The condition must not be immoral or opposed to public policy; (b) it should not merely be a restraint upon alienation or an impediment to the enjoyment of the property; (c) it should not postpone the ultimate devolution, beyond the lifetime of a life in being, at the time of the bequest; and (d) the ultimate devolution must be either to the testator himself (this is not fully recognised by the text-writers) or to some one who was alive at the date of the bequest. To these limitations, if we add in India that the condition should not contravene any recognised principle of Hindu or Muhammadan Law, we have a set of principles. I do not say they are incapable of amplification, into which one can work in a greater principle than any of these, namely, that, as far as possible, the intention of the testator should be effectuated. Examining the present case in the light of the above conceptions I am of opinion that, on the death of the mother, who had acquired an absolute estate in the property, by virtue of the failure of the other son's heirs and assigns to pay Government *kist*, the son's widow did not inherit the half share which she sold to the plaintiff.

For these reasons, I agree with the order proposed by my learned brother.

M. C. P.

*Appeal dismissed.*

(17) (1868) 1 H. L. (Sc. & Div.) 392.

(18) (1850) 1 Vos. (Sen.) 420; 27 E. R. 1117.

(19) (1905) A. C. 84; 92 L. T. 241; 53 W. R. 402; 21 T. L. R. 252; 74 L. J. Ch. 263.

(20) (1920) 1 Ch. 122; 88 L. J. Ch. 540; 64 S. J. 35; 35 T. L. R. 715; 122 L. T. 26.



NILU ROY v. ASIRBAD MANDAL.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 144 of 1920.

August 10, 1920.

*Present:*—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice and Justice Sir Ernest  
Fletcher, Kt.

NILU ROY—DEFENDANT—APPELLANT

versus

ASIRBAD MANDAL AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 11,  
Expl. IV, O II, r. 2—Mortgages, several—Successive  
suits by mortgagee, whether competent—Causes of  
action, distinct—Procedure.*

Where two distinct mortgages are successively executed by the same debtor in respect of the same property and in favour of the same creditor, the causes of action on the two mortgages are distinct, and, although it is open to the mortgagee in bringing a suit upon the first mortgage to include the claim on the second mortgage, that course is not obligatory upon him. A subsequent suit, therefore, on the second mortgage is not barred either under Explanation IV to section 11 or under Order II, rule 2 of the Civil Procedure Code. [p. 812, col. 2; p. 815, col. 1.]

There is nothing in the Code of Civil Procedure or in the Transfer of Property Act to prevent the holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit, subject, however, to this reservation that he cannot sell the property twice over, nor sell it under the second decree subject to the first. [p. 816, col. 2.]

*Dwarka Nath Nandi v. Mritunjoy Patra*, 3 Ind. Cas. 175, followed.

Appeal against the order of the Subordinate Judge, Bankura, dated the 25th of January 1920, reversing that of the Munsif, Second Court, at Bankura, dated the 21st of February 1919.

FACTS appear from the judgment.

Babu Bepin Behari Ghose (with him Babu Bankim Chandra Mookerjee), for the Appellant.—The defendant is the appellant. The appeal arises out of a mortgage suit. The facts may be stated shortly, thus. In 1899 the defendant and his brother who is dead, executed a simple mortgage-bond in favour of plaintiff's father in respect of the entire property belonging to the two brothers. Subsequently, in the next year, in June 1900, the defendant executed an instalment mortgage bond in respect of his share of the same property in favour of the same mortgagee, viz., the father of the plaintiff. One of the provisions of this latter bond was that, on failure by the mortgagor to pay two instalments of the money in succession, the

mortgagee would be entitled to sue the mortgagor. On the strength of this clause the present suit was instituted in 1917. As regards the first mortgage, dated 1899, the present plaintiff who was the mortgagee obtained a decree for sale of the property upon a suit brought in 1911. In that suit the plaintiff did not mention about the subsequent mortgage of 1900. The decree of 1911 has not yet been executed. In the present suit my defence was, that the suit was not maintainable inasmuch as there was already a decree against the same property, and that that decree might and ought to have included the claim made in the present suit. The first Court dismissed the suit on that view. But on appeal the suit was remanded for trial on the merits. It is against this order of remand that the present appeal has been preferred. My contention is, that the present suit is not maintainable in law. I submit the holder of two separate mortgages over the same property is not entitled to separate decrees for sale upon each of his separate suits. Refers to *Dorasami v. Venkata-teshaya* (1), *Nattu Krishnama Chariar v. Annangara Chariar* (2), *Dhondo Ramchandra Kulkarni v. Bhikaji Gopal* (3). The plaintiff should not have separate suits in respect of the same cause of action. Order II, rule 2, of the Code of Civil Procedure clearly operates as a bar to suit of such nature. In the present case there were two mortgages in respect of the same property. The plaintiff had, therefore, one cause of action which he could not split up into separate causes of action for separate suits. If he had failed to mention the whole of his claim against the defendant he cannot turn round again and sue the defendant, for the satisfaction of the rest. Refers to section 11, Explanation (IV) of the Code of Civil Procedure, which also makes it incumbent upon a plaintiff to include all that might and ought to have been claimed by him against the defendant or else his subsequent suit will be barred. Refers to *Kameswar Pershad v. Rajkumari Ruttan Koer* (4), *Hari Narain Banerji v. Shama Sundari*

(1) 25 M. 108; 11 M. L. J. 373.

(2) 30 M. 353; 2 M. L. T. 330; 17 M. L. J. 301.

(3) 27 Ind. Cas. 1095; 39 B. 158; 17 Bom. L. R. 144.

(4) 19 I. A. 234; 20 C. 79 (P. C.); 6 Sar. P. C. J. 241; 10 Ind. Dec. (N. S.) 53.

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*Dasi* (5), *Dorasami v. Venkateshayyar* (1); section 61 of the Transfer of Property Act. I submit, on considerations of equitable principles, the mortgagee is bound to bring one suit and claim one relief in respect of his successive mortgages. Then, there would arise another important point for consideration, viz., whether the property can be sold twice in execution of two separate decrees which would mean the doing away with the second mortgage. On all these considerations it would be meeting the ends of justice to dismiss the suit as being not maintainable, and this would also save the mortgagee from losing his rights under the second mortgage if he comes forward with a fresh suit based upon the two mortgages. In this view, therefore, the appeal should be allowed.

Babu Karunamoy Bose (with him Babu Phanindra Nath Das), for the Respondents.—As regards the difficulty in realising my dues under the second mortgage, I submit the difficulty is not insuperable. Refers to *Dwarkanath Nandi v. Mriturjoy Patra* (6). As regards section 61 of the Transfer of Property Act, I submit it must be read along with the provisions of the Civil Procedure Code as laid down in Order XXXIV, rule 12. Refers to *Subramania Aiyar v. Balasubramania Aiyar* (7). Then, as regards the first point raised by the other side that the suit is not maintainable because the plaintiff did not put forward his whole claim which he should have done, I submit Order II, rule 2 and Explanation IV to section 11 of the Code of Civil Procedure do not bear on the present case. Looking at the facts stated and alleged it is quite clear that the causes of action are distinct and the two mortgages did not form part of one and the same transaction. The failure of the plaintiff to include both in the same suit does not in the least affect the maintainability of a suit in respect of one of them only. The cases cited and relied on by the other side are all distinguishable from the facts of the present case. The onus is on them to prove that we might and ought to have made our claim on the second mortgage as a ground of attack in the former suit, in which they did not,

raise the point as they ought to have done. I submit there being distinct obligations under two mortgages; I am perfectly entitled to adopt the present course and I will not be interfered with on equitable principles. Refers to *Ramaswami Ayyar v. Vythithatha Ayyar* (8), *Thirukrikot Madathil Raman v. Thiruthiyil Krishnan Nair* (9), *Ram Sahai v. Ahmadi Begam* (10), *Kashinath v. Nathoo Keshav* (11).

Babu Bepin Behari Ghose replied briefly.

## JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal under Order XLIII, rule 1, clause (u), of the Civil Procedure Code, from an order of remand made under Order XLI, rule 23, in a suit to enforce a mortgage-security. The defendant executed an instalment mortgage-bond in favour of the father of the plaintiffs on the 25th June 1900, in respect of his share in the disputed property. The bond provided that, if default was made in the payment of two successive instalments, the entire sum would become recoverable. On the 30th November 1917, the plaintiffs, upon the allegation that such default had been made, instituted the present suit for realisation of their dues by sale of the hypothecated property. It appears that on the 1st February 1899 the defendant and his brother, now deceased, had executed another simple mortgage in favour of the father of the plaintiffs in respect of the entire property. In 1911 the mortgagees sued to enforce that mortgage and on the 27th November 1911 obtained a decree for sale which has not yet been executed. In that suit no mention of the second mortgage was made by either party. The mortgagor-defendant resists the present suit on the second mortgage on the ground that it is not maintainable in view of the decree already made in the previous suit which might and ought to have included the claim now put forward. The Trial Court gave effect to this contention and dismissed the suit. On appeal, the Subordinate Judge has overruled the objection in bar as untenable and has remanded the case for investigation

(5) 6 Ind. Cas. 159; 37 C. 559; 11 C. L. J. 551.

(6) 3 Ind. Cas. 175.

(7) 20 Ind. Cas. 317; 28 M. 927 (F. B.); 29 M. L. J. 195.

(8) 28 M. 760; 13 M. L. J. 448.

(9) 29 M. 157; 16 M. L. J. 48 (F. B.).

(10) 9 Ind. Cas. 53; 38 A. 302; 8 A. L. J. 47.

(11) 25 Ind. Cas. 73; 38 B. 444; 16 Bom. L. R. 454.

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on the merits. We have been invited, on this appeal, to examine the legality of the order made by the Subordinate Judge.

There has been a sharp difference of judicial opinion upon the question whether the holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, is competent to institute separate suits to obtain a separate decree for sale on each of them. The point was mooted before a Full Bench of the Allahabad High Court in *Sri Gopal v. Pirthi Singh* (12). The Court did not express an opinion upon the question, farther than this, that they were not prepared to endorse the decision of the lower Appellate Court that the second of such separate suits would be barred by the application of section 43 of the Code of Civil Procedure, 1882 (which embodied the principle that every suit must include the whole of the claim which the plaintiff was entitled to make in respect of the cause of action). When the case was taken up to the Judicial Committee, [*Sri Gopal v. Pirthi Singh* (13)] Sir Ford North observed as follows, with regard to the difficulties which had to be removed from the plaintiff's path before he could succeed:—

"Among others, section 43 of the Civil Procedure Code was held to be a bar to his suit in the two first Courts. The Court of Appeal expressed some doubt whether that was correct. There might have been a nice question to be argued; but the appellant's Counsel did not open it and did not even read the section to the Committee." It was apparently not brought to the notice of the Judicial Committee that the same Full Bench which had, on the 10th November 1897, expressed a doubt on the question in the case then under appeal, had, shortly afterwards, on the 17th February 1898, made a definite pronouncement on the subject in *Sundar Singh v. Bholu* (14), and had ruled that there was nothing in the Code of Civil Procedure or in the Transfer of Property Act to prevent the holder of two independent mortgages over the same property, who was not restrained by any covenant in either of them,

from obtaining decree for sale on each of them in a separate suit. This decision of the Allahabad High Court has formed the subject of much controversy in the other High Courts. Its correctness was questioned in Madras in the cases of *Dorasami v. Venkataseshayyar* (1) and *Nattu Krishnama Ohariar v. Annangara Ohariar* (2). But the authority of these cases has been considerably shaken, if they have not been actually overruled, by the decision of the Full Bench in *Subramania Aiyar v. Balasubramania Aiyar* (7), which affirms the proposition that it is open to a mortgagee to bring a suit for the recovery of his debt by sale of the properties mortgaged to him, subject to his interest in a prior mortgage. The same view has been recently approved in Patna: *Jagernath Singh v. Mohra Kuvar* (15). The Bombay High Court has, on the other hand, consistently refused to follow the rule enunciated in *Sundar Singh v. Bholu* (14) as will appear from *Zeshavram Dulvaram v. Ranchhod Fakira* (16) and *Dhondo Ramchandra Kulkarni v. Bhikaji Gopal* (3). In this Court, a doubt was expressed by Brett and Sharf-ud-Din, JJ., in *Hari Narain Banerji v. Shama Sundari Dasi* (5) where, however, the question did not actually require decision. But in *Gobind Frasad v. Tek Narain* (17) Brett and Vincent, JJ., ruled that a person having several mortgages over the same property was entitled to bring a suit on the earlier mortgages without joining in that suit his claim under the later mortgages. The cases in Bombay and Madras which were pressed upon the attention of the Court were all distinguished. In this conflict of judicial opinion, no useful purpose would be served by an examination of the facts of the particular cases where the question arose, it is sufficient to state that several of the decisions either entirely ignore or do not attach sufficient importance to the obvious distinction between the question of the right to institute a suit and the question of the nature and form of the relief which may be properly granted therein if the suit is held to be maintainable. We are here concerned primarily with the question, whether the plaintiffs-respondents were entitled to insti-

(12) 20 A. 110 (F. B.); A. W. N. (1897) 210; 9 Ind. Dec. (N. S.) 431.

(13) 29 I. A. 118; 24 A. 429 (P. C.); 4 Bom. L. R. 527; 6 O. W. N. 889; 8 Sar. P. C. J. 293.

(14) 20 A. 322 (F. B.); A. W. N. (1898) 58; 9 I. A. Dec. (N. S.) 566.

(15) 39 Ind. Cas. 76; 2 P. L. J. 118; 1 P. L. W. 653; (1917) Pat. 191.

(16) 30 B. 156; 7 Bom. L. R. 811.

(17) 7 Ind. Cas. 330; 38 O. 60; 13 C. L. J. 21; 14 C. W. N. 1053.



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tute this suit. If the answer be in the affirmative, the subsidiary question would arise, what relief are the plaintiffs entitled to obtain.

As regards the maintainability of the suit, the undoubted right possessed by the plaintiffs in that behalf under the mortgage contract, is said to have been extinguished by the operation of either Order II, rule 2 (1) or Explanation IV to section 11 of the Civil Procedure Code. We are of opinion that neither of these provisions avails the defendant.

Order II, rule 2 (1) provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. Rule 2 (2) provides that where a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. If rule 2 (1) is applicable to the circumstances of this case, rule 2 (2) plainly operates as a bar, but, in our opinion, rule 2 (1) has no application here. The rule provides in essence that the plaintiff shall not be entitled to split his cause of action into fragments and bring separate suits in respect thereof. But although the rule thus requires that every suit shall include the whole of the claim arising from one and the same cause of action, the rule does not further require that every suit shall include every claim or every cause of action which the plaintiff may have against the defendant. This distinction has been emphasised by the Judicial Committees in the cases of *Raja of Pittapur v. Suriya Eor* (18), *Amanat Bibi v. Imdad Hussain* (19), *Hanuman Kamat v. Hanuman Mandur* (20), *Saminathan Chetty v. Palaniappa Chetty* (21). In the case last mentioned Lord Moulton observed that "the rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion, in one and the same action, of different causes of action, even

though they arise from the same transaction, the first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in his action; the second portion makes it incumbent on him to ask for the whole of his remedies; the final paragraph is not intended to be an illustration of the foregoing provisions but a substantive enactment, making an obligation and a collateral security for its performance (which would otherwise be two independent causes of action), one cause of action for the purposes of the section." It may be conceded that particular instances may involve matters of considerable nicety and afford room for divergence of judicial opinion on the question whether the causes of action for the two suits are one or different. To mention one example only: the Courts are not agreed upon the question whether where several promissory notes have been executed for portions of the same debt, each promissory note creates a distinct cause of action on which a separate suit may be brought, *Preonath Mukerji v. Bishnath Prasad* (22), *Anantanarayana Iyer v. Savittri Ammal* (23). We are of opinion, however, that the case of two distinct mortgages, successively executed by the same debtor, in respect of the same property and in favour of the same creditor, is reasonably free from difficulty. The causes of action on the two mortgages are clearly distinct. It is not necessary to attempt to define the expression "cause of action" for our present purpose; it is sufficient to recall the description given by Lord Watson in *Chand Kaur v. Partab Singh* (24): "The cause of action has no relation whatever to the defence which may be set up..., nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour." This substantially accords with the earlier statement by West, J., in *Haji Hasam Ibrahim v. Manchooram* (25) and *Shridhar Vinayak v. Narayan* (26) "a cause of action is to be regarded

(18) 12 I. A. 116; 8 M. 520 (P. C.); 9 Ind. Jur. 274; 4 Sar. P. C. J. 658; 3 Ind. Dec. (N. S.) 356.

(19) 15 I. A. 106; 15 C. 600 (P. C.); 12 Ind. Jur. 255; 5 Sar. P. C. J. 24; Rafique & Jackson's P. C. No. 103; 7 Ind. Dec. (N. S.) 1117.

(20) 18 I. A. 158; 19 O. 123 (P. C.); 6 Sar. P. C. J. 91; 9 Ind. Dec. (N. S.) 927.

(21) 26 Ind. Cas. 228; 41 I. A. 142; 18 C. W. N. 617; (1914) A. O. 718; 17 New Law Reports 56; 83 L. J. P. C. 131; 110 L. T. 913 (P. C.).

(22) 29 A. 256; A. W. N. (1907) 4; 4 A. L. J. 15.

(23) 13 Ind. Cas. 458; 36 M. 151; (1912) M. W. N. 59; 11 M. L. T. 63; 22 M. L. J. 231.

(24) 15 I. A. 156; 16 O. 98 (P. C.); 5 Sar. P. C. J. 243; 12 Ind. Jur. 331; 8 Ind. Dec. (N. S.) 65.

(25) 8 B. 137; 2 Ind. Dec. (N. S.) 91.

(26) 11 B. H. C. R. 224.

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as the same if it rests upon facts which are integrally connected with those upon which a right and an infringement of a right have already been once asserted." See also the judgments of Esher, M. R., Fry, L. J., and Lopes, L. J., in *Read v. Brown* (27). Tested from the point of view thus indicated, the objection taken by the defendant proves unsustainable. The right of the plaintiffs to enforce the first mortgage depended upon facts entirely distinct from those essential for the establishment of their right to enforce the second mortgage; the right to sue upon the first security was neither enlarged nor abridged when the second security was given. The same point of view was expressed in different terms when the test was formulated by Scott, C. J., in *Kashinath v. Nathoo Keshav* (11), that if the evidence required to support the two claims is different in any material respects, the causes of action are different. Reference may, in this connection, be made to the judgment of Woodroffe, J., in *Mandal & Co., v. Fazul Ellahie* (29) where, after pointing out that the rule is framed to avoid the splitting of claims and remedies and to protect the defendant from being twice vexed for one and the same cause of action, the learned Judge quoted with approval the dictum of Garth, C. J., in *Pramada Dasi v. Lakhi Narain Mitter* (29) that care must be taken to give the section no wider construction than it would reasonably bear and emphasised the observation in *Sesha Ayyar v. Krishna Ayyangar* (30) and *Umed Dholchand v. Pir Saheb Jiva Miya* (31), that when parties choose to agree that there should be two instruments and two obligations, the Court is not justified in saying that there is only one obligation. This is well illustrated by the decisions in *Ramaswami Ayyar v. Vythinatha Ayyar* (9) *Thrikaikat Madathil Ramon v. Thiruthiyil Krishnan Nair* (9), and *Ram Sahai v. Ahmadi Begam* (10), which are authorities for the proposition that section 43 of the Code of 1882, which has been re-placed by

Order II, rule 2 of the Code of 1908, has no application to different suits upon different mortgages over the same property. The judgment in the case of *Atab Pramanick v. Mehrulla Sardar* (32), which purports to follow *Keshavram Dularam v. Ranchhod Fakira* (16), was pronounced upon an entirely different state of facts and cannot be treated as conclusive upon the question raised before us. We hold, accordingly, that Order II, rule 2, does not bar the present suit.

Explanation IV to section 11 is equally of no avail to the defendant. The explanation is in the following terms: "Any matter which might and ought to have been made ground of defense or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." The "former suit" referred to here is the "former suit" mentioned in the substantive portion of section 11, which provides as follows:—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court."

It will be observed that, when the defendant invokes the aid of Explanation IV, he assumes that when a plaintiff as second mortgagee sues to enforce his security and to cut off the equity of redemption under the second mortgage (which is really a mortgage of the equity of redemption under the first security) the parties litigate under the same title as they do when the plaintiff as first mortgagee seeks to enforce his security and to cut off the equity of redemption under that mortgage. We shall not pause to scrutinise the validity of this assumption, which, to say the least, is open to question. But, even on this assumption, the defendant must prove that the claim on the second mortgage might and ought to have been made a ground of attack in the former suit on the first mortgage. It is clearly not sufficient to show merely

(27) (1889) 22 Q. B. D. 128 at p. 131; 58 L. J. Q. B. 120; 60 L. T. 270; 37 W. R. 131.

(28) 26 Ind. Cas. 200; 41 C. 825.

(29) 12 C. 60; 6 Ind. Dec. (N. S.) 42.

(30) 24 M. 98 at p. 109.

(31) 7 B. 134; 4 Ind. Dec. (N. S.) 91.

(32) 23 Ind. Cas. 126; 19 C. L. J. 590.

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that it might have been made a ground of attack; if that had been the intention of the Legislature, the word "ought" might as well have been omitted. The result would then have been that a plaintiff would have been compelled to unite in one action all causes of action which he was at liberty to join under Order II, rule 3. Consequently, the defendant must establish, not merely that the plaintiffs might, but also that they ought to have made the claim on the second mortgage as a ground of attack in the former suit. In this connection, the circumstance is not wholly without significance that in the previous suit on the first mortgage, the defendant did not even suggest that such a course should be adopted. Now, as was observed by Lord Morris, in *Kameswar Pershad v. Rajkumari Ruttan Koer* (4), it depends upon the particular facts of each case to decide whether a matter ought to have been made a ground for defence or attack in the previous suit. No useful purpose would be served by an attempt to frame inelastic formulas so as to impair the elasticity of the rule of the Code, expressed in the colourless words "might and ought—" words used by Lord Westbury in *Hunter v. Stewart* (33). An examination of the cases on the subject discloses that tests of various descriptions, both positive and negative, have been applied to determine, in individual instances, whether a claim which might have been, ought to have been included in the prior suit. It has been said, for instance, that where matters are so dissimilar that their union might lead to confusion, it cannot reasonably be held that they ought to have been included in the same suit: *Kameswar Pershad v. Rajkumari Ruttan Koer* (4). On the other hand, it has been said that if the matters arise out of what may be regarded, for judicial purposes, as one transaction, several suits should not be permitted to proceed so as to render separate investigations necessary: *Shridhar v. Vinayak Narayan* (26), *Haji Hasam Ibrahim v. Mancharam* (25). The matter must, however, be regarded as essentially different where it did not originate in the same

transaction and when it constitutes a wholly different right in the plaintiff, giving rise to a different duty on the part of the defendant. These and other tests, however, which may be discoverable from an analysis of the cases in the books cannot be treated as an exhaustive enumeration of all the requisites or conditions before the bar can be applied. As Wigram, V. C., said in *Henderson v. Henderson* (34), the Court has to determine whether the point properly belonged to the subject of litigation and whether the parties exercising reasonable diligence might have brought it forward at the time. In the determination of this question, in the circumstances of a particular case, the limitation must be borne in mind that, where a given matter becomes the subject of litigation in and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been but was not brought forward as part of the subject in contest. From this standpoint, the view has been maintained that, where separate rights have been infringed, separate actions may be maintained, since the infringement of separate rights gives rise to separate causes of action: *Serrao v. Noel* (35) *Brunsdon v. Humphrey* (36), *Parambath Manakkal v. Puthengattil Moosamu* (37); see also the judgment of Garth, C. J., in *Dinobundhoo Chowdhry v. Kristomonee Dossee* (38) and of Lord Watson in *Mahabir Pershad Singh v. Macnaghten* (39). Reference may also be made to the judgment of Lord Macnaghten in *Moosa Goolam Ariff v. Ebrahim Goolam Ariff* (40) and of Sir John Edge in *Mahomed Ibrahim Hossein Khan v. Ambika Pershad*

(34) (1843) 3 Hare 100 at p. 115, 67 E. R. 813; 64 R. R. 213.

(35) (1855) 15 Q. B. D. 549.

(36) (1884) 14 Q. B. D. 141; 53 L. J. Q. B. 476; 61 L. T. 529; 32 W. R. 944; 49 J. P. 4.

(37) 28 M. 406.

(38) 2 C. 152 (F. B.); 1 Ind. Dec. (N. S.) 393.

(39) 16 I. A. 107; 16 C. 682 (P. C.); 13 Ind. Jur. 133; 5 Sar. P. C. J. 345; 8 Ind. Dec. (N. S.) 451.

(40) 16 Ind. Cas. 70; 40 C. 1; 16 C. W. N. 937; 23 M. L. J. 215; 16 C. L. J. 642; 14 Bom. L. R. 1211; 12 M. L. T. 449; 5 Bur. L. T. 211; (1912) M. W. N. 1097; 10 A. L. J. 486; 6 L. B. R. 119; 39 I. A. 287 (P. C.).

(33) (1861) 4 De G. F. & J. 168; 31 L. J. Ch. 346; 8 Jur. (N. S.) 317; 5 L. T. 471; 10 W. R. 176; 46 E. R. 1148; 135 R. R. 72.



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*Singh* (41) where some of the tests already mentioned were applied by the Judicial Committee to determine the applicability of Explanation II to section 13 of the Code of 1882. The decision of this Court in *Hari Narain Banerji v. Shama Sundari Dasi* (5) furnishes an instructive illustration as to how two rights, originally independent, may, by union in the same person, become amalgamated and be thereafter treated as an indivisible entity. There a puisne mortgagee, under the provisions of section 74 of the Transfer of Property Act, paid off the prior mortgage and thereby became subrogated to his rights. He then sued to enforce his own mortgage and obtained a decree. He next sued to enforce his rights under the prior mortgage which he had satisfied. It was ruled that section 43 of the Civil Procedure Code, 1882, was a bar to the second suit, as he might and ought to have included in the former suit the claim, not only under his own mortgage, but also that under the prior mortgage; the sum paid to discharge the latter was, it was said, an addition or accretion to the claim on his own mortgage. No such considerations arise in the case before us, where the securities were initially distinct and have throughout retained that character. We are accordingly of opinion that, although the plaintiffs might have included the claim on the second mortgage in the previous suit if they had so chosen, that course was not obligatory upon them, and the present suit is consequently not barred under Explanation IV to section 11, Civil Procedure Code.

We may add that in *Dorasami v. Venkateshachayyar* (1), reliance was placed on sections 61, 85 and 99 of the Transfer of Property Act as well as on the form of Decree No. 128 of Schedule IV of the Civil Procedure Code of 1882, to support the view that the suit on the earlier mortgage should include the claim on the later mortgage, and that a suit for sale on the earlier mortgage subject to the later mortgage could not be maintained. Whether the provisions mentioned really justified the conclusion may be a matter for argu-

ment [*Tajjo Bibi v. Bhagwan Prasad* (42), *Rhuda Baksh v. Alim-un-nissa* (43), *Ranjit Khan v. Ramdhan Singh* (44).] But as pointed out by Wallis, C. J., in *Subramania Aiyar v. Balasubramania Aiyar* (7), Order XXXIV, rule 1 and rule 14 of the Code of 1908, which reproduce the substance of sections 85 and 99 of the Transfer of Property Act, with important modifications, do not lend even apparent support to the conclusion deduced from those sections. As regards section 61 it does not, in our opinion, justify the inference that in every case not exactly covered thereby, because the properties comprised in the two securities are different, it is not merely permissible to the mortgagee to claim simultaneous redemption of the two mortgages, but it is also obligatory on him to proceed against the mortgagor in the same suit in respect of both the securities. It is by no means improbable that section 61 was framed in its present form because the doctrine of consolidation of securities, which was intended to be rendered inapplicable, had been limited to cases where the owner of different estates mortgaged them to one person separately for distinct debts or successively to secure the same debt or the same debt with further advances [*Shuttleworth v. Laycock* (45), *Pope v. Onslow* (46), *Jones v. Smith* (47), *Willie v. Lugg* (48)]. This doctrine, as we know, was extended by logical deductions to such an extent that it was entirely abolished by section 17 of the Conveyancing Act, 1881. In view of these considerations, we are not prepared to hold that section 61 may be legitimately regarded as indicative of an intention on the part of the Legislature to depart from the prevailing doctrine that a mortgagor may always redeem by paying the specific debt secured by the mortgage together with such prior liens as the mortgagee may have been compelled to pay for the protection of the mortgage. Nor can we invoke the

(42) 16 A. 295; A. W. N. (1894) 93; 8 Ind. Dec. (N. S.) 192.

(43) 27 A. 313; 1 A. L. J. 715; A. W. N. (1904) 273.

(44) 2 Ind. Dec. 879; 31 A. 182; 6 A. L. J. 654.

(45) (1684) 1 Vern. 245; 23 E. R. 443.

(46) (1692) 2 Vern. 286; 23 E. R. 784.

(47) (1794) 2 Ves. (Jun.) 372; 30 E. R. 679.

(48) (1761) 2 Eden, 78; 28 E. R. 825.

(41) 14 Ind. Cas. 496; 39 C. 527; 39 I. A. 68; 15 C. L. J. 411; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 22 M. L. J. 468 (P. C.).

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aid of the rule that the equitable, like the legal, mortgagee, is entitled, as against the mortgagor and all claiming under him (who have not or are not allowed to retain the full benefit of the legal estate) to add to his original debt, subsequent advances or liabilities made or incurred upon the security or credit of the estate without notice of any mesne charge. This principle is founded substantially on the policy which underlies the doctrine of taking as against mesne encumbrancers. Section 80 of the Transfer of Property Act militates against the view that the Legislature could have intended the application of a principle analogous to that of tacking in the class of cases now before us. Indeed, it looks that, when section 61 was invoked in the case of *Dorasami v. Venkateshayyar* (1), the Court took recourse to a doctrine which was neither consolidation nor tacking but possessed some of the characteristics of both the principles. Finally, we cannot overlook that section 61 must be read with Order XXXIV, rule 12, Civil Procedure Code, which re-places section 96 and contemplates the possibility of sale of mortgaged property subject to a prior mortgage (see also Forms of Decree No. 79 in Appendix D to Civil Procedure Code, 1908). As Wallis, C. J., points out, some confusion may possibly have been created by an inappropriate use of the formula that "the rights of redemption and foreclosure are co-extensive" which has reference to the time for institution of suits to enforce such rights and not to their other incidents [*Brown v. Cole* (49)]. The substance of the matter is that, when it is asserted that the right to foreclose and the right to redeem are reciprocal, what is intended is that, since the right of the mortgagor and mortgagee are reciprocal and commensurable, redemption under the mortgage is cut off at the expiration of the same time that the right to foreclose is barred, unless by Statute a different time is fixed for redemption from that allowed for foreclosure. There is thus no escape from the position that the present suit is maintainable.

We have finally to consider what conditions, if any, should be annexed to the decree that may be made herein, for it is

indisputable that the property cannot be sold twice in execution of the decrees in the two suits. There cannot be a sale on the first mortgage keeping alive a puisne encumbrance, for such a sale conveys the interests of the mortgagor and the mortgagee as they were at the date of the first mortgage and must, therefore, necessarily sweep away the subsequent encumbrance. On the other hand, if the property were directed to be sold in execution of the decree on the second mortgage subject to the rights of the mortgagee under the decree already made in his favour on the first mortgage, there might be needless complications and the property would not, almost to a certainty, fetch its proper values. The right course to follow in such circumstances is to direct that the property be sold free of both charges, whether the sale takes place in execution of the decree on the first mortgage or the decree on the second mortgage, and that the balance of sale-proceeds, after payment of incidental expenses, be applied in discharge of the dues on the first mortgage and the second mortgage, one after the other, the residue, if any, to stand to the credit of the holder of the equity of redemption. This accords with the view taken by Richardson, J., in *Dwarka Nath Nandi v. Mritun'oy Patra* (6), where he held that there was nothing in the Code of Civil Procedure or in the Transfer of Property Act to prevent the holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit, subject, however, to this reservation that he cannot sell the property twice over, nor sell it under the second decree subject to the first. This, in our opinion, is an accurate statement of the law applicable to this class of cases.

We direct, accordingly, that this appeal do stand dismissed with costs and the order of remand be carried out on the lines indicated in this judgment.

FLETCHER, J.—I agree.

*Appeal dismissed.*

(49) (1845) 14 Sim. 427; 65 R. R. 618; 14 L. J. Ch. 167; 9 Jur. 290; 60 E. R. 424.

GAYAN SINGH v. ATA HUSAIN.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 174 OF 1918.

December 8, 1920.

Present:—Justice Sir P. O. Banerji, Kt.,  
and Mr. Justice Gokul Prasad.

Thakur GAYAN SINGH AND OTHERS—

PLAINTIFFS—DECREE-HOLDERS—

APPELLANTS

versus

ATA HUSAIN AND OTHERS—

DEFENDANTS—JUDGMENT-DEBTORS—

RESPONDENTS.

*Limitation Act (IX of 1903), Sch. I, Art. 181—Mortgage suit—Preliminary decree—Final decree, application for, period for making—Decree against several defendants—Appeal by some defendants—Decree, when conclusive—Decree directing payment of prior mortgage but not specifying date of payment, effect of—Reasonable time, what is.*

The limitation applicable to an application for a final decree in a mortgage-suit is that provided by Article 181 of Schedule I to the Limitation Act, and commences to run from the date when the preliminary decree becomes conclusive between the parties. [p. 818, col. 1.]

Where a decree in a mortgage-suit is against separate sets of defendants for separate amounts, and some only of the defendants appeal and confine their appeal to the amounts decreed against them, the decree as regards the non-appealing defendants becomes conclusive upon the expiry of the period of limitation for an appeal from that decree, or on the expiry of the date fixed for payment of the amount decreed, if that should be a later date, and not the date of the decree in the appeal of the appealing defendants, because that appeal, being limited to that part of the decree which directs the property of the appellants to bear a proportionate part of the decretal amount, is not an appeal against the whole decree. Consequently, an application for a final decree in such a case against the non-appealing defendants made more than three years after the preliminary decree has become conclusive, would be barred by limitation. [p. 818, cols. 1 & 2; 819, col. 1.]

Where a decree for sale in a mortgage-suit provides for payment of the amount of a prior mortgage as a condition precedent to sale of the mortgaged property, but omits to specify the date on which such payment is to be made, the payment ought to be made or tendered within a reasonable time, and, as such a decree is a decree for redemption of that mortgage, payment should be made within six months of the decree. [p. 819, col. 1.]

First appeal from the decision of the Subordinate Judge, Cawnpore, dated the 5th of January 1918.

Messrs. Satya Ohander Mukerji and P. L. Banerji, for the Appellants.

Drs. S. N. Sen and Dr. S. M. Sulaiman, for the Respondents.

JUDGMENT.—This appeal arises out of an application for a final decree in a mortgage-

suit. The application which is now the subject-matter of controversy was presented on the 12th of June 1917. The question is, whether this application was time-barred. The preliminary decree in the suit was made on the 30th of April 1912. The suit was brought to enforce a mortgage against some of the properties comprised in the mortgage on the ground that the other properties had been purchased by the mortgagees themselves. The Court in making its decree declared the liability of each of the properties against which the mortgage was sought to be enforced, and it also declared in its decree that each of those properties would be liable for a proportionate part of the amount found to be due upon the mortgage. Those amounts were specified in the decree and the property which was to be liable for those amounts was also specified. Six months was granted to the mortgagors for payment of those amounts. There was a further provision in the decree that the decree-holders would not be entitled to bring the property to sale unless they paid the amount of a prior mortgage. The decree, however, did not fix any time within which the amount last mentioned was to be paid. It may be noted that the suit was brought upon a copy of the original mortgage which was alleged to have been lost. Three of the defendants appealed against this decree and their contention was that the loss of the original had not been accounted for and that the debt had been discharged. This appeal was preferred only in respect of the amount which the three appellants had been ordered to pay on account of the ownership of the property which was held to be liable for that amount. The Appellate Court, which was the High Court, held that the loss of the original had not been accounted for and that the suit was, therefore, not maintainable and on this ground dismissed the suit as against the appellants. As against the other defendants to the suit who were no parties to the appeal to the High Court and who themselves had preferred no appeal, the High Court made no order. The decree of the High Court was passed on the 6th of July 1914. An application for a final decree was made on the 7th of April 1915 by all the decree holders except the Court of Wards. The Court of Wards, however, was named as an opposite



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party to the application. That application was dismissed for default and subsequent applications made with the object of having the application of the 7th of April 1915 restored and revived were also dismissed. After these proceedings had taken place, the present application of the 12th of June 1917 was presented by all the decree holders. The Court below has dismissed the application and we have to consider whether the decision of that Court is right. It is not disputed that the limitation applicable to an application of this kind is that provided by Article 181 of the First Schedule to the Limitation Act, and the period of limitation is three years from the date on which the right to apply accrued. We have, therefore, to determine when the right of the present decree holders to make an application for a final decree in the cause arose. It may be taken as settled law that the right to apply for a final decree accrued to the decree-holders when the preliminary decree became conclusive between the parties. We have, therefore, to consider in this case when the decree of the Court of first instance became conclusive as between the decree-holders and the judgment debtors against whom the present application has been made. It is contended that the preliminary decree could not have become final as between the parties to the present appeal until the decision of the High Court in the appeal which was preferred by the three judgment-debtors who obtained a decree in the High Court. This contention is based mainly upon the provisions of Order XLI, rule 33, of the Code of Civil Procedure. It is urged that, since some of the judgment-debtors preferred an appeal to the High Court, the whole of the decree became *sub judice* and that it was competent to the High Court to dismiss the whole suit as against all the defendants and, until the final decision of the High Court, it could not be said that the decree against those defendants who had not appealed had become final. We are unable to agree with this contention. Under Order XLI, rule 4, the Appellate Court could, upon the appeal of some of the parties, reverse the decision of the lower Court if the appeal had been preferred against the whole decree and if the Court had proceeded upon a ground common to all the parties. In the present case the appeal which was preferred by

three of the defendants was limited to that part of the decree which directed their property to bear a proportionate part of the decretal amount and it was not an appeal against the whole decree. Therefore, although the Court of first instance had proceeded upon a ground common to all the defendants, the Appellate Court could not have reversed the decree under Order XLI, rule 4. Mr. Pearey Lal Banerji, who has ably argued this case on behalf of the appellants, concedes that rule 4 of Order XLI would not apply, but he rests his contention upon the provisions of rule 33 of that Order. We think that he cannot avail himself of the provisions of that rule and that the Appellate Court, in the appeal preferred by some of the defendants in respect of only a part of the decree, could not, by virtue of the provisions of rule 33, have dismissed the suit against those defendants who had in fact submitted to it. The principle of the Full Bench ruling in *Rangam Lal v. Jhandu* (1) applies to this case. There being a distinct provision as to the power of an Appellate Court to interfere with the decision of the Court of first instance upon an appeal preferred by some of the defendants in certain cases the provisions of rule 33 could not apply to cases for which clear provision is made in the order or to cases which would not come within the purview of the specific rule. We are, therefore, of opinion that the decree of the Court of first instance did not become *sub judice* when an appeal was preferred to this Court by some of the defendants only. The appellants were, consequently, not entitled to reckon limitation from the date of the decision of the High Court. The decree of the Court of first instance was in fact a decree which was a combination of several decrees against separate sets of defendants for separate amounts. As regards those of the defendants who did not appeal, that decree became conclusive upon the expiry of the period of limitation for an appeal from that decree. In the present case the decree allowed six months to the judgment-debtors to pay the amount decreed against each of them. That amount was payable on the 30th of October 1912. The decree, therefore, against the defendants who did not

(1) 11 Ind. Cas. 640; 34 A. 32; 8 A. L. J. 1111.

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appeal became a final and conclusive decree as between the decree-holders and them on that date, the period of limitation for an appeal having expired before that date. As the present application was presented more than three years after the day on which the preliminary decree became conclusive against the respondents, it is beyond time.

Another contention which was put forward on behalf of the appellants was, that the decree in directing the appellants to discharge the amount of a prior mortgage did not prescribe a particular period within which the prior mortgage was to be discharged and, therefore, as the decree holders could not bring the mortgaged property to sale without payment of the amount of the prior mortgage their right to apply for a final decree for the sale of the mortgaged property only accrued when they paid or tendered the amount of the prior mortgage. If this contention be carried to its legitimate length the decree-holders might wait for any number of years before they paid the amount of the prior mortgage. But Mr. Banerji fairly concedes that, although no date was fixed in the decree for payment of the amount of the prior mortgage, it ought to have been paid or tendered within a reasonable time. It is clear that the decree, in so far as it directed payment of the amount of the prior mortgage, was a decree for the redemption of that mortgage. The period within which the amount of the mortgage could be paid for redemption, as prescribed in Order XXXIV, rule 7, is a period within six months of the decree, so that the maximum period within which the amount of the prior mortgage could be paid for redemption of that mortgage was six months. If we adopt Mr. Pearey Lal Banerji's contention that the period should be a reasonable period we are unable to hold that that period should be anything more than the period mentioned in rule 7, Order XXXIV, i. e., a period of six months. If limitation be computed from the expiry of that period the present application would be beyond time. For these reasons, we hold that the Court below was right in dismissing the application made by the decree holders and this appeal must fail. We dismiss it with costs including fees on the higher scale.

*Appeal dismissed.*

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1837  
OF 1917.

May 20, 1920.

*Present:—*Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice Sir  
Ernest Fletcher, Kt.

BHAIRAB CHANDRA MONDAL AND  
OTHERS—PLAINTIFFS—APPELLANTS

*versus*

JIBAN KRISHNA MONDAL AND OTHERS  
—DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), ss. 43, 119—  
Exchange—Defective title—Subsequent acquisition of  
good title—Estoppel.*

The substance of the provisions embodied in section 43 of the Transfer of Property Act is that, though an assignment is of a defective title, yet when the assignor afterwards acquires a good title, the Court will make that good title available to make the assignment effectual, or, in other words, the interest when it accrues feeds the estoppel. [p. 820, cols. 1 & 2.]

The special provision relating to exchange contained in section 119 of the Transfer of Property Act does not exclude the operation of section 43 of the Act. For the purposes of section 43, an exchange stands on the same footing as a sale. [p. 820, col. 2.]

Appeal against the decree of the Second Additional District Judge, 24 Parganas, dated the 14th of May 1917, affirming that of the Subordinate Judge, Third Court, of that District, dated the 30th of August 1915.

FACTS appear from the judgment.

Dr. Dwarkanath Mitter (with him Babu Bhupendra Kumar Ghose), for the Appellants.—The plaintiffs are the appellants. The appeal arises out of a suit for declaration of title to three plots of land measuring in all about 4 *bighas*. The defendants admitted my title to plots Nos. 1 and 2 but have set up their title to plot No. 3 under an alleged exchange. They have alleged delivery to have taken place in 1911, on which date I had no title to the lands exchanged. Plaintiffs' vendors had title in them. The only question is whether the exchange is valid or not. The transaction is to be of same amount as in case of a sale.

[MOOKERJEE, ACTG. C. J.—Why should not the provisions of section 43 of the Transfer of Property Act apply to this case?]

That is a general section and ought not to override the provisions of the specific section, 119, of the Act. Refers to the

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judgment of Lord Westbury in *Holroyd v. Marshall* (1).

Babu Mahendranath Roy (with him Babu Baranasibasi Mukherjee, for the Respondents, was not called upon.

#### JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal by the plaintiffs in a suit for recovery of possession of land on declaration of title.

The defendants resisted the claim on the ground that they had acquired a good title under an exchange.

The Courts below have found that an exchange was effected in the manner provided by the Transfer of Property Act; that is, as the value of the property was less than Rs. 100, the plaintiffs delivered possession of the disputed land to the defendants. This is *prima facie* a complete answer to the claim, but the plaintiffs have established that, though at the time of the exchange they were in possession of the whole of the property, they had not a complete title thereto, as they were themselves purchasers from persons who were entitled only to a half share. Their contention, in substance, is that the defendants acquired a good title to that half share alone and have no title to the remainder.

The answer of the defendants is that, subsequent to the exchange, the plaintiffs acquired the title of the co-sharers of their vendor, and that as soon as their title to the whole was thereby perfected the benefit thereof accrued to the defendants. The Courts below have held that this is a conclusive answer to the case set up by the plaintiffs. In our opinion, there is no foundation for the claim.

Section 43 of the Transfer of Property Act provides that, "where a person erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property, at any time during which the contract of transfer subsists." This section in substance embodies the rule that the interest when it accrues feeds the estoppel; or, in other words, that though the assign-

ment was of a defective title, yet, as the assignor afterwards acquired a good title, the Court will make that good title available to make the assignment effectual: *Webb v. Austin* (2), *Cuthbertson v. Irving* (3), *Rowbotham v. Wilson* (4), *Holroyd v. Marshall* (1), *Booth v. Alcock* (5), *Bridgewater's Settlement, In re, Partridge v. Ward* (6), *Gresham Life Assurance, Society v. Orouther* (7), *Poulton v. Moore* (8), *Prosonna Kumar Mukerjee v. Srikanth Rout* (9).

Dr. Dwarka Nath Mitter has, however, contended that, although section 43 speaks of transfers in general terms, still it is not applicable to cases of exchange by reason of the special provision contained in section 119. That section provides that, "in the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation, or to the return of the thing transferred by him." But this does not exclude the operation of section 43; for a similar argument might be advanced in the case of sales, mortgages or leases, where, on proof of deficiency in the subject-matter, the purchaser, mortgagee or lessee may obtain compensation or cancellation.

Reference has also been made to the decision in *Holroyd v. Marshall* (1) where Lord Westbury speaks of this principle as applicable to cases of sales and mortgages; but this does not indicate that it is not applicable to cases of exchange. It is an elementary proposition that, for purposes like this, an exchange stands on the same footing as a sale. We are of opinion that

(2) (1844) 7 Man. & G. 701 at p. 724; 8 Scott (N.B.) 419; 13 L. J. C. P. 203; 185 E. R. 282.

(3) (1859) 4 H. & N. 742; 28 L. J. Ex. 306; 5 Jur. (N.S.) 740; 167 E. R. 1034; 33 L. T. (O.S.) 328; 118 R. R. 726.

(4) (1800) 8 H. L. O. 348; 30 L. J. Q. B. 49; 6 Jur. (N.S.) 965; 2 L. T. (N.S.) 642; 11 E. R. 463; 125 R. R. 192.

(5) (1873) 8 Ch. App. 663; 29 L. T. 231; 21 W. R. 743; 42 L. J. Ch. 557.

(6) (1910) 2 Ch. 342; 79 L. J. Ch. 746; 103 L. T. 421.

(7) (1914) 2 Ch. 219; 83 L. J. Ch. 867; Affirmed in (1915) 1 Ch. 214; 84 L. J. Ch. 312; 101 L. T. 887; 59 S. J. 103.

(8) (1915) 1 K. B. 400; 84 L. J. K. B. 462; 112 L. T. 202; 81 T. L. R. 43.

(9) 16 Ind. Cas. 365; 40 C. 173 at p. 184; 16 C. L. J. 202; 17 C. W. N. 137.

(1) (1862) 10 H. L. C. 191 at p. 208; 33 L. J. Ch. 193; 9 Jur. (N.S.) 218; 7 L. T. 172; 11 W. R. 171; 11 E. R. 999; 188 R. R. 108.



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the claim put forward by the plaintiffs is not merely unfounded, but is wholly unjust and has been rightly dismissed.

The appeal is dismissed with costs.

FLETCHER, J.—I agree.

*Appeal dismissed.*

ALLAHABAD HIGH COURT.  
SECOND CIVIL APPEAL No. 864 OF 1918.

February 1, 1921.

Present:—Mr. Justice Tudball and  
Mr. Justice Rague.

BINDA PERSHAD—PLAINTIFF—APPELLANT  
*versus*

RAM CHANDER AND OTHERS—  
DEFENDANTS—RESPONDENTS.

*Insolvency—Property alleged by creditor to belong to insolvent—Possession taken by Receiver—Suit by actual owner against creditor for damages, whether maintainable.*

At the instance of a creditor of an insolvent certain property which the creditor alleged belonged to the insolvent was taken possession of by the Receiver, but upon an objection by the real owner, the property was restored to him. The owner of the property then brought the present suit against the creditor for damages for wrongful seizure:

*Held*, that the suit was maintainable, and that it was not necessary to sue the Receiver.

Second appeal from the decree of the Additional Judge, Meerut, dated the 16th of April 1918.

Messrs. Nehal Chand and H. K. Mukerji, for the Appellant.

Messrs. S. P. Ghosh and G. Agarwala, for the Respondents.

**JUDGMENT.**—This is a plaintiff's appeal arising out of a suit for damages. The plaintiff's case was that he and one Abdul Haq became partners in a brick kiln business in August 1913; that a deed of partnership was drawn up on the 16th of October 1913; that the plaintiff supplied Rs. 2,000 and Abdul Haq Rs. 300 worth of capital, and that the plaintiff not having the necessary technical knowledge, Abdul Haq ran the business, but the plaintiff discovering

that Abdul Haq was heavily involved in debt decided to separate from him and on the 26th of March 1914 a deed of dissolution of partnership was drawn up under which the plaintiff paid to Abdul Haq Rs. 300 his share of the capital and Rs. 950 his share of some of the produce of the kiln. Apparently, this sum of Rs. 1,250 was distributed to certain creditors of Abdul Haq. Among the creditors were the respondents to the present appeal. Abdul Haq applied to the District Judge to be declared an insolvent and a Receiver was appointed to take possession of his property. According to the plaintiff, on the 20th of September 1914 the respondents applied to the District Judge stating that Abdul Haq owned a half share in the brick kiln and asking the Court to direct the Receiver to take possession of the kiln. The District Judge ordered the Receiver to comply, and the Receiver took complete possession of the kiln on the 26th of September 1914. The plaintiff filed objections which were allowed and on the 21st of January 1915 the Receiver gave up possession of the kiln. On the 30th of January 1915, however, the respondents, according to the plaintiff himself, made a further application for review of the order of the 21st of January 1915, and alleged that the whole of the kiln belonged to Abdul Haq and asked the Court to direct the Receiver to take possession thereof. The District Judge apparently passed an *ex parte* order to the Receiver to comply and on the 10th of February 1915, the Receiver again took possession of the whole of the kiln. An appeal was preferred to the High Court by the plaintiff against the order of the District Judge and this Court on appeal set it aside and possession of the kiln was restored to the plaintiff on the 6th of May 1915. On these allegations of fact, the plaintiff sued the defendants for damages caused to him by the seizure of the brick kiln by reason of which he alleged that he had suffered considerable loss. The defendants put in a long written statement denying many facts alleged by the plaintiff but asserted, among other things, that the dissolution of partnership of 26th of March 1914 was a bogus transaction, made by Abdul Haq and Binda Prasad in collusion, with a view to defeat the creditors of the former. It was also argued in Court that, assuming the

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facts to be as stated by the plaintiff, the defendants were not legally liable for any damages that had accrued to the plaintiff and that the proper person to sue was the Receiver who was responsible therefor. Both the Courts below have decided only two points. They have held that the dissolution of partnership of the 26th of March 1914 was a genuine and not a bogus transaction. They have then held that, on the facts alleged, the respondents were not legally liable for any damages, and that the suit ought to have been filed against the Receiver. In this view, the Courts below have dismissed the suit without going into the other facts or the question of actual damages. It is urged on appeal that the decision of the Court below on the point of law which is raised is erroneous and should be set aside. In view of the decision of this Court in *Abdur Rahim v. Sital Prasad* (1) it is clear that the decision of the Court below on the question of law is incorrect. The case mentioned above is parallel and exactly fits the facts of the present case. It is unnecessary for us to go any further into this point as the matter is covered by a decision of a Divisional Bench of this Court. The case must, therefore, go back for decision on its merits. There are several questions of fact into which the Court will have to go. We, therefore, allow the appeal, set aside the decree of the Court below and remand the case to the Court of first instance through the lower Appellate Court with directions to re-admit the suit on its original number and to proceed to hear and decide it according to law. The costs of this appeal and those of the Courts below will be costs in the cause and will abide the result. The costs in this Court will include fees on the higher scale.

*Appeal allowed.*

(1) 54 Ind. Cas. 792; 41 A. 658; 17 A. L. J. 856; 1 U. P. L. R. (A) 115.

## PRIVY COUNCIL.

### APPEAL FROM THE BOMBAY HIGH COURT.

February 11, 1921.

*Present:*—Lord Buckmaster, Lord Dunedin,  
Lord Shaw, Sir John Edge and  
Mr. Ameer Ali.

BHAIIDAS SHIVDAS—APPELLANT

*versus*

BAI GULAB AND ANOTHER—

RESPONDENTS.

*Letters Patent (Bom.), ss. 15, 36, 44—Civil Procedure Code (Act V of 1908), ss. 4, 98—Procedure—Letters Patent Appeal—Special form of procedure, whether affected by s. 98—Costs.*

Section 36 of the Letters Patent of Bombay prescribes a special form of procedure, by which, if the Judges hearing an appeal are equally divided, the opinion of the Senior Judge prevails. [p. 824, col. 1.]

The provisions of this section are not controlled by section 98 of the Code of Civil Procedure, which provides for a reference of the point in dispute to one or more other Judges. [p. 824, col. 2.]

In this case the Board, having all the materials before them, were willing to decide the question at issue, but the appellant would not consent to this being done. The Board in consequence reserved the costs of the appeal and all other costs since the error of procedure occurred, and intimated that the appellant might be made to pay these even if ultimately successful. [p. 825, col. 1.]

Appeal from a decree of the Bombay High Court, dated March 23rd, 1917, affirming a decree of Macleod, J.

FACTS of the case are sufficiently stated, for the purposes of this report, in their Lordships' judgment. The only question argued on this appeal was that of procedure.

Mr. De Gruyther, K. O. (with him Mr. Purikh), for the Appellant.—The question on the merits is, whether under the Will in suit, an estate for life, with power to appoint was given to the widow, or whether she was entitled absolutely. This question, however, does not arise, as there has been an error in procedure. The High Court erred in making a reference under section 98 of the Civil Procedure Code to two other Judges. The case was on the Original Side, and the procedure in appeal is regulated by sections 15 and 36 of the Letters Patent of 1865 (originally issued in 1862). By section 36 of the Letters Patent the opinion of Scott, C. J., as the Senior Judge, should have prevailed; and section 15 gives a further appeal locally. Section 98 of the Code of Civil Procedure does not override the provisions of the Letters Patent: it does not apply

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to Letters Patent Appeals, the special procedure under which is saved by section 4 of the Code. The latest case to this effect is a Bombay one, decided on 5th November 1917, (after the judgment in this case) and reported as *Surajmal v. Horniman* (1).

The Code of Civil Procedure does not restrict Letters Patent Appeals:

*Hurrieh Ohunder Chowdhry v. Kalisundari Debi* (2).

It may be conceded that the Code applies to proceedings under the Letters Patent, save so far as expressly provided to the contrary:

*Sabitri Thakurain v. Savi* (3) where *Hurrieh Ohunder Chowdhry's case* (2) (*Supra*) was not apparently cited.

But in cases of conflict the Letters Patent prevail:

*Hoop Lul v. Lakshmi Doss* (4), *Lachman Singh v. Ram Lagan Singh* (5).

*Nundceput Mahta v. Urquhart* (6) where the matter was fully considered.

[LORD SHAW.—You conducted your case on the reference without any protest.]

[LORD DUNEDIN.—They must be allowed to appear and argue on the merits.]

When the Judge has no inherent jurisdiction, the parties cannot confer it:

*Ledgard v. Bull* (7).

[LORD BUCKMASTER.—The only question here is the construction of a Will. We have the materials before us and can try the matter now: otherwise it will come back to us in five or ten years' time.]

My client in India has given specific instructions that we are to insist on the case being decided on the point of procedure. We cannot, therefore, consent to have the question of construction decided now.

Sir Erle Richards, K. C. (with him Mr. E. B. Raikes), for the Respondents.—Five out of seven Judges of the Bombay High Court have taken part in this case, and four

are in our favour. The procedure under section 98 of the Code is not an appeal, but merely a reference: it is no case of want of jurisdiction: the case remained in the hands of Scott, C. J., and Heaton J., all the time. Also, the appellant submitted to the jurisdiction of the two new Judges.

Mr. Raikes followed.—All the appellant was entitled to under section 36 was judgment on this particular point, which was not the only point in the case: there was an issue of limitation.

Section 98 is quite consistent with the Letters Patent: the Judges can refer a particular point to others; but these others are not seized of the appeal. The reference is not excluded by the Letters Patent and is allowed by section 98. Till the two Judges had made a decree they could alter their judgment.

[LORD BUCKMASTER.—If it were a mere case of asking advice, the Chief Justice would not be bound to follow it.]

Further, under section 44 of the Letters Patent, the Letters are subject to the legislative powers of the Government of India, so section 93 of the Code should prevail.

Mr. De Gruyther in reply.—The question of limitation was not raised in the appeal.

## JUDGMENT.

LORD BUCKMASTER.—The real question involved in the dispute giving rise to this appeal was a question as to the construction of the Will of one Nathoo Moolji, who died on the 8th December 1894, affecting the respective estates and interests that were taken by the testator's widow and his two daughters. One of the daughters died in the lifetime of the widow, and her heir, who is the present appellant, instituted, on the widow's death, in the High Court of Judicature in Bombay, Ordinary Original Civil Jurisdiction, the proceedings out of which this appeal has arisen, claiming that, according to the true construction of the Will, he was entitled to a vested one half share in the testator's property.

The learned Judge before whom the suit was first heard dismissed the application and held that there was an intestacy after the widow's death.

An appeal was taken from that judgment and heard before Chief Justice Scott and Mr.

(1) 47 Ind. Cas. 449; 20 Bom. L. R. 185.

(2) 10 I. A. 4 at p. 17; 9 C. 482 (P. C.); 12 C. L. R. 511; 7 Ind. Jur. 161; 4 Sar. P. C. J. 406; 4 Ind. Dec. (N. S.) 970.

(3) 60 Ind. Cas. 274; 48 I. A. 76; 40 M. L. J. 308; (1921) M. W. N. 159; 19 A. L. J. 231 (P. C.).

(4) 29 M. J.

(5) 26 A. 10; A. W. N. (903) 162.

(6) 13 W. R. 209 at p. 211; 4 B. L. R. A. C. 151.

(7) 13 I. A. 134 at p. 145; 9 A. 191 (P. C.); 4 Sar. P. C. J. 741; 5 Ind. Dec. (N. S.) 561.



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Justice Heaton. They differed in their opinion. Chief Justice Scott thought that the plaintiff was entitled to the relief he claimed; Mr. Justice Heaton, on the other hand, agreed with the Judge who had first tried the suit. The course then taken was to refer the matter to two other Judges. Mr. Justice Batchelor and Mr. Justice Shah, who also decided adversely to the plaintiff's contention.

The plaintiff has now brought an appeal before His Majesty in Council, and the first point that he has raised is this: that the order made referring the case to the decision of Mr. Justice Batchelor and Mr. Justice Shah was *ultra vires* and void; that there was no jurisdiction in these two Judges to entertain the dispute, and that he is entitled, as of right, to a decree in accordance with the opinion of Chief Justice Scott, the senior of the two Judges before whom the appeal was first heard.

That contention depends upon the construction of the Letters Patent of Bombay, under which the Court was constituted, and the Code of Civil Procedure, 1908. By section 36 of the Letters Patent it is provided that if the High Court is sitting in a Division composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, the decision shall agree with the opinion of the majority of the Judges; but if the Judges are equally divided, the opinion of the senior Judge shall prevail.

In this case it is quite clear. There were two Judges sitting; the Senior Judge was the Chief Justice; there was an equal division of opinion; and under section 36, in consequence, the plaintiff was entitled to a decree in his favour.

It is, however, urged on behalf of the respondents that the procedure in section 36 is modified by the Code of Civil Procedure, 1908, and it is pointed out that by section 44 of the Letters Patent there is an express provision which makes those Letters Patent subject to the legislative powers of the Governor-General in Council.

There are two sections in the Code of Civil Procedure which are relevant to this dispute. The one is section 4 and the other is section 98. Section 98 appears to have been the section under which the Judges

acted. That section provides:—

"That where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ, and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it."

It is quite plain that those provisions create a totally distinct method of procedure in the event of difference between two Judges from that which was laid down by section 36. Under section 36 of the Letters Patent the judgment of the Judge who was the senior Judge would be the judgment which the parties before the Court would have a right to obtain; under section 98, the judgment to which they are entitled is the judgment of the majority of all the Judges who have heard the appeal; and this case shows that those two provisions might produce a totally different result. If, therefore, section 98 controls section 36 the respondents would be entitled to say that the proper procedure had been followed, and that the appellant had no cause of complaint. But by section 4 of the Code of Civil Procedure it is also provided that:—

"In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed by or under any other law for the time being in force."

There is no specific provision in section 98, and there is a special form of procedure which was already prescribed. That form of procedure section 98 does not, in their Lordships' opinion, affect. The consequence is that the appellant is right in saying that in this instance a wrong course was taken when this case was referred to other Judges for decision, and he is technically entitled to a decree in accordance with the judgment of the Chief Justice. This view of the section is not novel, for it has been supported by judgments in Madras, in Allahabad and in Calcutta. [See *Roop Lal v. Lakshmi Doss* (4), *Lachman Singh*

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v. *Ram Lagan Singh* (5), *Nundeeput Mahta v. Urquhart* (6).

There only remains for their Lordships' consideration the question as to how they ought to deal with the costs of these proceedings.

As has been already pointed out, the real matter is the question of the construction of a Will. The record has been prepared, the Will is before their Lordships, and they are perfectly ready to undertake the duty of determining what the meaning of that Will may be; but the appellant's Counsel, acting under the strictest instructions from his client in India, is unable to consent to their Lordships taking that course, and is compelled to insist upon the determination of this dispute simply upon the question of procedure. The result, therefore, is this that, although it may be by a wrong path, this appeal has reached their Lordships by whom it could be ultimately decided, but they are not permitted to decide it; they are obliged to send the case back for further consideration and then, after a prolonged and tedious journey, it may find its way back again to the Board for ultimate decision.

Their Lordships are unable, in these circumstances, to advise His Majesty to follow the usual rule and give the successful appellant the costs of his successful appeal. They think that the whole of the costs from the 13th March 1917 when the mistake was first made, should await determination until the ultimate decision of this matter when the strict procedure has been followed, and they will reserve the power of awarding those costs as seems right when that course has been taken. If the appellant fails, these costs may be regarded as costs in the cause; their Lordships make this intimation for the assistance of the Board before whom the matter may ultimately come; but this will in no way fetter their discretion if they think that, even if the appellant ultimately were to succeed, he ought not to be recouped and indeed ought to pay the wasted expense of this barren victory. They only desire to add that the original judgment of the 13th March 1917, appears not to have dealt with costs at all; but before any decree is drawn up under that order, it would be desirable that some proper application should be

made to the Court for the purpose of seeing that the order is correct in that respect.

For the rest, they will humbly advise His Majesty that the decree of the Appellate Court should be set aside, and they will remit the case to the High Court to be dealt with according to law, their Lordships having already pointed out the way in which they think that direction should be obeyed. The costs of this appeal and all costs subsequent to the 13th March 1917 are to be reserved to be dealt with by this Board.

*Decree set aside.*

Solicitor for the Appellant.—Mr. E. Dalgado,  
Solicitors for the Respondents.—Messrs. Hughes & Sons.

ALLAHABAD HIGH COURT.  
SECOND CIVIL APPEAL No 36 OF 1918.  
December 8, 1920.

Present:—Mr. Justice Ramage and  
Mr. Justice Ryves.

JWALA SINGH—PLAINTIFF—  
APPELLANT

*versus*

FATTA alias NATHA AND OTHERS—  
DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 53—  
Fraudulent transfer—Decree against Lambardar for  
share of profits—Subsequent alienations by Lambardar  
—Suit to declare alienations invalid—Proof requisite.*

Certain decrees were obtained from the Revenue Court for a share of the profits against a *Lambardar*. The *Lambardar* thereafter alienated some of his property in favour of his son and grandson, and the present suit was brought to declare the alienations invalid, on the ground that they were made with the object of defrauding the decrees of the Revenue Court. It was not alleged, nor was evidence led to show, that after the alienations the *Lambardar* had no other property left to satisfy the decrees:

*Held*, that the suit must fail, as there was no allegation or proof that the alienations had the effect of depriving the plaintiff of the amount of the Revenue Court's decrees. [p. 826, col 1.]

Second appeal from a decree of the Additional Judge, Meerut, dated the 20th September 1917.

SULIN MOHAN BANERJEE v. RAJ KRISHNA GHOSH,

Dr. S. M. Sulaiman, for the Appellant.

Mr. Baldeo Ram Dave, for the Respondents.

JUDGMENT.—The two Appeals Nos. 36 and 37 of 1918 are connected, inasmuch as they are between the same parties and the points for determination are practically the same. It appears that four persons, namely, Jwala Singh, Sabir Singh, Har Gulal Singh and Dakhla, obtained from the Revenue Courts three decrees for their share of profits against Fatta, the *Lambardar*. The three decrees were obtained on the 6th of May 1909, 8th of November 1910 and 28th of August 1913. On the 17th of January 1910 Fatta executed a deed of gift in favour of his grandson, Budh Singh, in respect of some property. On the 11th of December 1913 Fatta executed a deed of sale in respect of the same property and some other property in favour of his son and grandson, namely, Simru and Budh Singh. On the 7th of December 1914, two suits were filed by Jwala Singh and others against Fatta his son, his grandson and Niader. By one suit Jwala and others sought to have the deed of gift in favour of Budh Singh declared invalid and inoperative and by the other they asked the sale-deed in favour of Budh Singh and Simru to be declared invalid. The reliefs in both the suits were sought on the allegation that the transfers which were challenged by the plaintiffs were made with the object of defrauding the decrees that the plaintiffs had obtained in the Rent Court. The claims were resisted on various grounds. The Court of first instance dismissed them and the decrees of the first Court were upheld in appeal. In second appeal to this Court, the findings arrived at by the lower Appellate Court are challenged. We find on reference to the pleadings and to the evidence in both the cases that there is no allegation that, after the alienations indispute, Fatta had no other property left to satisfy the decrees of the plaintiffs nor is there any evidence in support of such an allegation. The mere fact that Fatta gifted some property to his grandson and sold the same property with some other property to his son and grandson would not by itself render the alienations invalid. The appellant in order to succeed had to allege and to prove at least that the effect of the said alienations was to deprive him of the amount of the Rent Court's decrees. In the absence of

such proof the claim of the appellant cannot succeed. We, therefore, dismiss this appeal with costs including in this Court-fees on the higher scale.

*Appeal dismissed.*

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 617  
OF 1919.

July 22, 1920.

*Present:*—Sir Asutosh Mookerjee, Kt,  
Acting Chief Justice, and Justice Sir Ernest  
Fletcher, Kt.

SULIN MOHAN BANERJEE

AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAJ KRISHNA GHOSH AND ANOTHER—

DEFENDANTS—RESPONDENTS.

*Hindu Law—Widow, position of—Alienation by widow, whether void or voidable—Election by reversionary heir to treat alienation as nullity, what constitutes—Steps to avoid alienation, whether must be taken before suit—Landlord and tenant—Tenancy, transferable, proof of.*

A Hindu widow is not a tenant for life, but is the owner of her husband's property, subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. Her alienation is not, therefore, absolutely void, but is *prima facie* voidable at the election of the reversionary heir. The institution of a suit by the reversionary heir for possession shows his election to treat the alienation as a nullity, and in such a suit it is neither necessary for him to ask for a declaration that the alienation is inoperative, nor is it essential that he should take steps, before the institution of the suit to avoid the alienation. [p. 826, col. 2.]

In a suit for possession by the landlord against the transferee of a tenancy which was created before the passing of the Transfer of Property Act and was not for the purpose of residence, the defendant must establish that the tenancy was transferable under the law as it stood at the time of its inception. The fact that it is heritable does not make it transferable in the absence of a custom to the contrary or an express contract to that effect. [p. 829, col. 1.]

Appeal against the decree of the First Additional District Judge, 24-Pargannas, dated the 27th of February 1919, affirming that of the Subordinate Judge, Fourth Court, at Alipur, dated the 11th of January 1918.



SULIN MOHAN BANERJEE v. RAJ KRISHNA GHOSH.

FACTS appear from the judgment.

Babu Basanta Kumar Bose (with him Babus Jolindra Mohan Sen Gupta and Shiba Prosanna Bhattacharji), for the Appellants.—The permanent lease granted to the defendant by Muktakeshi was without legal necessity and cannot be binding upon her sons after her death. There is no denial that Muktakeshi had only a widow's estate in the one-third share of the property. The alienation cannot, therefore, bind the reversioners if it was made without legal necessity. The ground on which the suit of the reversioners has been dismissed is, that they took no steps to avoid the lease before suit. That view is clearly erroneous. No steps need be taken before suit to avoid the lease. All that is necessary is to institute a suit for possession. That is equivalent to an election to treat the lease as a nullity. Refers to *Bijoy Gopal Mukerji v. Krishna Mahishi Debi* (1). Then, with regard to the one-third share of Jogendra, the lessor had no power to grant the lease. Lastly, with reference to the claim of the defendant to possession by virtue of his purchase of the interest of the tenant, my submission is there having been no evidence of transferability the defendant got nothing as against the landlord. See *Hari Nath Karmakar v. Raj Chandra Karmakar* (2), *Madhab Chandra Pal v. Bijoy Chand Mahatab Bahadur* (3), *Madhu Sudan Sen v. Kamini Kanta Sen* (4) and *Ram Charan Naskar v. Hari Charan Guha* (5).

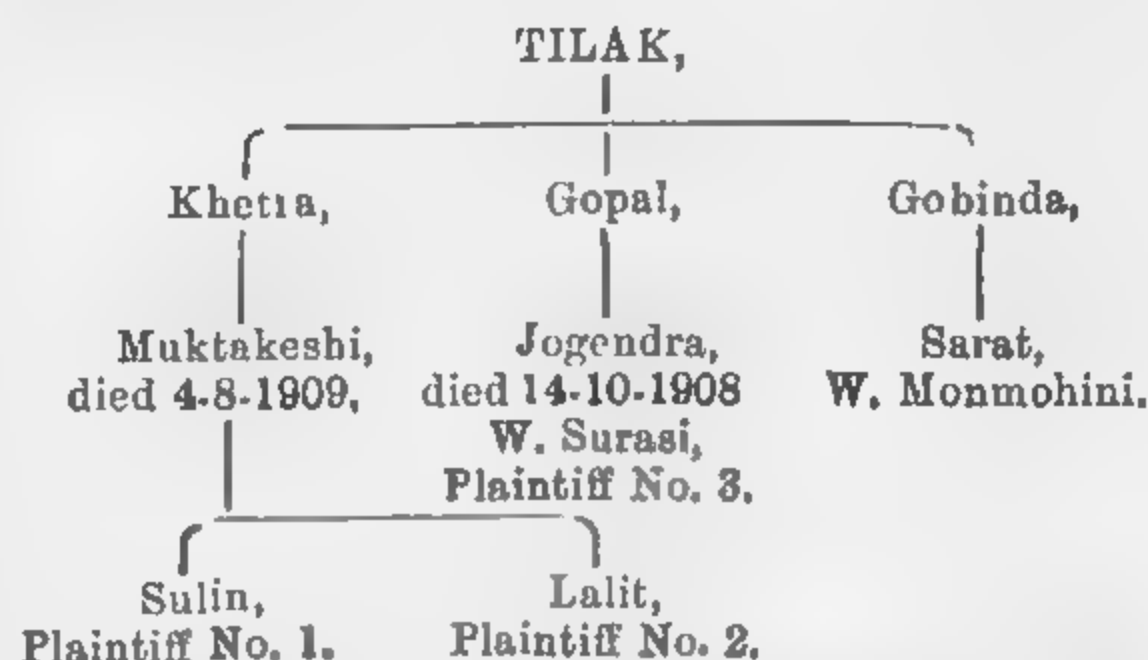
Babu Bimala Charan Deb, for the Respondents, refers to *Modhu Sudan Singh v. E. G. Rooke* (6). The plaintiffs have nothing whatever to urge as regards the interest of Sarat and the share of Jogendra which Sarat and Muktakeshi got under his Will. It is true that at the time of granting the lease they had no power to deal with the interest of Jogendra, but section 43 of the Transfer of Property Act is clearly applicable in favour of the defendant. Then, as regards the defendant's purchase of the tenant's interests,

I submit successive transfers and several instances of succession make the tenancy a transferable one.

Babu Basanta Kumar Bose was not called upon to reply.

## JUDGMENT.

MOOREHEAD, AGC. C. J.—This is an appeal by the plaintiffs in a suit for recovery of possession of land on declaration of title. The land belonged originally to Tilak, the founder of a family of Ghatake, which consisted of three brothers, Khetra, Gopal and Gobinda, as shown in the following genealogical table:—



Khetra left a daughter, Muktakeshi, whose sons are the first two plaintiffs. They claim as reversionary heirs to the estate of their maternal grandfather. Gopal left a son, Jogendra, who left a widow, Surasi Bala, the third plaintiff in this litigation. Gobinda left a son, Sarat Chandra, who left a widow, Monmohini, the *pro forma* defendant in this suit. The property was taken by the three brothers in equal shares. Consequently, upon their death, Muktakeshi, Jogendra and Sarat held the property in equal shares by right of inheritance. On the 18th April 1904, Muktakeshi and Sarat granted a lease of the entire property to the first defendant, as if Jogendra had no interest therein and they themselves were entitled to it to his exclusion. Muktakeshi died on the 4th August 1909. Jogendra had died on the 14th October 1908; prior to his death, he had made a testamentary disposition of his properties on the 18th August 1908. Under that Will, he left one-half of his one-third share to his cousin sister Muktakeshi and the other half to his cousin Sarat. The plaintiffs claimed to recover the property from the first defendant on the allegation that the permanent lease granted to him on the 18th April 1904 was without legal

(1) 34 C. 329; 11 C. W. N. 424; 5 C. L. J. 334; 9 Bom. L. R. 602; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 I. A. 87 (P. C.).

(2) 2 C. W. N. 122.

(3) 4 C. W. N. 574.

(4) 32 C. 1023; 9 C. W. N. 895.

(5) 7 C. L. J. 107.

(6) 25 C. 1 (P. C.); 24 I. A. 164; 1 C. W. N. 433; 7 M. L. J. 127; 7 Sar. P. C. J. 194; 13 Ind. Dec. (N. S.) 1.

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necessity and ceased to be operative upon the death of Muktakeshi. The defendant pleaded that the lease was binding upon the reversionary heirs, and further that he was entitled to remain in occupation, as he had, on the 25th April 1904, purchased from one Bepin Bahary Roy the interest of a tenant of the land.

The Court of first instance dismissed the suit. Upon appeal, that decision has been affirmed by the District Judge.

The first point which requires consideration in the present appeal is, the validity of the permanent lease granted by Muktakeshi and Sarat on the 18th April 1904. It is clear that the lease was operative in respect of a two-third share, during the lifetime of Muktakeshi and Sarat. But, as we have already explained, Muktakeshi and Sarat subsequently obtained the one-third share of Jogendra by virtue of his Will. In these circumstances, the Courts below have rightly held that the provisions of section 43 of the Transfer of Property Act are applicable, and that the share of Jogendra, when it vested in Muktakeshi and Sarat on the 14th August 1908, became available to perfect their title and consequently the title of the first defendant in the entire property [see *Bhairab Chandra v. Jibin Krishna* (7): Second Appeal No. 1837 of 1917, decided on the 20th May 1920].

But the question remains whether the lease is operative as against the sons of Muktakeshi who claim as reversionary heirs to the estate of their maternal grandfather. It has not been established that the lease was executed for legal necessity. *Prima facie*, then, the lease does not bind the reversionary heirs but; the Courts below have held, on the authority of the decision of the Judicial Committee in *Modhu Sudan Singh v. E. G. Rooke* (6), that an alienation made by a Hindu widow or a Hindu daughter who has only a qualified estate in the property of the last male owner is not void but voidable and that as the plaintiffs did not take steps before the institution of the suit to avoid the lease, they are not entitled to relief in the present litigation. We are of opinion that the view taken by the Courts below is manifestly erroneous. The decision of the Judicial Committee in

*Modhu Sudan Singh v. E. G. Rooke* (6) was, for a time, erroneously regarded as an authority for the proposition that a lease granted by a Hindu widow is on her death only voidable and must consequently be avoided. This is manifest from the decision of this Court in *Bejoy Gopal Mukerji v. Nil Ratan Mookerji* (8). When that case, however, was taken up to the Judicial Committee, Lord Davey pointed out [*Bijoy Gopal Mukerji v. Krishna Mahishi Debi* (1)] that the earlier decision of the Judicial Committee in *Modhu Sudan Singh v. E. G. Rooke* (6) had been misunderstood and misapplied. "A Hindu widow," it was stated, "is not a tenant for life, but is owner of her husband's property, subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it, subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir." The institution of a suit for possession shows his election to treat the alienation as a nullity, and in such a suit, it is not necessary for him to ask for a declaration that it is inoperative. It is thus plain that the first two plaintiffs are entitled to succeed in respect of the one-third share which originally belonged to their maternal grandfather. They are not entitled, however, to be placed in the same position with regard to the one-sixth share which became vested in their mother by virtue of the Will of Jogendra. The terms of that Will show that it has been correctly held by the Courts below that Muktakeshi obtained an absolute interest in the one sixth share left to her by her own cousin. As regards the share of Sarat, namely, the one-third share vested in him at the time of the grant of the permanent lease and also the one sixth share which

(7) 60 Ind. Cas. 819; 33 C. L. J. 184.

(8) 30 O. 990; 7 O. W. N. 864.

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he subsequently obtained under the Will of Jogendra, the plaintiffs are admittedly not entitled to relief. The conclusion follows that, subject to the determination of the question of the validity of the purchase of the tenant's right by the first defendant, the first two plaintiffs are entitled to a decree in respect of the one-third share originally held by their maternal grandfather.

We have next to consider, whether the first defendant acquired a good title to possession by virtue of his purchase on the 25th April 1904 from Bepin Behary Roy, who had, it is alleged, obtained under successive transfers, the interest of a tenant, Satoowri Ghose, in the disputed land. The question, in our opinion, must be answered in the negative. The tenancy of Satoowri Ghose was created long before the Transfer of Property Act, and is said to have been in existence at least as early as 1869. The tenancy has passed from father to son; in other words, there is evidence to show that the tenancy is heritable. But it does not follow that the tenancy is transferable. It is well known that there are tenancies which are heritable but not transferable: an occupancy holding furnishes an obvious example. The first defendant must consequently establish that the tenancy was transferable under the law as it stood at the time of its inception. Now, it has been laid down by this Court in the cases of *Hari Nath Karmakar v. Rai Ohandra Karmakar* (2), *Malhab Ohandra Pal v. Feoy Ohand Mahatab Bahadur* (3), *Madhu Sudan Sen v. Kamini Kanta Sen* (4) and *Ram Oharan Naskar v. Hari Charan Guha* (5), that under the law as it stood before the Transfer of Property Act, tenancies, whether of homestead lands or of agricultural lands, were not transferable, in the absence of a custom to the contrary or of an express contract to that effect. The only recognized exception to this rule is that stated in the case of *Peni Madhub Banerjee v. Jai Krishna Mookerjee* (9). In that case Sir Barnes Peacock, C. J., observed that if one man grants a tenure to another for the purpose of living upon the land that tenure, in the absence of evidence to the contrary, is assignable. The same view was subsequently taken in the case of *Durga Prasad Misser v.*

*Brindaban Sookul* (10). In the case before us, the tenancy had not been created for the purpose of residence. Consequently, we must hold that the tenancy was not transferable.

The result is, that this appeal is allowed, the decree of the District Judge set aside and the suit decreed for possession and mesne profits in respect of a one-third share. The record will be sent down to the Court of first instance so that mesne-profits may be ascertained in that Court.

There will be no order for costs in this appeal. The parties will pay and receive costs in proportion in the Courts below.

FLETCHER, J.—I agree.

*Appeal allowed.*

(10) 7 B. L. R. 159; 15 W. R. 274.

# ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No 355 OF 1918.

December 6, 1920.

*Present:—*Mr. Justice Tudball and  
Mr. Justice Rafique.

*Babu* ISHRI PERSHAD—DEFENDANT  
—APPELLANT

*versus*

*Syed* MUHAMMAD SAMI, AND AFTER  
HIS DEATH *Mrs.* ELVINA SAMI AND OTHERS—  
PLAINTIFFS AND DEFENDANTS—

RESPONDENTS.

*Limitation Act* (IX of 1908), Sch. I, Art. 116—  
*Mortgage—Mortgagee agreeing to pay prior mortgage—*  
*Default in payment—Payment made by mortgagor—*  
*Suit for damages—Cause of action, date of, accrual of—*  
*Limitation applicable*

Where the parties to a mortgage agree that the mortgagee is to pay off a prior mortgage when he pleases, he being solely responsible for any interest which might accrue under the prior mortgage, and where owing to the default of the said mortgagee the amount due on the prior mortgage with interest is paid by the mortgagor, the cause of action for a suit by the mortgagor against the mortgagee for damages accrues when he is demitted and not on the date of the mortgage. To such a suit the period of limitation contained in Article 116 of Schedule I to the Limitation Act applies. [p. 830, col. 2.]

Second appeal from the decision of the District Judge, Azamgarh, dated the 17th of December 1917.

(9) 7 B. L. R. 152; 12 W. R. 495.



ISHRI PERSHAD V. MUHAMMAD SAMI.

Messrs. K. N. Katju and Badri Narain, for the Appellant.

Dr. S. M. Sulaiman, for the Respondents.

**JUDGMENT.**—This appeal and Second Appeal No. 356 of 1918 arise out of two cross-suits brought by the same parties. Two persons Shah Muhammad Fasi-uz-Zaman and Shah Abdur Razzaq, ancestors of the plaintiffs-respondents, executed a usufructuary mortgage of their share in Mauza Kol together with a grove in favour of Baldeo Prasad, the present defendant-appellant's predecessor-in-title, in lieu of a sum of Rs. 1,000 and out of it they left Rs. 530 in the hands of the mortgagee for payment to a prior mortgagee named Tapeswar Rai. This sum was due on foot of a deed, dated the 20th of February 1890. The prior mortgage covered not only the property in Mauza Kol but other property belonging to the mortgagors. In the mortgage-deed it was clearly and distinctly set down that the money was to remain with the mortgagee and that any interest which might accrue on this sum in the future would be entirely upon his shoulders and that he would have to pay it when he paid Rs. 530. It is quite clear from the deed that the money was left with Baldeo Prasad to pay whenever he pleased, so long as he did pay it, he being solely responsible for any interest which might accrue. Baldeo Prasad did not pay this money and, later on, the prior mortgagee obtained a decree for Rs. 962-8-3 on the 14th of December 1905. He assigned his decree to another person who took out execution of it and on the 20th of January 1912 the share in Mauza Kol was put to sale and purchased by defendant No. 3 for Rs. 500. The prior mortgagee then sought to bring the remaining hypothecated property to sale in satisfaction of the balance of the mortgage debt. Whereupon the original mortgagors, in order to save their property, paid Rs. 718-6-6 and saved it. They have now sued to recover damages from the mortgagee. The heirs of the mortgagee at the same time have brought a suit to enforce their mortgage-deed and to recover the money on the allegation that the mortgagors have not put them into possession of all the mortgaged property. We must note here that the mortgage in favour of Baldeo Prasad was a usufructuary mortgage. The

Courts below have come to the same conclusion, namely, that the allegation of the mortgagees that the mortgagors did not put them into possession of the mortgaged property is untrue. They have, therefore, dismissed the mortgagees' suit. In the mortgagors' suit for damages they have taken into account what was due from the mortgagors to the mortgagees and have come to the conclusion that a sum of Rs. 996 is due to the plaintiffs mortgagors from the defendants. This amount has been decreed in their favour together with proportionate costs in both Courts. The point taken before us in this appeal, that is to say, the appeal of the defendant-mortgagees, is that the suit is barred by limitation. It is urged that the cause of action accrued on the date of the mortgage, that is, on the 12th of May 1899. Our attention has been called to certain rulings under which, if this contention were correct, the suit would be barred by limitation. But, in our opinion, those rulings do not affect the present case. They do not apply inasmuch as the facts are different. It is clear to us that the agreement between the parties to the mortgage of the 12th of May 1899 was that the mortgagee might pay the sum of Rs. 530 to the prior mortgagee when and where he pleased, he taking upon his shoulders all liability for the interest which might in future accrue. This being so, the present plaintiffs had no cause of action until they were damaged. The suit was brought in the year 1916 well within the period of six years from the 20th of January 1912. The suit is clearly governed by Article 116 of the Limitation Act, being a suit for compensation for breach of a contract in writing registered. In our opinion it is not barred by time and the appeal, therefore, fails and is dismissed with costs including fees on the higher scale.

*Appeal dismissed.*

SANT PRASAD v. BHAWANI PRASAD,  
ALLAHABAD HIGH COURT.  
FIRST APPEAL FROM ORDER NO. 177  
OF 1919.

November 23, 1920.

Present:—Mr. Justice Piggott and  
Mr. Justice Walsh.

SANT PRASAD—PETITIONER—  
APPELLANT

versus

BHAWANI PRASAD AND ANOTHER—  
OPPOSITE PARTY—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLIII,  
r. 1 (u)—Remand, order of, whether appealable in  
cases where no second appeal from decree.*

There is no second appeal from an order remand-  
ing a case, in those cases in which there is no second  
appeal from the decree of the Appellate Court.

First appeal from an order of the Subor-  
dinate Judge, Jaunpur, dated the 17th May  
1919.

Dr. S. M. Sulaiman, for the Appellant.

Mr. M. L. Agarwal, for the Respondents.

**JUDGMENT.**—A preliminary objection  
is taken to the effect that no appeal lies.  
Under Order XLIII, rule 1 (u), an appeal  
from an order remanding a case will only  
lie where an appeal would lie from the  
decree of the Appellate Court. We have,  
therefore, to determine whether in the case  
before us an appeal would lie from a  
decree by the lower Appellate Court. The  
suit was one of a Small Cause Court nature  
and in the suit itself no second appeal  
would have lain by reason of section 102  
of the Code of Civil Procedure. There has  
been a consensus of authority in three  
High Courts; *Vide Sri Bullov Bhattacharji  
v. Baburam Chatteropadhyaya* (1) as also  
*Shyama Charan Mitter v. Debendra Nath  
Mukherji* (2), *Macula Anmal v. Mavula  
Marcoir* (3) and *Narayan Parminand v.  
Nagindas Bhaidas* (4) to the effect that a  
second appeal will not lie in an execution  
matter, if a second appeal would not have  
lain in the suit itself. This decision seems  
to us a reasonable one and, in the absence  
of authority to the contrary in this Court,  
we are prepared to follow it. Holding that

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no appeal lies, we dismiss this appeal with  
costs.

*Appeal dismissed.*

ALLAHABAD HIGH COURT.  
SECOND CIVIL APPEAL NO. 145 OF 1918.  
December 9, 1920.

Present:—Mr. Justice Rafique and  
Mr. Justice Ryves.

SHAM DAS—PLAINTIFF—APPELLANT  
versus

BAHADUR SINGH AND ANOTHER—  
DEFENDANTS—RESPONDENTS.

*Jurisdiction of Civil and Revenue Courts—Rent-free  
grantee, suit by, to recover rent wrongly realised by  
zemindar, whether cognisable by Civil Court—Question  
of status of plaintiff.*

A suit by a rent-free grantee to recover the  
amount of rent wrongfully realised by the zemindar  
is cognisable by a Civil Court, even though it is  
necessary in such a suit for the Court to decide the  
question of the status of the plaintiff in relation to  
the land in question [p. 832, col. 2.]

Second appeal from the decree of the  
District Judge, Aligarh, dated the 19th of  
November 1917.

Mr. P. L. Banerji, for the Appellant.

Mr. Panna Lal, for the Respondents.

**JUDGMENT.**—It appears that Hanuman  
Pershad was the zemindar of the village of  
Bamni. Sham Das, alleging himself to be  
the rent-free grantee of certain plots situate  
in that village, sued one Shibban for the  
recovery of rent describing him as a sub-  
tenant. The latter pleaded that he was the  
tenant of Hanuman Prasad, the zemindar  
and had in good faith paid the amount to  
him on the 1st of July 1916. The Rent  
Court allowed the plea in defence and  
dismissed the claim of Sham Das. There-  
upon the latter brought the suit, out of which  
this appeal has arisen, for the recovery  
of Rs. 37 principal and interest, the amount of  
the rent realised by Hanuman Prasad. Hanu-  
man Prasad died before the institution of  
the suit. It was brought against his legal  
representatives. Sham Das alleged in his  
plaint that he was a rent-free grantee of the  
plots of which rent had been realised by  
Hanuman Prasad and that he (Sham Das)  
had been in possession for a number of

(1) 11 C. 169; 5 Ind. Dec. (N. S.) 872.

(2) 27 C. 484; 4 C. W. N. 269; 14 Ind. Dec. (N. S.)  
318.

(3) 30 M. 212; 17 M. L. J. 376.

(4) 30 B. 113; 7 Bom. L. R. 641.

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years and had acquired proprietary rights in the said plots. He, therefore, prayed that he should be declared the proprietor of those plots and the defendants should be declared to have no rights to realise rents in respect of those plots, and as such proprietor, he (Sham Dass) prayed for the recovery of Rs. 30 the principal amount realised from Shibban by Hanuman Prasad and Rs. 7 for interest. The defendants resisted the suit by denying the allegations made in the plaint. They denied that the plaintiff was a rent-free grantee or that by lapse of time he had acquired proprietary interest in the plots in question. They pleaded that their father had rightly realised the rent from Shibban. The learned Munsif, after carefully considering the pleadings and evidence in the case, came to the conclusion that he could not give a declaration to the plaintiff as to his having become a proprietor of the plots in question. Such a declaration the learned Munsif held could only be made by a Revenue Court. He, however, found on the evidence that the plaintiff was a rent-free grantee of the plots in dispute and the rent had been wrongfully realised by Hanuman Prasad. He held that as such rent-free grantee Sham Das was entitled to recover the rent from his sub-tenant Shibban. The claim was accordingly decreed. The defendants preferred an appeal and the learned District Judge reversed the decree of the first Court on the ground that the suit of the plaintiff was not maintainable in a Civil Court. The other points raised in the case were not decided by the learned District Judge.

In second appeal before us the decree of the learned District Judge is challenged. It is contended that, though the plaintiff had asked for something which could not be granted by a Civil Court, the decree of the Munsif was, nevertheless, correct inasmuch as the plaintiff was awarded the right to recover the rent which had been wrongfully realised by the *zemindar*. The Court of first instance, no doubt, found that the plaintiff was a rent free grantee but that finding was merely ancillary to the principal relief relating to the recovery of money wrongfully realised by the *zemindar*. On behalf of the respondents it is urged that the present suit is not maintainable in a Civil Court. The principal relief that the

plaintiff seeks by his plaint is that he should be declared proprietor of the plots in question. The relief granted to him by the first Court that he is a rent free grantee is no doubt a lesser relief, but even such a relief cannot be granted by a Civil Court. The learned Vakil for the respondents relies on the provisions of Chapter X, Act II of 1901, in support of his argument and on two rulings in *Nannhu v. Thakurji Maharaj* (1) and *Baldeo Singh v. Mardan Singh* (2). We do not think that the cases relied upon by the learned Vakil for the respondents or Chapter X, Act II of 1901, have any application to the present case. The plaintiff was really suing to recover the rent which, according to him, had been wrongly realised by the *zemindar* Hanuman Prasad. His rent suit was dismissed under section 198. In clause (2) of the said section the only remedy open to the plaintiff was to go to a Civil Court and get a declaration that he was the person entitled to recover rent. In order to determine the question whether the plaintiff was entitled to recover rent from Shibban it was necessary for the learned Munsif to decide his status in relation to the plots in question. The conduct of the *zemindar* in realising the rent from the sub-tenant virtually amounted to the dispossession of the plaintiff. If the latter had to bring a suit for possession he would have had to go to a Civil Court. This view is borne out by the case of *Gobind Rai v. Banwari Lal* (3). It is true that in the present case the plaintiff does not formally seek to recover possession of the plots of which rent was taken wrongfully by Hanuman Prasad but, practically, the present suit is to recover possession of the said plots by establishing his title to recover rent from Shibban. We think that the claim of the plaintiff in the form in which it was decreed by the learned Munsif is maintainable in a Civil Court. We, therefore, set aside the decree of the lower Appellate Court and remand the case under Order XLI, rule 23, to it for disposal according to law. The costs in this Court including fees on the higher scale will abide the event.

*Case remanded.*

(1) 46 Ind. Cas. 784; 16 A. L. J. 881; 41 A. 37.

(2) 6 Ind. Cas. 425; 7 A. L. J. 818.

(3) 58 Ind. Cas. 594; 18 A. L. J. 388; 2 U. P. L. R. (A.) 98; 42 A. 412.



MATHURA PRASAD v. CHANDRA NARAYAN.

## PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.  
March 1, 1921.*Present:*—Viscount Haldane, Viscount  
Finlay, Lord Dunedin, Lord Shaw,  
Lord Moulton, Sir John Edge  
and Mr. Ameer Ali.MATHURA PRASAD, SINCE DECEASED,  
(NOW REPRESENTED BY BISWANATH  
PRASHAD AND OTHERS)—APPELLANTS*versus*

CHANDRA NARAYAN CHOWDHURY

AND OTHERS—RESPONDENTS.

*Registration Act (III of 1877, ss. 17, 28, 49, 50,  
65—Transfer of Property Act IV of 1882, s. 54—  
Registration of documents—Place of registration—  
Inclusion in mortgage of property not intended to  
form part of security, effect of—Registration, validity  
of—Sale of immoveable property of value less than  
Rs. 100 by unregistered instrument—Delivery, con-  
structive, whether sufficient.*

A mortgage-deed, executed in 1902 purported to mortgage a property in the Darbhanga District and a property in the Mozufferpore District. It was registered in the Mozufferpore District. It was found that the statement in the bond that it comprised the Mozufferpore property was, to the knowledge of both parties, a mere fiction introduced for the purpose of getting registration in the Mozufferpore District; and that the parties never intended that the Mozufferpore property should form part of the security:

*Held*, that the inclusion of the Mozufferpore property was a fraud on the registration law, and that the registration obtained by its means was invalid. [p. 435, cols. 1 & 2]

For the purpose of section 54 of the Transfer of Property Act, where immoveable property of value less than Rs. 100 is sold by means of an unregistered instrument, there must be a real delivery of the property. Mere constructive delivery resulting from the delivery of the unregistered instrument of transfer is not sufficient. [p. 435, col. 2 p. 436, col. 1]

Appeal from a decree of the Calcutta High Court, dated March 17th 1915, reversing a decree of the District Judge, Darbhanga.

FACTS are stated in their Lordships' judgment. The claim for a personal judgment for the mortgage-debt was made for the first time in the application for leave to appeal to the Privy Council, but was omitted in appellants' "case".

(The appeal was originally heard on May 6 and 7, 1920, before Viscount Haldane, Viscount Finlay and Lord Moulton, judgment being reserved. Thereafter, orders were passed that it be re-heard before a fuller Board.)

Mr. DeGruyther, K. O. (with him Mr. Abdul Mail), for the Appellants.—The High Court have erred in holding that the registration here is invalid. Under section 65 of the Registration Act, if a deed covers property in two Districts, a copy is sent from one to the other: that has been done here; the transaction is in fact registered at Darbhanga.

[LORD MOULTON.—But that is a derivative registration. The first registration must be good.]

The mortgagor purchased this small share of property from a Mukhtar in order to give the Mozufferpore Registration office jurisdiction. There was a regular deed. It was not registered and did not need to be: in fact, there was no necessity for a deed at all. I submit the property included in a mortgage need not be the mortgagor's property. It may be that, at the time of the mortgage, the mortgagor had no title, but that alone would not invalidate the mortgage if he got title subsequently. The case of *Harendra Lal Roy Chowdhuri v. Srimati Hari Das Deb* (1), referred to by the High Court, was widely different: in that case a property was fictitiously included: here, the Courts have found that the purchase was a genuine one. Both Courts have accepted the evidence of Osman that the price was actually paid: also, delivery was effected as far as possible. Handing over the document was sufficient: it operated symbolical possession. The property itself was in the possession of tenants: and the document would give the purchaser the power of going to the tenants when the time came. Whether we actually took possession or not, we had the right to do so, and we could at once sell the property. My argument does not rest on the completion of the sale at all.

[LORD SHAW.—If it is not possible to deliver possession, the document must be registered.]

I submit that, even if the sale were a form and no delivery took place, the registration is still good: we had the right to bring the property to sale, or to mort-

(1) 3 Ind. C. 437, 41 I. A. 110 (P. C.); 41 C. 972; 27 M. L. J. 83; 12 A. L. J. 774; 16 M. L. T. 6; (1914) M. W. N. 462; 1 L. W. 1050; 18 C. W. N. 817; 19 C. L. J. 121; 15 P. M. L. R. 107.

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gage it, at once. So a mortgage by a man who has at the time no title, but subsequently gets one, is good as against him. Section 22 does not say the property must belong to the mortgagor. There is no question that the document does relate to the Mozufferpore property.

[LORD MOULTON.—I think relates must mean "*bona fide* relates".]

The literal wording of the Act should be regarded: so it has been held under this very section that any portion of the property, however unsubstantial, will suffice:

*Hari Ram v. Sheodayal Mal* (2).

The Act must be construed as a whole and with reference to its object. That object is that there shall be a Register in each District which will show a person examining it all he needs as to the lands in that District. That object is attained if the transaction gets on to the Register. The parties here clearly intended to go through some form of conveyance to comply with the Act: it has been found that money passed: and the sale-deed was not registered only because the parties were advised it was unnecessary.

[LORD SHAW.—They took the risk of the conveyance being ineffectual.]

Respondents did not appear.

### JUDGMENT.

VISCOUNT FINLAY.—The action to which this appeal relates was brought to enforce a mortgage upon land. Its validity was challenged by the defendants on the ground that it has not been registered in accordance with the Indian Registration Act, 1877, and was, therefore, inoperative. A registration had been effected, but it was alleged for the defence that it was void, as no part of the property to which the mortgage related was situate within the District of the Sub-Registrar in whose office the mortgage was presented for registration.

The High Court held, reversing the District Judge, that the mortgage was invalid, on the ground that it had not been duly registered.

This appeal was brought by the representatives of the mortgagee, praying (1) that the mortgage should be put in force against the land; and (2) in the alternative,

(2) 16 I. A. 12 at p. 14; 11 A. 136 (P. C.); 5 Sar. P. C. J. 281; 6 Ind. Dec. (N. S.) 515.

that under the head of General Relief judgment should be given against the defendants personally for payment of the amount of the debt.

There was no appearance on this appeal on behalf of the respondents, and the case was argued before their Lordships' Board *ex parte*.

In 1867 one Bhukhan Lal died intestate, leaving considerable property. He was succeeded by his daughter, Maharani Bibi, who by Hindu Law had a life-estate in the property. She effected alienations of various parts of the property, one of them being a sale in 1884 of a 7 annas share of a property known as Mahomedpur Boari to Nena Chowdhury. On the death of Maharani Bibi the estate of Bhukhan Lal devolved upon her son, Mathura Prashad, who brought suits challenging the validity of the alienations made by his mother. One of these suits (No. 133 of 1901) was brought against the representatives of Nena Chowdhury for the recovery of the 7-annas share of Mahomedpur Boari. In February 1902 it was agreed that this suit should be compromised on the terms that Mathura Prashad should receive Rs. 14,000 in lieu of all claims upon the property. Rs. 6,000 were paid in cash, and the balance of Rs. 8,000 was secured by the mortgage-bond now in suit. This bond was executed by Udit Narayan, the eldest son of Nena Chowdhury, as the head and managing member of the joint Hindu family of which the respondents are members. Default was made in payment of the sum secured, and this action was brought by Mathura Prashad for a mortgage decree and sale.

Two defences were set up. The first was that the mortgage was merely colourable, and was never delivered as an operative instrument. This defence entirely failed on the facts, and no more need be said about it. The second defence was that the mortgage-bond is inoperative for want of proper registration.

The bond is dated the 27th February 1902, and is executed by Udit. It recites the suit by Mathura Prashad for recovery of the 7-annas share of Mouza Mahomedpur Boari against Udit and the other members of the Chowdhury family, and the agreement of compromise for Rs. 14,000.

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It also recites the payment of Rs. 6,000, and that it had been agreed to take a mortgage-bond for the balance, Rs. 8,000. The bond goes on to state that Udit undertakes to pay that sum with interest in the month of Bhadra 1309 Fasli, which month ends the 7th September 1902. In security for the money, principal and interest, Udit states in the bond that he has mortgaged the properties mentioned below, the property of the joint family, "up to this time in possession of the joint family without participation and possession of others." The "properties mentioned below" are the 7-annas share in the Mouza Mahomedpur Boari in Zillah Darbhanga, and one cowri share in the Mouza Kolhua in Zillah Mozufferpur. The witness to the bond is Mahomed Osman, Makhtar.

The bond was registered in the Mozufferpur District, and the plaintiffs in the action attempted to justify this on the ground that the bond comprised one-cowri share of Mouza Kolhua within that district. The defendants asserted that this cowri share of Kolhua property did not belong to the mortgagor, and that the statement in the bond that it comprised this share was, to the knowledge of both parties, a mere fiction introduced for the purpose of getting registration in the Mozufferpur District.

The mortgage on which this action is brought required registration as a registrable instrument under section 17 of the Indian Registration Act of 1877. Section 28 of that Act requires that every registrable document "shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate," and section 49 enacts that no registrable instrument shall affect any immoveable property comprised therein unless it has been registered in accordance with the provisions of the Act. Section 65 provides for the transmission of copies to the offices of other districts in which any of the mortgaged property is situate.

The 54th section of the Transfer of Property Act of 1882 requires that a transfer on sale of tangible immoveable property of a value less than Rs. 100 may be made either by a registered instrument or by delivery of the property, while if it is of the value of

Rs. 100 or more the transfer must be by registered instrument.

Mahomedpur Boari, on which the mortgage was to be given, is situate in the Darbhanga district, but for motives of convenience it was desired that registration should be effected in the Mozufferpur District. In this last district the mortgagor had no property, but it was alleged in support of the registration there that before the mortgage was executed Osman (the witness to the mortgage-deed, who appears to have acted for all parties in carrying out the compromise) sold to the mortgagor, Udit Narayan, a one-cowri share in the Kolhua property of which Osman was owner. Osman's account of the transaction as given in evidence by him was as follows:—

"I sold a share of one-cowri in Kolhua. A *kobala* was executed, but it was not registered. The price was Rs. 50. I do not remember who witnessed the execution. It was executed two or three days before the execution of the bond in suit. I do not remember if Polai Lal was present. I sold the property at the request of Udit Narayan, who wanted to register the bond in Mozufferpur in order to complete the transaction quickly, and had no property in that district. He said if there was delay in registration the compromise might fall through. He paid me Rs. 50, the price of the property. I do not know if Udit Narayan pays revenue or road cess for that share or if he has since sold it or has had his name registered. Mathura Prashad has landed property in Mozufferpur District."

Polai Lal, mentioned in this evidence, had been guardian of Mathura Prashad during his minority, and had assisted him in bringing the seven suits above mentioned.

The alleged *kobala* was not produced, and no foundation was laid for giving secondary evidence of its contents. No such instrument was registered, and there was no delivery of possession of the cowri share, so that neither of the conditions necessary under section 54 to make a good transfer on sale of property under the value of Rs. 100 was fulfilled.

Their Lordships cannot accept the suggestion made on behalf of the appellants that for the purpose of section 54, some sort of constructive possession resulting from the delivery of the alleged instrument of transfer



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might be sufficient. For this purpose there must be a real delivery of the property.

Assuming such a *kobala* existed, if it was intended to be effective as a transfer, it would have been registered or possession would have been given. There was neither registration nor delivery. Why? Only one reason can be given. There was no intention really to acquire this cowri share in the Kolhua property. All that was wanted was the use of its name for the purposes of registration, and it was for this use that the sum of Rs. 50 was paid.

The District Judge found in favour of the plaintiffs on this point. He was clearly mistaken in saying that Udit was the owner of the cowri share. The alleged *kobala* was unregistered and there was no delivery, so that the property never passed. His judgment in favour of the plaintiffs, though he said the sale was "merely nominal," appears to rest on the erroneous view that the cowri interest, though a small one, passed from Osman to Udit by the *kobala*, and from Udit to the mortgagee.

The view which their Lordships take of the facts is that which is compendiously stated by the High Court in the judgment of Coxe, J.:—

"I agree. The circumstances of the case leave no doubt that the parties never intended that the share of Kolhua should really be sold to Udit Narayan or mortgaged to Polai Lal. The so-called sale was a mere device to evade the Registration Act."

The more detailed judgment of Sharfuddin, J., is to the same effect.

In coming to the conclusion that this appeal must be dismissed, their Lordships' judgment rests on the view that none of the parties ever intended that the one cowri share in Mouza Kolhua should vest in Udit or should pass by the mortgage from him to the mortgagee. This case differs *toto cœlo* from the case suggested in argument of a mere failure to make a good title to property dealt with by the instrument, and which both parties had intended should form part of the security.

On the view of the facts taken in the High Court and by their Lordships, this case falls within the decision of this Board in the case of *Harendra Lal Roy Choudhuri v. Srimati Pari Das Debi* (1). The following passage in the judgment delivered in that case by Lord

Moulton is applicable to the facts of the present case:—

"Their Lordships hold that this parcel is in fact a fictitious entry, and represents no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security. Such an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact exists, is a fraud on the Registration Law, and no registration obtained by means thereof is valid."

In the *Harendra Lal's* case (1) the property was non-existent. In the present case, though the Kolhua Mouza existed, the mortgagor had no interest in it, and the parties to the mortgage never intended that it should form part of the security. The two cases stand on the same basis for the purposes of the Registration Act.

As regards the alternative claim for a personal judgment for the mortgage debt, it is to be observed that no such claim was made in the Courts in India. There is nothing in the evidence or in the judgments which would enable their Lordships to deal with such a claim. At the same time, their Lordships think it desirable in this case that the plaintiffs should have an opportunity of bringing this matter before the High Court. If any such application is made, it will be for the High Court to consider whether any such claim is open upon the present pleadings and, if not, whether any amendment raising it should be made; and, further, whether, under all the circumstances, the claim should be entertained at this stage of the proceedings. If the High Court should think it right to enter upon the consideration of this claim, all defences on the merits or arising out of the lapse of time must be open to the defendants, and the High Court should have power to impose any terms which it thinks just and to deal with the costs.

The appeal, so far as it relates to the enforcement of the mortgage on the land, must, in their Lordships' opinion, be dismissed. If the alternative claim be not made within six months before the High Court, or be dismissed, judgment should be entered for the defendants in the action.

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Their Lordships will humbly recommend to His Majesty that an order should be made in these terms.

*Appeal dismissed*

Solicitor for the Appellants.—Mr. J. Tucker.

## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 941 OF 1918.

January 28, 1921.

Present :—Mr. Justice Ryves and

Mr. Justice Gokul Prasad.

Musammāt JEONI—PLAINTIFF—APPELLANT

versus

KALLOO AND ANOTHER—DEFENDANTS—

RESPONDENTS.

*Agra Tenancy Act (II of 1901), s. 198—Rent, amount of, paid to third party—Good faith not pleaded—Section, whether applicable.*

Where after the institution of a suit to recover arrears of rent, and after the filing of his defence, the defendant pays the amount due to a third person, the provisions of section 198 of the Agra Tenancy Act have no application.

Second appeal from the decision of the Additional Judge, Meerut, dated the 17th of April 1918.

Mr. Iqbal Ahmad, for the Appellant.

**JUDGMENT.**—This appeal arises out of the following circumstances: A Nawab gave a lease of a certain Mahal to two persons, the present plaintiff, Musammāt Jeoni, and one Mubarak Ali. Mubarak Ali died some time ago leaving a son and a widow, Musammāt Jannat. The son has since died and his widow, Jannat, is alive. The plaintiff as a lessee brought a suit for recovery of the rent for certain years from Kallu, a tenant. The defence pleaded by Kallu was that he had all along paid the rent to Mubarak Ali during his lifetime and since his death Musammāt Jannat has been collecting rent from the defendant. Up to this day this defendant has had no concern with Musammāt Jeoni. It will appear from the statement of defence above referred to that the defendant nowhere pleaded that he had paid the rent in good faith to Musammāt Jannat. The learned Assistant Collector dismissed the suit and the dismissal has been

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confirmed by the lower Appellate Court. After he had filed his defence, the defendant-tenant paid off the rent for the years in suit to Musammāt Jannat and Musammāt Jannat who had been impleaded as a party later on admitted having received the rent. The point raised before us is, that the defendant not having alleged that he had paid the rent in good faith to Musammāt Jannat, section 198 has no application. The question whether Jannat would be entitled to the rent does not arise in this case as the rent had not been paid to her before the suit was brought. Musammāt Jeoni, the plaintiff-appellant, is one of the lessees and as such is entitled to receive the rent. That section 198 does not apply to a case like the present is clear from the decision of a Bench of this Court in *Shodihal Singh v. Badri Narain* (1). If that section were meant to apply to cases in which the defendant had only to allege that he was going to pay rent to a certain person in good faith there would have been no end of the litigation. He might one day say that he was willing to pay the rent to A, whom he thought to be the person entitled to it, and in another suit by A he might plead that, since then, he has found that C was the real owner and that he was to pay to him in good faith. We think that the view taken by the learned Judges who decided the case above-mentioned was a correct view. The result of our observation is that the plaintiff's claim was bound to succeed. We, therefore, set aside the decrees of the Courts below and decree the plaintiff's claim with costs in all Courts.

*Appeal allowed.*

(1) 8 Ind. Cas. 1098; 7 A. L. J. 1198; 33 A. 61.

## PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.  
March 9, 1921.

Present :—Lord Buckmaster,

Lord Danedin, Lord Shaw, Sir John Edge  
and Mr. Ameer Ali.

Syed HABIBUR RAHMAN

CHOWDHURY AND ANOTHER—PLAINTIFFS—  
APPELLANTS

versus

Syed ALTAF ALI CHOWDHURY AND OTHERS  
—DEFENDANTS—RESPONDENTS.

*Mohammadan Law—Legitimacy—Acknowledgment*

**HABIBUR RAHMAN v. ALTAF ALI.**

*of legitimacy, effect of—Marriage, disproof of—Legitimacy and legitimation, difference between—Concurrent findings, what constitutes.*

There is a difference between legitimacy and legitimation. Legitimacy is a status which results from certain facts. Legitimation is a proceeding which creates a status which did not exist before. In the proper sense, there is no legitimation under the Muhammadan Law. [p. 841, col. 2.]

An acknowledgment of legitimacy raises a presumption of marriage, but such presumption is capable of being displaced by contrary proof. Such an acknowledgment is a declaration of legitimacy and not a legitimation, and is, therefore, liable to be contradicted. [p. 842, col. 1.]

Once the fact of no marriage is established, no acknowledgment of legitimacy has any effect. [p. 841, col. 2.]

To constitute a concurrent finding, it is sufficient that a majority of the Court of Appeal should concur in the view of the facts taken by the Original Court. Such a concurrent finding is not vitiated as such because the minority of the Court of Appeal does not come to the same conclusion in fact. [p. 841, col. 1.]

Appeal from a decree of the Calcutta High Court, dated August 1st, 1918, reported as 49 Ind. Cas. 545, affirming a decree of Greaves, J.

FACTS of the case are sufficiently stated in their Lordships' judgment.

Sir John Simon, K. O., (with him Mr. De Gruyther, K. O., and S. Hyam), for Appellants, submitted that there was ample evidence that the deceased Nawab acknowledged Habibur Rahman as his legitimate son. It had been suggested in the High Court that the Muhammadan Law allowed an enquiry as to the motive of such an acknowledgment, and that this might deprive the acknowledgment of its force, but there was no authority for any such proposition. A casual statement mattered nothing, but an intentional statement of legitimacy was enough, whatever the motive. There were some cases in which the plainest acknowledgment was invalid: (1) impossibility of age, (2) when the relationship between the assumed father and mother made their marriage invalid, (3) when the person acknowledged repudiated it, (4) when the true paternity of the acknowledgee was proved: but here it was admitted the first appellant was the natural offspring of the Nawab, and the only question was whether he was legitimate.

According to Muhammadan Law, the acknowledgment of a father renders a son or daughter a legitimate child and an heir, unless it is impossible for the son or daughter to be so:

*Oomda Beebee v. Syud Shah Jonab Ali* (1).

In that case Sir Barnes Peacock refers with approval to Sir William Macnaghten's Principles of Muhammadan Law, Chapter VII, section 33, page 61.

Assuming you have a valid acknowledgment, the thing barring it is not whether there was in fact a marriage, but whether a marriage was possible.

In a later case it was held that a child born out of wedlock, if acknowledged, acquires legitimacy.

*Bibee Nujeeboonnissa v. Bibee Zumeerun* (2).

A binding acknowledgment is not merely *prima facie* evidence, but establishes the fact acknowledged.

*Musammatt Jaibun v. Musammatt Bibee Nujeeboonnissa* (3).

If the thing is impossible, the acknowledgment would not be binding.

[MR. AMEER ALI.—My view is, that legitimacy arises from a valid relation between the parents. If people live together and the father states the child is legitimate, it establishes the valid relation from the beginning.]

Baillie in his Digest of Muhammadan Law, Chapter II, section 2, page 408 (2nd edition) lays down when an acknowledgment is valid.

An acknowledgment is sufficient, even if there be no evidence of marriage:

*Bibee Wuheedun v. Syud Wusee Hossain* (4).

My submission is, that the view expressed in Wilson's Digest, paragraph 55, is entirely confirmed by the authorities: that the presumption arising from acknowledgment can only be rebutted in certain specific ways, and that it is not open to the Tribunal to go into the question whether the parties were in fact married.

My proposition is, not so much one of Muhammadan Law as one of logic. An acknowledgment of legitimacy is a substantive source of status; when you get it, even though the parties may not have been married at the time, effect must be given to it. It is enough that a lawful union between them was possible.

The issue of fact has been found against me, the Courts holding that the woman was

(1) 5 W. R. 132; 1 Ind. Jur. (N. S.) 143.

(2) 11 W. R. 426.

(3) 12 W. R. 497; 4 B. L.R. A. C. 55.

(4) 15 W. R. 403 at p. 406.



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the Nawab's mistress only : but the other side have to disprove not merely marriage, but the possibility of marriage.

This Board has repeatedly laid down that an illegitimate child, if acknowledged, acquires the status of legitimacy :

*Ashrafud Dowlah Ahmed Hossein Khan v. Hyder Hossein Khan* (5), *Mahammad Azmat Ali Khan v. Musammatt Lalli Begum* (6) ; *Abdul Razak v. Aga Mahomed Jaffer* (7).

The proposition can hardly now be challenged.

It is true that Mahmood, J., took a contrary view in *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (8), but his was a minority judgment : and the passage in Lord Atkinson's judgment in *Sadik Husain Khan v. Hashim Ali Khan* (9) does not mean that, after acknowledgment, you can still enquire into the fact of marriage, for the authorities cited do not say any such thing. I submit that the acknowledgments here are acknowledgments of legitimation, and that once there is such an acknowledgment it is an irrelevant enquiry how the evidence stands as to actual marriage. Provided there was a possibility of marriage, it is not material whether the marriage in fact took place : that is a question into which one cannot enter.

Mr. De Gruyther, K. O., followed.—The presumption that the union was valid, consequent on an acknowledgment of legitimacy, is a *presumptio juris et de jure*, and cannot be rebutted. The rule of Muhammadan Law is laid down as well established in *Sadakat Hossein v. Mahomed Yusuf* (10).

In *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (8) it was advanced that the offspring of adultery could be acknowledged : it was that proposition which Mahmood, J., was combating. The

decision in that case is not against us, and, so far as Mahmood, J.'s judgment is against us, it is directly against the view taken by the Board in *Sadakat Hossein v. Mahomed Yusuf* (10). Under all systems of law certain enquiries are shut out.

It is not the case that there are concurrent findings that the marriage of Moselle Cohen with the Nawab has been disproved : they are only to the effect that it has not been proved. The issue fixed was, "Was Moselle Cohen married to Sobhan ?" The burden of proof was on us, and we failed to sustain it. The result might have been different if the burden had been placed on the other side to prove that the marriage did not take place.

Lord Atkinson in *Sadik Husain Khan v. Hashim Ali Khan* (9) used the words proved to be illegitimate " in the sense that it was proved that marriage was impossible.

It has been contended that the offspring of fornication cannot be acknowledged, but none of the actual texts refer to anything but disclaimer, proximity of age, or proof that the child is in fact the child of another.

We contend that you can presume a marriage except where such marriage could not possibly have taken place.

Mr. Upjohn, K. O., for the Respondents.—We submit that there was no sufficient or binding acknowledgment of plaintiff as legitimate : this is a question of fact : (2) under the established facts of the case, the doctrine of acknowledgment has no application : this is a proposition of law.

The facts established here are that Habib was the Nawab's son by Moselle, and that it has been proved affirmatively that there was no marriage and that Habib was illegitimate. He was the offspring of *Zina*—an unlawful union between a man and a woman. In Muhammadan Law a man can have a lawful union with two women only—his wife and his slave. Any other connection is a crime—*Zina*—and its offspring is stamped for ever with an incapacity to become legitimate.

Amir Ali's Muhammadan Law, Volume II, (4th Edition, 1917), page 316.

There was no semblance of the relation of husband and wife between the Nawab and Moselle.

The doctrine of acknowledgment mostly applies when it is uncertain whether there has been a marriage or not ; it comes in to

(5) 11 M. I. A. 94 at p. 113; 7 W. R. P. C. 1; 1 Suth. P. O. J. 659; 2 Sar. P. O. J. 222; 20 E. R. 37.

(6) 9 I. A. 8 at p. 18; 8 C. 422 (P. C.); 4 Sar. P. C. J. 310; 6 Ind. Jur. 201; 17 P. R. 1582; 4 Ind. Dec. (N. S.) 269.

(7) 21 I. A. 56 at p. 69; 21 C. 666 (P. C.); 4 M. L. J. 131; 6 Sar. P. O. J. 389; 10 Ind. Dec. (N. S.) 1074.

(8) 10 A. 289; 6 Ind. Dec. (N. S.) 193.

(9) 36 Ind. Cas. 104; 43 I. A. 212 at p. 234; 31 M. L. J. 607; 14 A. L. J. 1248; 19 O. C. 192; 18 Bom. L. R. 1037; 21 O. W. N. 130; (1916) 2 M. W. N. 577; 21 M. L. T. 40; 38 A. 627; 1 P. L. W. 157; 4 O. L. J. 22; 25 O. L. J. 863; 6 L. W. 378; 12 Bur. L. T. 140 (P. C.).

(10) 11 I. A. 81 at p. 36; 10 C. 663 (P. C.); 8 Ind. Jur. 212; 4 Sar. P. C. J. 519; 5 Ind. Dec. (N. S.) 446.

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supply defects of proof of marriage. Acknowledgment will be valid if there is no *zina* or no evidence of it; but here we have proved the *zina*. If the intercourse was unlawful, even though simple fornication, acknowledgment is ineffectual. A child whose illegitimacy is proved beyond doubt cannot be validly acknowledged.

An acknowledgment in Muhammadan Law cannot create a new right: it is a declaration of legitimacy, not a legitimation:

Birjardi, cited in I. L. R. 10 Allahabad, 308, at page 303.

That an acknowledgment in Muhammadan Law is an acknowledgment of antecedent right is recognised in *Ashraf Dowlah's* case (5), that is quite inconsistent with the statement at page 113 that an illegitimate child can be made legitimate. The decision in that case is against appellant: but sentences are picked out here and there which support his contentions.

The appellant is asking the Board to reverse what was laid down in *Sadik Husain Khan's* case (9), as well-established, viz: that no statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate. The authorities cited for that proposition fully support it: the first is *Muhammad Allahdal Khan v. Muhammad Imail Khan* (8), where the Muhammadan texts were elaborately examined, and all the Judges agreed that there could be no effective acknowledgment in the case of a person proved to be illegitimate.

There is no case in which the contrary has ever been held, and all the actual decisions are in our favour, though in certain cases there are *dicta* which are against us. (He was stopped).

Mr. De Gruyter, K. O. in reply.—The rule laid down in *Sadik Husain v. Hashim Ali Khan* (9) was not essential to the decision in that case.

#### JUDGMENT.

Lord DUNEDIN.—In this suit the plaintiff and appellant, Habibur Rahman Chowdhury, claims a declaration that he is the legitimate son of the late Nawab of Bogra, who died intestate on the 2nd July 1915. The suit is opposed by the late Nawab's grandson, who is the son of a legitimate daughter, and by two nephews, the sons of an elder brother. The plaintiff is admittedly the natural son of the late Nawab, his mother having been

a Jewess, Moselle Cohen, who became a Muhammadan and cohabited with the Nawab. He was born in 1893. The Nawab had a daughter by the same lady in 1891. The Nawab's legitimate wife, the grandmother of the first defendant, died in 1890. The plaintiff based his claim on two grounds. He averred first that Moselle was married to the Nawab. He further averred that on many occasions the Nawab had acknowledged him as his legitimate son. The defendants aver that no marriage ever took place. They also deny that any proper acknowledgment of legitimacy was made.

The case went to trial before Greaves, J., and oral evidence was led and documentary evidence produced on both sides. Greaves, J., held that no marriage was proved, but that on the contrary, it was proved that Moselle Cohen was no better than a prostitute and that no marriage ever did take place. He held that the Nawab did acknowledge the plaintiff as his legitimate son; but he held that in law, as the fact of no marriage was conclusively established, such acknowledgment would not confer the status of legitimacy. He, therefore, dismissed the suit.

Appeal was taken by the plaintiff. In the Court of Appeal the Chief Justice agreed with Greaves, J., that the marriage was in fact disproved. Differing from Greaves, J., he held that there was no proper acknowledgment of legitimacy, but, upon the assumption that there was, he agreed with Greaves, J., on the law that such an acknowledgment, in the face of the disproof of the marriage, was of no avail.

Woodroffe, J., thought that there was no acknowledgment of legitimacy and no affirmative proof of marriage, and, therefore, the plaintiff failed but he did not go the length of holding that there had been disproof of marriage.

Chitty, J., held that the marriage was disproved. That being so, he did not feel called upon to decide with certainty as to whether there was a good acknowledgment of legitimacy or not, though he indicated that the bias of his opinion was that there was not.

The plaintiff is thus faced by two adverse concurrent findings of fact to the effect that the existence of a marriage is disproved. As, however, the Junior Counsel for the plaintiff urged that this was not so, it is well to make

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it clear as to what constitute concurrent findings.

The first issue as settled by the Trial Judge was, "Was Moselle Cohen married to Sobhan" (the Nawab) ? His finding as to this was :—

"I hold that upon the evidence the long connection of Sobhan and Moselle was inconsistent with the relation of husband and wife, and that Moselle is, upon the evidence, proved to be merely his concubine, and that Moselle Cohen was not married to the deceased Nawab."

The Chief Justice said :—

"I think the learned Judge was right in holding that Moselle was never married to the late Nawab Sobhan; to put it in other words, in my judgment it has been proved that Moselle was never married to the late Nawab,"

and Chitty, J., said :—

"I do not believe that any marriage between Abdus Sobhan and Moselle Cohen ever took place; in other words, I find the marriage disproved."

These two learned Judges form a majority of the Court of Appeal. That makes a concurrent finding, and it is not vitiated as such because, as here, the other Judge in the Court of Appeal does not come to the same conclusion in fact though coming to the same result in law arising from another fact. Of course, to be concurrent findings binding on this Board, the fact or facts found must be such as are necessary for the foundation of the proposition in law to be subsequently applied to them.

The Senior Counsel for the appellants was unable to deny that there were concurrent findings as to the non existence of the marriage. His argument was directed to this, that, assuming he could show a good acknowledgment of legitimacy, that conferred the status of legitimacy and made it irrelevant to enter into any enquiry as to the fact of marriage.

The case might be disposed of by holding, as the majority of the learned Judges of the Court of Appeal did, that there was no proper acknowledgment of legitimacy. There is not, however, as to this a "concurrent finding," for the learned Trial Judge thought otherwise, and it would be necessary to examine the evidence before coming to the above conclusion. Their Lordships do not

think it necessary to embark on this enquiry. They will, without deciding, assume that there was a proper acknowledgment, for, as is to be presently explained, they are of opinion that such acknowledgment, in face of the fact that there was no marriage, is of no avail. Their Lordships consider that this result is reached on principle, and is concluded by authority.

Before discussing the subject, it is as well at once to lay down with precision the difference between legitimacy and legitimation. Legitimacy is a status which results from certain facts. Legitimation is a proceeding which creates a status which did not exist before. In the proper sense, there is no legitimation under the Muhammadan Law. Examples of it may be found in other systems. The adoption of the Roman and the Hindu Law effected legitimacy. The same was done under the Canon Law and the Scotch Law in respect of what is known as legitimation *per subsequens matrimonium*. By the Muhammadan Law a son to be legitimate must be the offspring of a man and his wife or of a man and his slave; any other offspring is the offspring of *zina*, that is, illicit connection, and cannot be legitimate. The term "wife" necessarily connotes marriage; but, as marriage may be constituted without any ceremonial, the existence of a marriage in any particular case may be an open question. Direct proof may be available, but if there be no such, indirect proof may suffice. Now, one of the ways of indirect proof is by an acknowledgment of legitimacy in favour of a son. This acknowledgment must be not merely of sonship, but must be made in such a way that it shows that the acknowledgor meant to accept the other not only as his son, but as his legitimate son. It must not be impossible upon the face of it: i.e., it must not be made when the ages are such that it is impossible in nature for the acknowledgor to be the father of the acknowledgee, or when the mother spoken to in an acknowledgment, being the wife of another, or within prohibited degrees of the acknowledgor, it would be apparent that the issue would be the issue of adultery or incest. The acknowledgment may be repudiated by the acknowledgee. But if none of these objections occur, then the acknowledgment has more than a mere evidential value. It



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raises a presumption of marriage—a presumption which may be taken advantage of either by a wife claimant or a son claimant. Being, however, a presumption of fact, and not *juris et de jure*, it is, like every other presumption of fact, capable of being set aside by contrary proof. The result is that a claimant son who has in his favour a good acknowledgment of legitimacy is in this position: The marriage will be held proved and his legitimacy established unless the marriage is disproved. Until the claimant establishes his acknowledgment the onus is on him to prove a marriage. Once he establishes an acknowledgment, the onus is on those who deny a marriage to negative it in fact.

A large number of cases were cited to their Lordships which they think it unnecessary to discuss in detail. It is quite true that in the earlier of the series not only is stress laid on the fact that an acknowledgment of legitimacy has more than a mere evidential value, but also there are expressions used such as that by a proper acknowledgment the status of legitimacy is "acquired." Fastening on such expressions, the learned Counsel for the appellants argued that to enter into an enquiry into the fact of marriage when a good acknowledgment had been made out was not only bad law but a sin against the rules of logic. The simple answer to this is that the phraseology of such expressions as cited above must not be pressed to disturb what is the ruling principle, and that principle is that in Muhammadan Law such an acknowledgment is a declaration of legitimacy and not a legitimation. A declaration, though it cannot be withdrawn, may be contradicted, for it is only a statement: legitimation is an act, which being done cannot be undone. So the rules of logic remain untouched.

The whole question was thoroughly examined in a very learned judgment by Mahmood, J., in the case of *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (8) and, finally, in the case of *Saidik Hujain Khan v. Hashim Ali Khan* (9), Lord Atkinson, delivering the judgment of the Board, said as follows (page 231):—

"If this be so, the rule of the Muhammadan Law applicable to the case is well established. No statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate, but where no proof of

that kind has been given such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement provided his legitimacy be possible."

That statement is, in their Lordships' view, clear and conclusive, and what they have said above is no more than an elaboration of what was there said.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

*Appeal dismissed.*

Solicitors for the Appellants:—Messrs. Barrow, Rogers & Nevill.

Solicitors for the Respondent:—Messrs. T. L. Wilson & Co.

## ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No 56 OF 1920.

December 9, 1920.

*Present:*—Mr. Justice Piggott and Mr. Justice Walsh.

SHANKAR LAL—DEFENDANT—  
APPELLANT

*versus*

L. BABU RAM—PLAINTIFF  
—RESPONDENT.

*Transfer of Property Act (IV of 1882), s. 106—Landlord and tenant—Notice to quit—Notice containing clause for enhancement of rent if premises not vacated, whether valid.*

A notice by a landlord to his tenant to vacate premises occupied by him by a certain date which contains a clause that, if the premises are not vacated by the date mentioned, the tenant would be liable to rent at a certain enhanced rate is a perfectly valid notice, and, in the absence of anything to show that the tenant accepted the offer to continue at the enhanced rate, is sufficient in law to determine the tenancy [p. 843, col. 2; p. 844, col. 1.]

First appeal from an order of the Additional Subordinate Judge, Meerut, dated the 13th February 1920.

Mr. Peary Lal Banerji, for the Appellant,

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Messrs. B. E. O'Connor and Ram Nama Prasad, for the Respondent.

**JUDGMENT.**—The defendant in this case was the tenant of the plaintiff in respect of a certain shop with buildings appertaining to the same. The suit was one in ejectment against the defendant, and the Courts below have differed on the question whether a certain notice served by the plaintiff on the defendant was valid to terminate the tenancy under the provisions of section 106 of the Transfer of Property Act, IV of 1882. The first Court held that it was not and that, consequently, the plaintiff was not entitled to a decree for ejectment, or to any decree except one for arrears of rent. The lower Appellate Court has held that the notice was valid to terminate the tenancy and has remanded the case to the first Court, because on this view of the matter there remain other questions to be determined before a final decree could be passed. The appeal before us is against the order of remand. One point taken is that, inasmuch as the law requires a notice expiring with the end of a month of the tenancy, the reference in the notice to the vacating of the house by the 30th of June 1919 rendered it invalid, as the reference should have been to the day following, namely, the 1st of July. There is no force in this contention, indeed it could not be seriously pressed. On the wording of the notice as a whole, it is obvious that the tenant was given until the expiration of the month of the tenancy, that is to say, until midnight of the 20th of June, to vacate the house and, so far as this point goes, the notice was unquestionably valid and in accordance with the requirements of the law. The other point taken is a somewhat more arguable one. The landlord did not confine himself to giving his tenant notice to quit. He certainly did this and up to a certain point he did so in unequivocal terms; but he went on to add that he desired the tenant to take notice further that, if he did not vacate the house by the date mentioned in the notice, he, the landlord, would hold the tenant liable from the 1st of July 1919 to rent at a certain enhanced rate. The contention before us is that the addition of this clause to the notice left it undetermined whether

the landlord did or did not desire to terminate the tenancy, or, in any case, gave the tenant an option to stay on as a tenant at the higher rent named in the latter portion of the notice. On behalf of the plaintiff-respondent it has been contended before us that the concluding words of the notice in no way affect the former portion; that they did not amount even to the offer of a new tenancy, but are merely an indication of the rate at which the landlord will claim damages in the event of the tenant's disregarding the notice and staying on as a trespasser. We do not think it necessary to go quite this length in order to determine the present appeal. The principles governing the decision in a case of this sort have been laid down by a Full Bench of this Court in *Bradley v. Atkinson* (1). We find in an English case, *Ahearn v. Bellman* (2) certain remarks of Bramwell, Lord Justice, which seem precisely to cover the state of affairs created by the notice now before us. It is there said that, if an offer is made by the landlord which the tenant may conceivably accept the question will then be whether that offer was or was not accepted. The precise words in the report, at page 204, which we desire to quote, are as follows:—"Had he (i.e., the tenant) done so (i.e., accepted the offer) the notice to quit would have been as efficacious as it was before, and would have put an end to the old tenancy, but there would, at the same time, have been created a new tenancy. I think there would have been no difference if the notice had been given in one letter and the offer made in another letter at a subsequent time. I cannot understand how it can be said that an offer of a new tenancy in any way affects the validity of the notice to determine the old one; if anything, it corroborates it, because it supposes that the old tenancy is gone, otherwise there would be no competency to enter into a new one." Another point of view from which this case and similar cases can be looked at is this. We may ask whether the notice actually issued by the plaintiff to the defendant would or

(1) 7 A. 899; A. W. N. (1885) 288; 4 Ind. Dec. (N. S.) 990.

(2) 1879 4 Ex. D. 201; 48 L. J. Ex. 681; 40 L. T. 711; 27 W. R. 955.

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would not have bound the plaintiff if the defendant had acted upon its terms. In the present case that question admits of no answer but one. If the defendant had complied with the notice and vacated the premises on the 30th of June, the plaintiff would have been bound, and by no possibility could he have suggested that the old tenancy continued, or that a new tenancy had been created. With regard to the suggestion that a new tenancy at Rs. 100 a month is offered by the concluding words of the notice, it seems sufficient to say that the defendant, so far from accepting that offer, has up to this moment strenuously repudiated it. Something has been said in argument to-day by way of a suggestion that the defendant should be allowed the option of accepting this offer now, but we see no reason whatever why any such indulgence should be extended to him. There is one more point taken in the memorandum of appeal as to which we ought to say a few words. The plaintiff claimed damages from the 1st of July 1919, up to the date of the actual vacating of the house, whether in execution of the decree of the Court or in anticipation of such decree, at the rate of Rs. 100 a month. In the memorandum of appeal before us it is assumed that this question is concluded in favour of the plaintiff by the judgment of the lower Appellate Court, but this is obviously not so. The case goes back to the Court of first instance for the trial of this question along with others still left open. It will be for the Court to determine whether or not, under the circumstances and in view of the equities of the case, it is proper that the defendant should be bound to pay damages at the rate which the plaintiff had warned him in the notice of ejectment that he would claim. Subject to these remarks, we dismiss this appeal with costs.

*Appeal dismissed.*

## PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 36 of 1920,  
February 16, 1921.

*Present*:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Adami.

KULDIP NARAIN SINGH—APPELLANT

*versus*RAGHUNANDAN SINGH AND OTHERS—  
RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 110—  
Appeal to His Majesty in Council—Partition suit—  
Value of subject-matter, how to be determined.*

Where a decree in a partition suit affects not only the share of the plaintiff in certain property but also the shares of those of the defendants who would be entitled to share in the property if the plaintiff's suit were decreed, the value of the subject-matter of the suit, within the meaning of section 110 of the Civil Procedure Code, is the value of the property in dispute and not the value of the share claimed by the plaintiff in the property. [p. 846, col. 2.]

Appeal from a decision of Mr. Justice Das and Mr. Justice Adami, dated the 23rd February 1920, modifying a decree of the Additional Subordinate Judge, Mozufferpore, dated the 19th April 1917.

Messrs. S. O. Mitter and R. Prasad, for the Appellant.

Messrs. S. N. Rai, L. K. Jha and J. Prasad, for the Respondents.

## JUDGMENT.

MILLER, O. J.—This is an application for leave to appeal to His Majesty in Council.

The applicants, as the surviving male members of one of three branches of the family of Damodar Singh, instituted the suit claiming a partition and a one-third share in the joint family property. There was a fourth branch of Damodar's family, *viz.*, that of his deceased son, Sheodani, the only surviving members of which when the suit was instituted were the widows of Sheodani and his two sons, also deceased. The plaintiffs claimed that the widows were entitled to maintenance only whereas the widows claimed that, by a previous family arrangement, a portion of the *z'rait* lands of the family, amounting to 51 *bighas*, had been allotted to them in lieu of maintenance and that this portion of the estate was in consequence not liable to partition. This Court on appeal differed from the view of the Subordinate Judge and found in favour of the validity of the family arrangement set up by the widows and varied the decree of the lower Court by



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excluding the 51 *bighas* from the property to be partitioned.

The plaintiffs have presented the present petition claiming a certificate that the case fulfils the conditions of section 110 of the Civil Procedure Code. They place the value of the whole of the family property at Rs. 41,555 and that of the 51 *bighas* of *zirait* lands at Rs. 20,400. The contesting respondents, the widows, on the other hand, whilst not disputing the total value of the family property, contend that the value of 51 *bighas* now in dispute is not more than Rs. 5,000. The other two branches of the family, who supported the plaintiffs' claim at the trial, are also made respondents in the present appeal. We have been asked to order an enquiry to ascertain the actual value of the disputed lands, but before doing so we must be satisfied that the applicants are entitled to appeal even if their valuation should be accepted. They claim a third share in the disputed lands which, on their own valuation, would amount to between Rs. 6,000 and Rs. 7,000 and on the lower valuation to between Rs. 1,000 and Rs. 2,000. If, therefore, the subject-matter in dispute on appeal is the share claimed by the appellants in the 51 *bighas* it follows that, even on their own valuation, the case does not comply with section 110 of the Civil Procedure Code.

The appellants contend, in the first place, that in a partition suit the subject-matter in dispute is the whole of the property to be partitioned and not merely the share claimed by the plaintiffs, and, secondly, that in any case as the value of the whole property the subject of partition is over Rs. 40,000, the plaintiffs' share alone exceeds the appealable value. It is clear, however, that, whatever may have been the subject-matter of the suit in the Court of first instance, there is no longer any dispute as to the partition of anything except the 51 *bighas* of *zirait* land. The remainder of the property, even under the decree of this Court, alone stands to be partitioned, and the subject-matter in dispute in this appeal is the right to the 51 *bighas* and nothing else. It remains to consider, however, whether the value for the purposes of this appeal is that of the whole 51 *bighas* or only that of the plaintiffs' one-third share. The plaintiffs contend that the subject-matter in dispute is

the whole 51 *bighas* and not merely the share claimed by them, and in support of this view they rely on the decision of the Calcutta High Court in *Lala Bhugwat Sahay v. Rai Pashupati Nath* (1). In that case the plaintiff's suit for partition of property valued at over Rs. 10,000 was dismissed by the High Court. He applied for leave to appeal to His Majesty in Council and was met by the objection that the share claimed by him was below Rs. 10,000 in value. The Court granted a certificate observing, in answer to the contention that the subject-matter in dispute was only the share of the plaintiff, that this was not so, for the share of the plaintiff could not be ascertained without determining the value of all the other shares in the estate with a view to a proper partition. I think that decision can be supported on the ground that the other defendants in the suit, apart from the contesting respondents, were also claimants to a share in the property, and the effect of the suit, if successful, would be to divide up the whole property according to the respective shares of all the claimants. A partition suit, as a rule, has this peculiar feature that it involves not only a decision as to the share to be awarded to the plaintiff but a splitting up of the property amongst several parties, some of whom, although defendants, are really in the position of claimants to a share in the property. If the only question for determination was, whether the plaintiff was entitled to a specific share leaving the rest of the property undivided in the hands of the defendants, I should have great difficulty in holding that the subject-matter in dispute involved anything more than the share claimed, or that its value could be regarded as exceeding the value of that share. It seems to me necessary to consider the actual circumstances in each case before it can be determined whether or not the provisions of the section are complied with, and that it is not a sufficient compliance merely to show that the claim, although below the statutory value, is a claim to a share in property above that value. In the present case it appears that the defendants first party, who constitute the two branches of the family other than the plaintiffs and the widows, supported the plaintiffs' case and claimed each a third share in the family

(1) 10 C. W. N. 564; 3 C. L. J. 257.

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property including the *zirait* lands in dispute. The judgment of this Court, from which it is now sought to appeal, deprives them equally with the plaintiffs of the benefit of the decree of the Trial Court to the extent of their shares in the 51 *bighas* now allotted to the widows; and, although they are not appellants to the Privy Council, they are made respondents in the present proceedings and would, I apprehend, be entitled to appear in the present appeal and support the case presented by the appellants. Moreover, the procedure provided by Order XLI, rule 33, is particularly appropriate to suits of this nature, and there is no reason to suppose that their Lordships would not adopt that procedure in the present case. Should the appeal succeed, the first party, defendants, would be entitled to their share in the disputed property equally with the appellants. It would appear, therefore, that the principle acted on in *Lal Bhugwat Sahay v. Rai Pashupati Nath* (1) (*ubi sup*) governs the present case if the value of the 51 *bighas* of land in dispute exceeds Rs. 10,000.

The respondents, however, rely upon the case of *De Silva v. De Silva* (2) which decided that the value of the subject matter in dispute on appeal under section 110 must be determined by reference to the detriment to the party seeking relief, and where the value of the relief sought is estimated at less than Rs. 10,000 the subject-matter in dispute is not of the prescribed value. It was accordingly decided in that case that, where the plaintiff claimed and was awarded a third share in certain house property as one of the heirs of his mother to whom the property formerly belonged but which had been assigned by her husband to third parties after her death, no appeal lay to His Majesty in Council as the value of the share claimed was less than Rs. 10,000, although the value of the whole property exceeded that amount. The only claimant in that case was the plaintiff but the present appeal appears to me to involve, if not directly certainly indirectly, the claims of the first party, defendants, as well as of the appellants, the effect of the decree appealed from being to prejudice the interests of all those parties who between them are entitled

to the whole 51 *bighas* if the decree of the High Court should be set aside. The decision of the Madras High Court in *Velu Goundan v. Kumaravelu Goundan* (3) is not in conflict with the view expressed, as in that case the suit was not one for a general partition among all the share-holders but for a specific and definite share by one member of the family only.

In my opinion, there is no inconsistency between the views expressed in the cases referred to and the same principle finds expression in each. It is necessary in all such cases to ascertain what the subject-matter in dispute is, and this can only be done by considering the detriment to the parties affected by the decree. In the present case the decree affects the interests not only of the plaintiffs who are appealing but of some of the defendants other than the widows who, although respondents, are asserting a claim to a share in the disputed property and whose interests will be finally determined by the appeal.

As there is a dispute between the parties as to the actual value of the 51 *bighas* the matter will be referred to the Court of first instance under Order XLV, rule 5, of the Civil Procedure Code to report as to the market-value of the same and to return the report together with the evidence to this Court at an early date.

ADAMI, J.—I agree.

*Order accordingly.*

(3) 20 M. 239; 7 M. L. J. 30; 7 Ind. Dec. (N. S.) 203.

ALLAHABAD HIGH COURT.  
SECOND CIVIL APPEAL No. 438 of 1918.  
January 11, 1921.

*Present*:—Mr. Justice Taddall and  
Mr. Justice Rafique.

BOHRA BHUPAL—PLAINTIFF—  
APPELLANT

*versus*

KUNDAN LAL—DEFENDANT—  
RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 64—  
Mortgage—Attachment subsequent to mortgage—Sale—  
Mortgage, whether enforceable against auction-purchaser.*

On 9th June 1912 certain property was attached in execution of a decree by K. On 12th February 1913,

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L., another decree-holder, applied for execution by rateable distribution. On the 25th March 1913, the property was sold. On 2nd April 1913 K. and the judgment-debtor applied to have the sale set aside on the ground that K's decree had been satisfied out of Court, but the application was disallowed. The auction-purchaser having failed to complete the deposit of the purchase-money, the sale was set aside on the 24th May 1913. On the 26th May 1913 the judgment-debtors mortgaged the property to B. On 26th June 1913 L. attached the property and it was sold to P. who, on 12th February 1914, sold it to the present defendant. B. brought the present suit to enforce his mortgage against P. who asserted that, as against him the mortgage was void :

*Held*, that as P.'s right was a right enforceable under L.'s attachment of the 20th June 1913, and as this attachment was subsequent to the mortgage to B. the mortgage was enforceable against him. [p. 848, col. 1.]

Second appeal from the decision of the District Judge, Agra, dated the 23rd of January 1918.

Mr. P. L. Banerji, for the Appellant.

Mr. S. P. Ghosh, for the Respondent.

**JUDGMENT.**—This is a plaintiff's appeal arising out of a suit for sale based upon two mortgage-deeds of the 26th of May 1913 and the 6th of December 1913 executed by the defendants, Gauri Shankar and Beni Prasad, for Rs. 600 and Rs. 300, respectively. The property mortgaged consisted of two houses. The Court of first instance dismissed the claim on the basis of the mortgage of the 6th of December 1913 and decreed the claim on the basis of the mortgage of the 26th of May 1913. The defendant alone appealed and on appeal the lower Appellate Court dismissed the claim also on the basis of the deed of the 26th of May 1913. The plaintiff has come here in second appeal and the contention is that the decision on the point of law raised in the Court below by that Court is incorrect and that on a true interpretation of the law the claim under the bond of 26th of May 1913 should have been decreed and the lower Appellate Court ought to have dismissed the appeal in respect thereto. We are concerned only with the mortgage of the 26th of May 1913. Gauri Shankar and Beni Prasad were judgment-debtors under two decrees. One was obtained against them by Koka Mal who applied for execution and in execution attached the two houses on the 9th of June 1912. Lala Mal was another decree-holder against them who apparently also applied for execution of his decree

and the property having been already attached in Koka Mal's decree he applied for a rateable distribution on the 12th of February 1913. Koka Mal proceeded with his execution and the property was put up for sale and sold on the 25th of March 1913. On the 2nd of April 1913 the judgment-debtors and Koka Mal made an application to the Court stating that the decree of Koka Mal has been satisfied out of Court and asking that the sale be set aside as the decree had been satisfied. On the 26th of April 1913 the Court refused to set aside the sale on this ground, being apparently of opinion that these two persons were combining to defeat the claim of Lala Mal. However, it appears that the auction-purchaser having deposited his one-fourth at the date of sale failed to deposit the remaining three-fourths of the purchase-money and on the 24th of May 1913 the Court set aside the sale for this reason. Then comes the mortgage of the 26th of May 1913 which is the basis of the present claim. On the 20th of June 1913 Lala Mal applied for and obtained attachment of the property in execution of his own decree. On the 24th of June 1913 he applied to the Court which was executing the decree of Koka Mal and asked that rateable distribution should be allowed to him in this way, that Koka Mal be directed to bring into Court the money that he had received from the judgment-debtors in satisfaction of his decree, and that out of it he (Lala Mal) should receive his fair share. This application of his was disallowed on the 6th of July 1913. The execution of Lala Mal's decree proceeded. The property was put up to auction and was purchased by one Piare Lal who in his turn sold it to Kundan on the 12th of December 1914. Kundan is the present respondent before us. On behalf of the defendant it was urged in the Court below that the private transfer of the 26th of May 1913 was void as against him because Lala Mal had applied for a rateable distribution prior to the 26th of May 1913 and the plea is based upon the wording of the Explanation to section 44 of the Code of Civil Procedure. The learned District Judge has expressed his opinion in the following language: "The property, in my opinion, remained under



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attachment until the order of the 5th of July 1913 and, in view of the Explanation attached to section 64 of the Civil Procedure Code, Lala Mal's claim for rateable distribution was undoubtedly enforceable under that attachment and the sale-deed of the 26th of May 1913 is, therefore, void as against the defendant-appellant."

We are referred on behalf of the plaintiff respondent to the Privy Council ruling in *Mina Kumari Bibi v. Bijoy Singh Dudhuria* (1), but that ruling is under the old Civil Procedure Code and it is argued that it is not applicable to the present case. The question is one which was considered by a Full Bench of the Madras High Court in *Annamalai Chettiar v. Palamalai Pillai* (2), and in that case the decision of their Lordships of the Privy Council was considered, and it was clearly held that the Explanation attached to section 64 had not materially advanced the benefits of execution creditors who had applied for rateable distribution. The decision of their Lordships of the Privy Council is also quite clear on the point. If we apply the *ratio decidendi* of that judgment to the facts of the present case it is quite clear that the right of Kundan is a right which is enforceable not under the attachment of the 9th of June 1912 but under the attachment by Lala Mal of the 20th of June 1913. His rights cannot be referred in any way to the prior attachment but only to the subsequent attachment which was also subsequent to the mortgage of the 26th of May 1913. We do not think it necessary to add anything to the very cogent reasons to be found in the Full Bench decision of the Madras High Court. We fully agree with that decision, and, in our opinion, the decision of the Court below was incorrect. The result is that we allow this appeal, set aside the decree of the Court below and restore that of the Court of first instance. The plaintiff will have his costs in this Court

and in the lower Appellate Court as against the defendant-respondent. Costs in this Court will include fees on the higher scale.

*Appeal allowed.*

### PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 309

OF 19 9

January 3, 1921.

Present :—Mr. Justice Jwala Prasad and  
Mr. Justice Ross.

MUNI LAL KATARIAR—APPELLANT

*versus*

Babu SHASHI BHUSAN RAI AND OTHERS—  
RESPONDENTS.

*Provincial Insolvency Act (III of 1907), ss. 5, 15—  
Petition for adjudication by debtor—Grounds for  
dismissing petition.*

A debtor applied to be adjudged an insolvent but his petition was dismissed on the grounds, (1) that he had allowed a register containing the names of pilgrims allotted to him on partition to remain with his brothers 2, that he had removed his place of residence: (3) that he had inserted fictitious amounts as debts, and (4) that he had given a false account of his income:

*Held*, that none of these grounds was a valid ground for dismissing the petition. [p. 842, col. 1.]

Appeal from a decision of the District Judge, Gaya, dated the 20th November 1919.

Mr. Kailash Pati, for the Appellant.

Messrs. Murari Prasad and Achalendra Nath Das, for the Respondents.

### JUDGMENT.

JWALA PRASAD, J.—This appeal comes to us from an order of the District Judge of Gaya, dated the 20th of November 1919, dismissing an application of the appellant for his being adjudged an insolvent under the Insolvency Act (Act III of 1907). The petition for insolvency was filed on the 24th of June 1919, and, after certain amendments in order to make the application conform to the requirements of the Act, the petition was admitted on the 2nd of July 1919 and necessary notices under section 12 of the Act were issued. The applicant was examined on the 15th of November 1919 and the order of the Court was passed

(1) 40 Ind. Cas. 242; 44 C. 662; 1 P. L. W. 425; 5 L. W. 711; 32 M. L. J. 425; 21 C. W. N. 585; 21 M. L. T. 344; 15 A. L. J. 382; 25 C. L. J. 508; 19 Bom. L. R. 424; (1917) M. W. N. 473; 44 L. A. 72 (P. O.).

(2) 43 Ind. Cas. 539; 41 M. 265 (F. B.); 22 M. L. T. 461; 33 M. L. J. 707; (1917) M. W. N. 882; 7 L. W. 298.

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on the 20th of November dismissing the application.

The grounds for which the learned District Judge has dismissed the application are as follows: (1) that the applicant allowed the pilgrim register containing the names of pilgrims allotted to him on partition to remain with his brothers; (2) that he removed his place of residence; (3) that he inserted fictitious amounts and dates of some of the debts, and (4) that he gave false account of his present income.

None of these grounds appear to be valid for the dismissal of the application under section 15 (1) of the Act which has been relied upon by the Court below. The Court has not held that the applicant had no right to make the application in question. In fact, the petition filed by him clearly sets forth his liabilities for exceeding Rs. 500 fixed by section 6, clause (a) of the Act in order to entitle him to make an application under the Act. The applicant further supported his statement in the petition by a sworn affidavit. He was, therefore, entitled to an adjudication required by section 5 of the Act. No doubt, that section gives certain discretion to the Court to refuse an application, for the Court is not bound to adjudge an applicant insolvent under that section; but there must be clearly made out a proper case for the dismissal of the application, namely, an abuse of the process of the Court, or a deliberate attempt on behalf of the debtor to defeat the creditors. The Court below has not held that the applicant was guilty of the aforesaid charges and, therefore, the discretion used by the Court is unwarranted and there was no option left to the Court but to adjudge the petitioner an insolvent under section 5 of the Act.

The first clause of section 15 (1), which entitles the Court to dismiss an application when it is not satisfied with the proof of the right to present the petition or of the service of notice on the debtor, as required by section 12, sub-section (3), has obviously no application for the right to present the petition was conclusively proved in this case and has not been found to be otherwise by the Court below, and no question of notice on the debtor under section 12, sub-section (3), arises in this case, for the debtor himself is the applicant. As to there having been committed an act of insolvency there can

be no doubt for the petition presented by the applicant himself is an act of insolvency. The second part of section 15 (1) has also no application, for that clause refers only when an application is made by a creditor under section 6 of the Act. That clause is the only one under which the debtor might object to an adjudication of an insolvency by showing that he is able to pay his debts or any other sufficient cause. The grounds referred to by the Court below are not the grounds for the dismissal of an application but grounds for refusing to discharge the insolvent under section 44 of the Act. That stage has not yet been reached.

It is needless to consider in detail the authorities quoted on both sides. The view taken appears to be in full accord with that of all the Courts of India, *vide Biva Jeer Ohetty v. Bava Rangasami Ohetty* (1), *Girwardhari v. Jai Narain* (2), *Gulam Rahim v. Wakeel Ali* (3), *Behari Sahu v. Juthar Mall* (4) and *Udai Chand Maity v. Ram Kumar Khara* (5).

The result is, that the order of the Court below is set aside and the applicant, who is appellant before us, is declared an insolvent under the Act. The appeal is decreed with costs.

Rose, J.—I agree.

*Appeal decreed.*

(1) 12 Ind. Cas. 612; 36 M. 422; 10 M. J. L. T. 433; (1911) 2 M. W. N. 480; 23 M. L. J. 52.

(2) 7 Ind. Cas. 34; 32 A. 615; 7 A. L. J. 831.

(3) 16 Ind. Cas. 470; 16 O. W. N. 853.

(4) 38 Ind. Cas. 822; 1 P. L. W. 227.

(5) 7 Ind. Cas. 394; 12 C. L. J. 40; 15 C. W. N. 213.

## PATNA HIGH COURT.

### FULL BENCH.

SECOND CIVIL APPEAL No. 1084 of 1918.

January 6, 1921.

Present:—Sir Dawson Miller, Kt., Chief Justice, Justice Sir B. K. Mallick, Kt., and Mr. Justice Bucknill.

*Babu LAL SHAHA*—PLAINTIFF—

APPELLANT

versus

*KADO MAHTO AND OTHERS*—DEFENDANTS  
—RESPONDENTS.

*Section 17, Patna Civil Rules, r. 36—Attachment of property—Sale on judgment-debtor to pay off decree, claimant—Set by purchaser against judgment-debtor, applicability of—Limitation Act (IX of 1908), S. 1, A. 1, applicability of—Execution of decree—Attachment of property—Objection, dismissed—Appeal, dismissed.*

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*et aside—Suit by objector against judgment-debtor—Limitation.*

The intention of rule 36 of the Sonthal Parganas Civil Rules is specifically and solely to protect the decree-holder; so that where there has been a *bona fide* sale by a judgment-debtor of property under attachment for the purpose of paying off the decree-holder, the judgment-debtor cannot question the validity of that sale as between himself and the purchaser, and a suit for possession of the property by the purchaser against the judgment-debtor is not barred by the rule. [p. 856, col. 2.]

Where property purchased from a judgment-debtor was attached in execution of another decree against the judgment-debtor and the purchaser's objection was dismissed, but the attachment was subsequently set aside on the purchaser satisfying the decree:

*Held*, that a suit by the purchaser for a declaration against his vendee, the judgment-debtor, was not barred by the fact that the order dismissing his objection was not questioned or set aside by a suit within the period of limitation prescribed by Article 13 of Schedule I to the Limitation Act, inasmuch as that Article had no application to the facts of the present case. [p. 856, col. 2.]

Appeal from a decision of the Deputy Commissioner and District Judge, Dumka, dated the 21st May 1918, affirming a decision of the Subordinate Judge, Deoghur, dated the 27th February 1918.

#### ORDER OF REFERENCE TO A FULL BENCH.

JWALA PRASAD AND ADAMI, JJ.—(August 17, 1920).—The plaintiff is the appellant. He brought a suit, out of which this appeal has arisen, in the Court of the Subordinate Judge of Deoghur, Sonthal Parganas, (Title Suit No. 10 of 1915) under the following circumstances:—

The defendant first party, Kodo Mahto, had one anna *mul raiyati* interest in *Mouta Barodi*, Taluqa Sarawan, and his name was entered in the Settlement Record of Rights. He mortgaged this property for Rs. 260 to defendant second party who sold the mortgage-deed to defendants third party. The defendants third party obtained a mortgage-decree, in execution of which the property was attached and advertised for sale.

While the property was under attachment, on the 25th of March 1913 the defendant first party sold the property to the plaintiff by a *Kobala* for Rs. £95 with the object of satisfying the decree of defendant second party and protecting the property from Court sale. Accordingly, Rs. 576-9-0 was deposited in Court by Challan, dated the 20th April 1913, and the decree of defendants third party was satisfied and the execution

case was struck off.

The defendants third party then instituted another suit for other money claims of theirs against the defendant first party and attached the property before judgment on the 27th April 1913.

The plaintiff then, on the basis of his *Kobala* of the 25th March 1913, preferred a claim in the execution proceedings of the money claim. His claim was at first allowed by the executing Court, but was ultimately disallowed by the Commissioner in appeal, on the ground that the sale was void under rule 36 of the Sonthal Civil Rules. The plaintiff then paid into Court, on the 10th March 1915, Rs. 228 2 3 to satisfy the money-decree of the defendants third party, and on the 19th November 1915 he instituted the present suit for a declaration that the sale of the property to him by defendants first party per *Kobala*, dated the 25th March 1913, is valid and not void, as observed by the Deputy Commissioner and the Commissioner in the execution claim case. He also claimed a refund of Rs. 228-2-3 paid by him into Court to satisfy the money-decree of defendants third party against the defendant first party.

The claim of the plaintiff so far as defendants third party were concerned was compromised during the pendency of the suit and hence no issue was framed by the Subordinate Judge as regards the consequential relief for the recovery of Rs. 228-2-3.

The suit was, therefore, tried only on the issue relating to the declaration of his title to the property in suit on the basis of his *Kobala*.

Defendant No. 1, the vendor, contested the suit.

The Courts below have dismissed the suit on the grounds, (1) that the sale deed was invalid; (2) that the suit was barred by limitation, and (3) that the relief by way of declaration cannot be given, inasmuch as the Specific Relief Act is not in force in the Sonthal Parganas. The plaintiff comes to this Court in second appeal.

It is undisputed, and is concluded by the concurrent findings of the Courts below, that the *Kobala* of the plaintiff was duly executed by the defendant on the 25th March 1913 and that the plaintiff paid the consideration-money Rs. 895 and satisfied the mortgage-decree, in execution of which it was advertised



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for sale. He also subsequently had to pay Rs. 228 2 3 to satisfy the decree of the defendant No. 3 against the defendant No. 1 in execution of which the property was attached on the 27th April 1913 subsequent to the plaintiff's Kobala.

It has also been found that the plaintiff is in possession of most of the properties on the basis of the sale. His name has been recorded in respect of the *mul raiyati* right in the village and has been recognized by the Sub-Divisional Officer.

The Kobala of the plaintiff was, therefore, *bona fide* executed for valuable consideration and was given effect to, he being in possession of most of the property. His title to the property is, therefore, undisputed.

The Court below accepts this and says that defendant No. 1, the vendor, having received the consideration-money is estopped from disputing the validity of the sale-deed executed by him and that the plaintiff was entitled to take this plea as a ground of defense in case of a suit being brought against him, but as a plaintiff in the present case he is not entitled to the declaration sued for, inasmuch as such a suit is barred by rule 36 of the Sonthal Civil Rules, page 87 of the Sonthal Perganas Manual, 1911, which lays down that a judgment debtor whose property is under attachment in execution of a decree "shall be incompetent to alienate or encumber the attached property." The Courts below have construed it to impose an absolute incapacity upon the judgment-debtor to alienate the attached property even for the payment of the decree in which the property was attached. The rule was obviously intended to prevent alienations to the prejudice of the attaching creditor and certainly it could not possibly have been intended to render alienation void for the purpose of satisfying the decree of the attaching creditor himself. The hardship of the interpretation will be obvious when the property of a large value is attached to pay off a nominal decree if the judgment debtor is not permitted to raise money on that property or to alienate a portion of it to satisfy his debt. No doubt, the wording of the section is different from that in the present Code of Civil Procedure (V of 1905) but under the earlier Codes of Civil Procedure words more stringent than those in the Sonthal Civil Rules in question were held not to affect

the alienation made for the satisfaction of the decree in which the property was attached. Section 240 of Act VIII of 1859 had enacted that alienation "during the continuance of the attachment shall be null and void." The Courts in India always held that these words were not to be taken in the widest possible sense as null and void against all the world including even the vendor, but they should be taken in the comparatively limited sense and that the object was to make the sale null and void so far as it was necessary to secure the execution of the decree and to prevent only such alienation as would affect the creditor who obtained the attachment. In the case of *Anund Loll Doss v. Jullodhur Shaw* (1) their Lordships of the Judicial Committee accepted this as being the true meaning of the section. Their Lordships further observed: "It could scarcely be held, in fact it was scarcely maintained in argument, that a sale made to a *bona fide* purchaser by the vendor could be set aside by the vendor himself. The words must, therefore, be read with some limitation. . . . They were intended for the protection of the creditor who had obtained execution."

The corresponding section 64 (Act V of 1908) in the Code of Civil Procedure is the result of the interpretation put upon the earlier section by the Courts in India as well as by their Lordships of the Privy Council. Rule 36 of the Sonthal Civil Rules must also be similarly construed. It does not, therefore, affect the sale in the present case, inasmuch as out of the consideration-money the mortgage-decree in which the vendored property was attached, was satisfied. The vendor at least cannot take advantage of the rule and question the validity of the sale as clearly held by their Lordships.

The Courts below are, therefore, wrong in holding that the sale was invalid under rule 33 of the Sonthal Civil Rules.

The next ground upon which the suit has been dismissed by the Courts below is limitation. The Courts below have held that the Commissioner's order in the claim suit declaring that the sale of the property was null and void, was passed on the 19th

(1) 14 M. L. A. 543; 17 W. R. 313; 10 B. L. R. 134; 2 Suth. P. C. J. 558; 3 Sar. P. C. J. 81; 20 E. R. 558.

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November 1914, and that, under Article 13 of the Limitation Act, the suit should have been brought within one year from that date. The suit having been brought on the 20th November 1915, was late by one day.

The plaintiff does not claim "to alter or set aside" the order of the Commissioner, and hence Article 13 has no application. In fact, he will not gain anything by having the order set aside. He simply wants a declaration that the sale was valid, and not void. The suit is governed by Article 120 of the Limitation Act and is not barred; vide *Luchmi Narain Singh v. Atsrup Koer* (2) and *Koylash Ohunder Paul Chowdhury v. Preonath Roy Chowdhury* (3). The suit of the plaintiff is, therefore, not barred and the view taken by the Courts below is wrong.

The last ground upon which the suit has been thrown out is, that the Specific Relief Act (I of 1877) is not in force in Sonthal Parganas and, therefore, the declaratory relief sought for by the plaintiff cannot be granted.

In the case of *Satya Narayan Chackravarti v. Dwarka Nath Saha* (4), Mullick and Atkinson, JJ., held that the Specific Relief Act did not apply to the Sonthal Parganas. This view was subsequently doubted in the case of *Tekait Deg Narain Singh v. Bhuk Lal Raut* (5) decided by Contts and Adami, JJ., and it was observed that the question whether the Sonthal Parganas is a scheduled district was not considered in the previous case. There is, however, no room for this doubt, inasmuch as the Sonthal Parganas is mentioned in Schedule I, Part 3 of Act XIV of 1874, section 1 of which defines "scheduled districts" to mean the territories mentioned in the First Schedule annexed to that Act. Therefore, the Sonthal Parganas is a scheduled district. The view has been recently adopted by their Lordships of the Judicial Committee in *Maha Prasad Singh v. Ramni*

*Mohan Singh* (6). The operation of the Specific Relief Act has been expressly excluded from the Sonthal Parganas by section 1 of the Act.

The fact that the value of the suit was over Rs. 1,000 does not at all affect the question. No doubt, under section 2 of Act XXXVII of 1855, read with section 3 of Regulation III of 1872 and section 9 of Regulation V of 1903, the General Laws and Regulations will apply to the trial of suits in the Sonthal Parganas, the value of which exceeds Rs. 1,000. But this, to my mind, will not extend the Specific Relief Act to such suits when it has been expressly excluded from the Sonthal Parganas. Besides, as observed by Mullick and Atkinson, JJ., the Act is not *proprio vigore* in force in the whole of British India and hence the aforesaid provisions in the Sonthal Parganas Laws will not make the Specific Relief Act applicable to suits the value of which exceeds Rs. 1,000. Thus, to my mind, the Specific Relief Act does not apply to the Sonthal Parganas whatever be the value of the suit.

The question then arises as to whether, apart from the Specific Relief Act, the reliefs contemplated by the Act can be granted in suits in the Sonthal Parganas. Obity and Richardson, JJ., in the case of *Janardan Mahato v. Ekirab Ohandra Montal* (7) answered this in the affirmative and held that, although the Specific Relief Act was not applicable to the Sonthal Parganas, a prayer for specific performance of a contract can be granted upon the principles of justice, equity and good conscience. Their Lordships, Mr. Justice Mullick and Mr. Justice Atkinson, disagreed with this view and held that the principles of the Act which are of a highly technical character cannot be extended to a locality which the Government of the country has expressly declared to be unfit for the operation of the Act. This view was doubted subsequently by their Lordships, Contts and Adami, JJ., in the case *Tekait Deg Narain Singh v. Bhuk Lal Raut* (5) referred to above. Their Lordships observed that, as the value of the

(2) 9 C. 43 at p. 45; 5 Shome L. R. 57; 4 Ind. Dec. (N. S.) 681.

(3) 4 C. 610; 3 C. L. R. 25; 2 Ind. Dec. (N. S.) 387.

(4) 40 Ind. Cas. 174; 2 P. L. J. 379; 1 P. L. W. 738.

(5) 57 Ind. Cas. 196; 2 U. P. L. R. (Pat.) 150; 1 P. L. T. 699; (1921) Pat. 38.

(6) 25 Ind. Cas. 451; 42 C. 116 at p. 145; 18 C. W. N. 984; 16 M. L. T. 106; (1914) M. W. N. 565; 1 L. W. 619; 20 C. L. J. 231; 27 M. L. J. 459; 16 Bom. L. R. 824; 41 L. A. 197 (P. O.).

(7) 30 Ind. Cas. 365.

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suit was over Rs. 1,000 the Code of Civil Procedure of 1859 applied to the suit under which declaratory reliefs could be granted subject to the condition that there were circumstances which might justify the grant of consequential reliefs and hence, before 1877, such reliefs were maintainable in the Sonthal Parganas irrespective of the Specific Relief Act. No doubt, that case was distinguishable in that there was a prayer for an injunction as a consequential relief. But the aforesaid observation is certainly contrary to the view expressed in the earlier case of a Division Bench of this Court referred to above. It is, therefore, necessary to consider this in some details.

The history of section 15 in the Civil Procedure Code of 1859 is given in the judgment of their Lordships of the Judicial Committee in the case of *Strimathoo Moothoo Vija Ragoonadah Kolanapurwee Natchiar v. Dorasinga Tevar* (8). It was first introduced in this country in section 19 of Act VI of 1854. The provision is precisely in the same words as the English enactment, 15 and 16 Vict., c. 126, section 50. In the opinion of their Lordships, expressed at pages 178 179, no such power was possessed by the Courts in India before that. The trial of suits of value exceeding Rs. 1,000 in the Sonthal Parganas is regulated by the Code of Civil Procedure for the time being in force. Hence, a right to obtain merely declaratory relief existed in such a suit in the Sonthal Parganas under section 15 of Act VIII of 1859, without granting consequential relief. If the present suit were governed by the Civil Procedure Code of 1859, the plaintiff in the present case would certainly be entitled to the declaration of his title to the land in suit, inasmuch as he was entitled to ask for consequential relief for the possession of some of the properties in suit of which he was out of possession, as held by the Subordinate Judge. According to the learned Subordinate Judge consequential relief could have been given to the plaintiff if he had asked for it and paid proper Court-fee. The condition laid down in the aforesaid decision of their

Lordships of the Privy Council at page 187 of the report, for a declaratory decree, that there should be "a right to consequential relief capable of being had in the same Court or in certain cases in some other Court", is fully satisfied in this case.

The plaintiff, no doubt, actually prayed for consequential relief in this case, namely, to recover Rs. 228-2-3 from the defendant 3rd party, but this relief was not actually tried, inasmuch as the claim for money was compromised between the plaintiff and the defendant No. 3 during the pendency of the suit and the case proceeded only upon the declaratory issue. If the suit could still be regarded as a suit for recovery of money on declaration of plaintiff's title to the property in suit, the question whether declaratory relief could or could not be given in the Sonthal Parganas would not arise. But this is doubtful, inasmuch as the claim for money was finally settled between the parties and the consequential relief ceased to exist thereafter. This may also be gathered from the aforesaid case of the Privy Council.

The plaintiff is entitled to his decree only if the right to a declaratory decree created in the Sonthal Parganas by section 15 of the old Code of Civil Procedure could still be deemed to be in force in that territory. Section 15 of Act VIII of 1859 was deleted from the subsequent Code of Civil Procedure, and instead the Specific Relief Act (I of 1877) was introduced with more comprehensive and detailed provisions relating to specific reliefs. Now, under this Act declaratory reliefs can be given in British India, except the scheduled districts, of which the Sonthal Parganas is one. The new Code of Civil Procedure is now in force in the Sonthal Parganas by virtue of section 10 of Act V of 1903 and section 153 of the Code of Civil Procedure (Act V of 1908). Act VIII of 1859 is no longer in force in the Sonthal Parganas. The new Code of Civil Procedure does not make provision for declaratory decrees. Thus, although at one time declaratory decrees could be made in suits in the Sonthal Parganas, it is doubtful whether they can be made now.

(8) 2 I. A. 169 at p. 166; 15 B. L. R. 83 (P. C.); 23 W. R. 314; 3 Sar. P. C. J. 456.

The Sonthal Parganas was taken out of the purview of the General Laws on account



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of the uncivilised condition of the people of the Pargana, as is stated in the preamble of Act XXXVII of 1855. In 1859, it was considered fit to receive the benefit of declaratory decrees, and there is no reason why it should not be considered fit to continue to exercise that right now. There does not, therefore, appear to be the intention of the Legislature to take away this relief. But if the law, as it at present stands, makes it impossible to construe it in favour of the right having been continued, the intention of the Legislature will be of no avail. Their Lordships, Chitty and Richardson, JJ., would extend the principles of the Specific Relief Act to the Sonthal Parganas on grounds of justice, equity and good conscience, *vide Janardan Mahato v. Bhairab Chandra Mondal* (7). But in face of the express exclusion of the Specific Relief Act from the Sonthal Parganas, and in view of the declaratory reliefs being a special mode of relief introduced recently in England and in this country, it is doubtful whether the considerations of equity, justice and good conscience would entitle a Court to grant the reliefs in that locality without any legislation.

The point is not free from difficulty and cases of this nature are frequently arising in the Sonthal Parganas. There has been difference of opinion among the learned Judges of this Court as well as of the Calcutta High Court. We, therefore, consider it necessary to refer this case to the learned Chief Justice for constituting a larger Bench for the decision of the points involved in this case.

The points referred to are as follows:—

(1) Whether a Court in the Sonthal Parganas can refuse to grant a declaratory decree in a suit the value of which exceeds Rs. 1,000 simply because no consequential relief is prayed for?

(2) Whether an alienation of a property under attachment of a Civil Court decree made by a judgment-debtor for the purpose of satisfying the claim of the attaching creditor is invalid under rule 36 of the Sonthal Civil Rules; and can the judgment-debtor be permitted to question the validity of the purchase made by the vendee for bona fide and valuable consideration? and

(3) Whether Article 13 of the Limitation

Act applies to the present suit for declaration of title based on a deed already held to be invalid in execution proceedings, no prayer to set aside or vary the order of the executing Court being made?

—  
Messrs. S. M. Mullick, J. Prasad and N. N. Sen, for the Appellant.

JUDGMENT.—This case came before a Division Bench of this Court on appeal from a decision of the Deputy Commissioner and District Judge of Dumka, dated the 21st May 1918. The facts in the case may be shortly stated. The defendant first party, Kado Mahto, was the proprietor of a one-anna share in *Mauza Barodi* which he mortgaged to the defendants second party, who in turn assigned their mortgage to the defendant third party, Kali Charan Sabu. Kali Charan then got a decree on the mortgage-bond and attached the property in suit. On the 25th March 1913, whilst the property was under attachment, Kado Mahto, the original proprietor, sold the property to the plaintiff for the sum of Rs. 895. That sale was made with a view to satisfying the decree obtained by Kali Charan and consequently to avoid the sale of the property. Out of the proceeds of the sale to the plaintiff, the decretal amount under the mortgage-decree was paid into Court on the 20th April 1913 and the execution-case was accordingly struck off. Kali Charan, it appeared, had a further claim against the defendant first party, Kado Mahto, and he instituted a suit to recover the amount due, and before judgment attached the same property on the 27th April 1913. If the sale made to the plaintiff by Kado Mahto was valid and subsisting, it followed that the attachment of the property by Kali Charan for a debt due from Kado Mahto was not a valid attachment and the plaintiff thereupon entered an objection to the attachment made by Kali Charan. His objection was, in the first instance, allowed by the Deputy Collector and that decision was affirmed by the Collector. But on appeal to the Deputy Commissioner the decision was overruled and that decision, which went on revision to the Commissioner, was upheld. The ground upon which the objection to the attach-

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ment was dismissed by the Deputy Commissioner and the Commissioner was that, under rule 36 of the Sonthal Civil Rules, it is provided that, where property is attached in proceedings before the Courts mentioned in those rules and the attachment is published in the manner directed thereafter, the judgment-debtor shall be incompetent to alienate or encumber the attached property. The plaintiff, having failed to get the attachment set aside, in order to stay the sale of the property, was compelled to pay into Court the amount of the decree for which Kali Charan had sued. He accordingly paid into Court the sum of Rs. 228 and some odd annas in order to satisfy the claim of Kali Charan, and that claim having been satisfied, all further proceedings in that suit came to an end with the result that the property was released from attachment. The plaintiff, considering that he was aggrieved by having had to pay into Court the sum of Rs. 228, and considering further that there was some cloud cast upon his title by the decision of the Sonthal Parganas Court, brought the present suit claiming a declaration that the sale by which he purchased the property from Kado Mahto on the 25th March 1913 was a valid and subsisting sale and not void as stated in the execution claim. He further claimed, as consequential relief, the payment back from Kali Charan of the sum of Rs. 228-2-3 which he had paid into Court to satisfy the latter's claim. He did not claim possession of the property, although it was found by the lower Court that he was out of possession of a portion thereof.

When the case came before the Subordinate Judge he dismissed the claim on various grounds. First of all, he decided that the Kobala under which the plaintiff claimed was not valid, because a sale, such as that under which the plaintiff claimed, he considered was void under rule 36 of the Sonthal Civil Rules. He further came to the conclusion that the suit was one in the nature of a suit to set aside a decision or order of a Civil Court in any proceeding other than a suit and that it was governed by Article 13 of the Limitation Act, and, as the suit had been instituted more than one year after the date when the execution case in which the plaintiff's

objection had been made and decided, he thought that the suit was barred by Limitation. The learned Subordinate Judge also came to the conclusion that the Specific Relief Act was not in force in the Sonthal Parganas and that a suit claiming a declaration in the terms stated in the plaint was bad in law.

That decision was affirmed upon appeal to the Deputy Commissioner.

The matter then came before this Court and, in a considered judgment, the Court came to the conclusion that the reasons given by the lower Appellate Court for its decision could not stand but as it thought the points were not free from difficulty and were frequently arising in this Court it referred the matter to a Full Bench for determination. The points of law which have been raised for our determination are,—

- (1) Whether a Court in the Sonthal Parganas can refuse to grant a declaratory decree in a suit, the value of which exceeds Rs. 1,000, simply because no consequential relief is prayed for?
- (2) Whether an alienation of a property under attachment of a Civil Court decree made by a judgment-debtor for the purpose of satisfying the claim of the attaching creditor is invalid under rule 33 of the Sonthal Civil Rules; can the judgment-debtor be permitted to question the validity of the purchase made by the vendee for *bona fide* and valuable consideration? and
- (3) Whether Article 13 of the Limitation Act applies to the present suit for declaration of title based on a deed already held to be invalid in execution proceedings, no prayer to set aside or vary the order of the executing Court being made?

With regard to the first point, it was urged by the learned Vakil on behalf of the appellant that this is not a suit merely for a declaration because what is asked for is not merely a declaration of the validity of his purchase but consequential relief in the nature of a claim to recover back Rs. 228 paid into Court in the execution

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proceeding in the previous suit. So far as that is concerned, that portion of the claim had been settled before the case came to this Court and, therefore, there is no consequential relief any longer claimed in this suit and, consequently, it becomes unnecessary for the Court to deal merely with the question of the declaration, unless it is satisfied that this is the class of case in which a declaration ought to be granted apart from any consequential relief sought. As it appears, however, that the plaintiff is out of possession of some portions of the property he now asks that his plaint may be amended by claiming that he may be put in possession of that part in respect of which he has been held to be out of possession and he has declared his willingness to pay an *ad valorem* Court-fee upon the valuation of the property as stated in the plaint. That being so, it follows that the claim should not be treated as one coming under the Specific Relief Act and asking merely for a declaration of title without any consequential relief. In the circumstances, therefore, the first question submitted to us does not really arise, because this being a case asking not for a declaration of title only, but also for consequential relief, there can be no doubt as to the jurisdiction of the Court.

With regard to the second question, it is unnecessary to deal with this at any length. The judgment of the Court which referred the matter to us has dealt at some length with this point and we are entirely in agreement with the conclusion arrived at by them. That conclusion is based upon a decision of their Lordships of the Privy Council in the case of *Anund Loll Doss v. Jul'odhur Shaw* (1), which dealt with the effect of section 240 of Act VIII of 1859, where the words were, if anything, more stringent than the words used in rule 6 of the Sonthal Civil Rules. The words in section 240 of the Act of 1859 were that, an alienation during the continuance of the attachment shall be null and void. Their Lordships in that case observed: "It could scarcely be held, in fact it was scarcely maintained in argument, that a sale made to a *bona fide* purchaser by the vendor could be set aside by the vendor himself. The words must, therefore, be read with some limitation... They were intended for the protection of the creditor who had obtained execution." Although that decision is not a decision upon

the particular rule in question, there can be no doubt that the principle there applied applies with equal, if not greater, force to the present case and, looking at the rule as it stands, we have no doubt whatever that the intention of that rule was specifically and solely to protect the decree-holder. Where there has been a *bona fide* sale by the judgment-debtor of the property for the purpose of paying off the decree-holder, then it does not lie in the mouth of the judgment-debtor to question the validity of that sale as between himself and the purchaser.

With regard to the third question submitted, whether Article 13 of the Limitation Act applies to the present suit, we consider that that Article has no application. The suit is not one in effect to set aside the decision of the executing Court nor is it necessary that that decision should be set aside before the plaintiff is entitled to institute the present suit. All that was decided in the execution proceedings was, that the attachment should not be set aside. That was the decision. Incidentally the Court had to come to the conclusion that the purchase made by the present plaintiff was not a valid purchase, but that attachment has subsequently been set aside by payment into Court of the amount due to the decree-holder and, therefore, in so far as that decision had any binding and valid effect, it is quite unnecessary for present purposes that the order therein made should be set aside at all nor indeed does the plaintiff seek to have it set aside. So far as his claim for the Rs. 228 is concerned, it might have created a difficulty on that point. But that has already been settled and, therefore, we are no longer concerned with that, but it is perfectly clear to our minds that the present suit for a declaration is in no way barred by limitation merely by reason of the fact that a suit to alter or set aside the decision or order of the Civil Court in any other proceeding in the suit under Article 13 of the Limitation Act is barred within one year. As already stated, the present is not such a suit, nor is it necessary that such a suit should be brought as a condition precedent to the present suit. In our opinion, this appeal ought to be allowed with costs to the appellant before the Trial Court and the lower Appellate Court, but as no one appeared for the respondents in the High Court there will be no order as to costs.



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either in this appeal or in the appeal before the Division Bench. The appellant will be entitled to a declaration of his title to the property in suit and an order for possession of that portion of the property of which he has been found by the lower Courts to be out of possession. This decree will not be executed until the appellant has paid the Court-fee appropriate to a suit claiming a consequential relief in the nature of possession. The deficit under this head he has reckoned at Rs. 183. This matter may be referred to the Stamp Reporter to check and report thereon. The plaint will be amended by adding thereto a prayer claiming confirmation of possession, or if he should be found out of possession then that possession should be granted to him. Let the plaint be amended accordingly.

*Appeal allowed.*

# ALLAHABAD HIGH COURT.

CIVIL REVISION No. 154 OF 1919.

November 16, 1920.

*Present:*—Mr. Justice Piggott and  
Mr. Justice Walsh.

KANHYA LAL—DEFENDANT—  
PETITIONER—APPELLANT

*versus*

FIRM JAGANNATH PERSHAD.  
HANUMAN PERSHAD, THROUGH  
JAGANNATH PERSHAD—PLAINTIFF—  
RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 115, Sch. II, para. 15—Arbitration—Order of reference—Objection to validity of reference—Revision—Material irregularity.*

After an order of reference to arbitration, it is too late for either party to object to the form of the proceedings anterior to the reference or to the form of the issues [p. 868, col. 1.]

Where after the submission of an award the Court reverses the order of reference to arbitration and sets aside the award on the sole ground of some supposed defect in the order of reference, it acts with material irregularity in the exercise of its jurisdiction within the meaning of section 115 of the Civil Procedure Code [p. 868, col. 1.]

Civil revision against the order of the Subordinate Judge, Cawnpore, dated the 16th of September 1919.

The Hon'ble Dr. T. B. Saprú and Messrs. K. N. Katju and D. O. Banerji, for the Appellant.

Messrs. B. E. O'Connor and Badri Narain, for the Respondent.

## JUDGMENT.

WALSH, J.—In this case a suit was brought in the Court of the Subordinate Judge of Cawnpore by a firm named Jagannath Prasad, etc., against one Kanhya Lal, who was alleged to be 22 years of age, for damages for non-delivery of goods. The defendant alleged infancy, and a written statement was filed upon his behalf by one Lachmi Narain in which the contract was denied, and the defenses of infancy, and of wagering were set up. Issues were settled by the Judge on the 9th January 1919. The question of the defendant's minority was separately tried, and was decided against him in March. When the day for the trial, in May, arrived the parties decided to refer their dispute to arbitration, and the issues which had been struck were, by order of Court, referred to an arbitrator, who made an award on the 23rd June in favour of the defendant, holding that, although the defendant was of age, there had been no contract, and dismissing the suit.

On the 25th June the plaintiff filed objections in the Court of the Subordinate Judge praying that the award be set aside. These objections alleged, (1) Fraud and collusion between the defendant and the arbitrator, and necessarily, therefore, misconduct by the arbitrator; (2) Failure by the defendant to file a written statement of his own after the decision against him as to his age, and (3) Further trumpery complaints of the nature of misconduct against the arbitrator not necessary to particularize here.

On the 16th of September, in spite of the fact that the defendant had adopted the written statement of Lachmi Narain, and that the issues originally settled had been expressly referred to the arbitrator by the Court, the Subordinate Judge held that the absence of a further written statement by the defendant invalidated the reference and the arbitration, and that, therefore, the award was invalid, and he set it aside. The defendant now applies to this Court in revision to quash the order,

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and an objection is raised to the jurisdiction of this Court to interfere. This objection gives rise to a technical question of some difficulty.

The decision of the Subordinate Judge is clearly indefensible. The ground upon which he has interfered is no ground at all for questioning either the arbitration proceedings, or the award. Both parties were bound by the order of reference as to all matters covered by it, including the pleadings as they then stood, and the issues as settled. After the order of reference, it was too late for either party to object to the form of the proceedings anterior to the reference, or to the form of the issues. The defendant could not have done so himself, and the plaintiff had less ground, if possible, than the defendant for objecting to the absence of a fresh written statement as the prejudice, if any, would affect the defendant alone. The ground upon which the learned Judge has acted is, in fact, an objection to the decision of the arbitrator in the guise of an objection to the proceedings of the Trial Court, and the decision of the Subordinate Judge amounts to a reversal of the order of reference passed by the same Court, without any change in the circumstances, except the execution of the order by the holding of the arbitration and the making of the award. In other words, it is equivalent to an order refusing to stay the suit where there has been not only an agreement, but an order to refer to arbitration. It is not so in terms, otherwise it would be appealable under section 104.

In the course of the argument, we were referred to the case of *Ghulam Khan v. Mohammad Hassan* (1), the leading authority in the Privy Council on Arbitration Law as laid down in the Civil Procedure Code, and to that of *Lutawan v. Lachiya* (2), a Full Bench decision of this High Court reported in 12 Allahabad Law Journal 57. In both cases a decree had been passed in accordance with, and not in excess of, an award, so that the point to be decided differed from the question now raised. It is necessary, therefore, to

examine the principles established by those cases, which are, of course, binding upon us.

Their Lordships point out that the Code deals with arbitrations under three heads. Only the first of these need concern us, namely, where the parties to a litigation refer to arbitration any matter in the suit, so that all proceedings are under the supervision of the Trial Court. Subject to that, an arbitrator has a free hand. If he proceeds regularly, and decides the matters referred to him and no others, he may make any error of law or fact with reference to the matters actually in dispute without power of redress to any party, and if the award is duly made and an application to set it aside is refused by the Trial Court, that Court has no option but to pronounce a decree in accordance with it. Against such decree there is no appeal. Turning to Schedule II of the Code, paragraph 15 provides the grounds upon which an award may be set aside. Since the case of *Ghulam Khan v. Muhammad Hassan* (1) (*supra*) was decided, the words "or being otherwise invalid" have been added, without in any way affecting the decision or the reasons given by their Lordships of the Privy Council. But reasoning mainly from that expression the Members of the Full Bench in *Lutawan v. Lachiya* (2) were unanimous in saying that the original Court, and no other, should decide any objections to the award on the ground of invalidity from any cause whatever. That is to say, the "otherwise invalid" must not be construed as *eiusdem generis* with what has gone before it. Accepting to the full that construction, it is necessary to point out that some limitation must be placed upon the words so construed. They cannot mean that a decision merely adopting an idle or wanton objection, however absurd and irrelevant, would be a decision of "invalidity from any cause whatever." We think the meaning to be put upon the language of the Full Bench is, that the decision must be a real decision of some ground, no matter what, which, if it existed, would invalidate an award. In fact, paragraph 15 prescribes and delimits the jurisdiction of the original Court: "No award," it says, "shall be set aside except, etc." The ground taken and adopted in the decision of this case is no ground affecting the validity of the award at all.

(1) 29 C. 167 (P. C.); 6 C. W. N. 228; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902.

(2) 21 Ind. Cas. 989; 12 A. L. J. 57; 86 A. 69.

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It is merely a decision that the Court ought not to have referred. Is that a matter affecting the validity of the award once the dispute has been referred? On this point their Lordships say [*Ghulam Shan v. Mohammad Hassan* (1)]: "In cases falling under Head I" (as this case now does) "the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of the Court. So that no question can arise as to the regularity of the proceedings up to that point." The decision before us in fact questions their regularity, and is based upon it. It appears, therefore, to us that the Judge has travelled outside his jurisdiction as expounded by the Privy Council, without deciding any ground in any way affecting the validity of the award. In the ordinary way revision would, therefore, lie. The Privy Council, however, have pointed out in *Ghulam's case* (1) that in cases where an attempt is made to review, or avoid the decision by arbitration on the merits, revision is more objectionable than an appeal, because the finality of the award would be open to question. But in *Ghulam's case* (1) they took pains to explain that the application in revision was avowedly an application to set aside the award, and also (page 183) that the Judge in the original Court had not exercised a jurisdiction not vested in him by law, or failed to exercise his jurisdiction, or acted in the exercise of his jurisdiction with material irregularity. In our opinion, the Judge in this case had no jurisdiction to reverse the order of reference, which he has in substance done, and in setting aside the award on the sole ground of some supposed defect in the order of reference, which was irrelevant, he has acted with material irregularity.

We have taken pains to make the position clear, as, although the result of our order will be to restore to the award that finality which the Legislature intended, it must not be supposed that we desire to depart, or have in any way departed, from the principle of inviolability which attaches to decisions, either upholding or rejecting objections under paragraph 15, when they are in fact decisions upon real objections of invalidity to the arbitration proceedings

and award.

The order of the Court is, that the order of the Subordinate Judge of the 20th September 1919 be set aside, and the application to have a decree passed in accordance with the award be restored to the file of the Court to be dealt with according to law. The plaintiff must pay the costs in this Court and of the proceedings in the Court below.

PICCOTT, J.—I agree that the order complained of is quite unsustainable, and I am clearly of opinion that the defendant must be allowed some legal remedy against it, so that the only proper ending to the suit, necessarily, is a decree dismissing the same in accordance with the award of the arbitrator. The difficulty which has been discussed in the judgment of my learned brother, strikes me as in substance a question only of procedure. I have myself long inclined to the view that, under the present Code of Civil Procedure, the intention of the Legislature was to impose a somewhat stringent limit on the revisional jurisdiction of this Court by the use of the words, "any case which has been decided," in section 115, but at the same time to open a wide door of relief to litigants who have been prejudiced by errors of procedure on the part of the Trial Court by means of the provisions of section 105. I certainly think that those Hon'ble Judges who are disposed to accept the more rigid view of the effect of section 115, to which I have above referred, ought to be prepared to give a very liberal interpretation to the words "affecting the decision of the case" in section 105. Possibly, if I were certain that my own individual view in this matter would prevail, not only at this stage but throughout this particular litigation, I might be disposed to hold that the proper course for the defendant was to wait for the final decree of the Trial Court and to challenge the order setting aside the award in his memorandum of appeal, in the event of the suit ending in a decree against him. I am aware, however, that there is considerable conflict of judicial opinion over the interpretation of the words, "affecting the decision of the case" in section 105, Civil Procedure Code, and I certainly think it would be unjust to the defendant if he were to fail in the present



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application by reason of any doubts I might entertain as to the applicability of this Court's revisional jurisdiction and later on be deprived of his remedy by way of appeal on account of any judicial opinion regarding the operation of section 105 of the same Code. For these reasons, subject only to this reservation, that I do not stand committed to the proposition that an order like the one here complained of could not be challenged in a petition of appeal under section 105, I concur in the order which has been passed.

*Order set aside.*

**CALCUTTA HIGH COURT.**  
**APPEAL FROM APPELLATE DECREE NO. 2148**  
**OF 1917.**

May 13, 1920.

*Present:*—Sir Asutosh Mookerjee, Kt.,  
 Acting Chief Justice, and Justice  
 Sir Ernest Fletcher, Kt.

**BHARAT CHANDRA DEB AND OTHERS—**  
**DEFENDANTS—APPELLANTS**  
*versus*

**RAM SUNDAR CHOWDHURY—**

**PLAINTIFF, AND OTHERS—RESPONDENTS.**

*Limitation Act (IX of 1908), Sch. I, Arts. 47, 142—*  
*Order awarding possession under section 145, Criminal*  
*Procedure Code, made without jurisdiction—Suit to*  
*recover possession—Limitation applicable.*

Where in a proceeding under section 145 of the Criminal Procedure Code an order is made awarding possession of immoveable property, but that order is made without jurisdiction, a suit to recover possession is, as regards limitation, governed by Article 142, and not by Article 47, of Schedule I to the Limitation Act. [p. 862, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Sylhet, dated the 8th of June 1917, modifying that of the Munsif, Additional Court, at Sunamgunj, dated the 4th of December 1916.

FACTS appear from the judgment.

Babu Birendra Chandra Dey, for the Appellants.—The facts of the case are briefly these. The suit was for recovery of possession of seven plots of land on declaration of plaintiff's title thereto. There was a pro-

ceeding under section 145 of the Code of Criminal Procedure between the parties with regard to all the plots in suit, in which the defendants were the first party and the plaintiff was the second party. On the 14th October 1909 the parties had entered into a deed referring their dispute under section 145 case and also other matters to the arbitration of five Pleaders. In the deed it was provided, amongst other things, that the defendants first party were to reap the standing crops and take possession of the game. On the basis of these provisions, the Magistrate, on the 15th October 1909, made an order to the effect that the defendants first party would remain in possession. The present suit was instituted on the 23rd November 1915. The learned Munsif held that the suit having been instituted more than three years after the date of the order of the learned Magistrate in the section 145 case was barred under Article 47 of the Indian Limitation Act. On appeal by the plaintiff, the lower Appellate Court held that the compromise referring the dispute to arbitration, when brought to the notice of the Magistrate, ousted his jurisdiction and, therefore, the order of the learned Magistrate was *ultra vires*. The learned Judge in that view of the case held that the suit was not barred under Article 47 of the Indian Limitation Act and decreed the suit accordingly. The defendants Nos. 2, 3 and 8 have, therefore, appealed to this Court. My contention is that, under Article 47 of the Indian Limitation Act, a person bound by an order under section 145 of the Code of Criminal Procedure has to sue for possession within three years from the date of the Magistrate's order. The question that would consequently next arise, therefore, would be whether the order of the Magistrate was binding on the parties. Here the Magistrate's order was passed on the admissions contained in the deed referring the dispute to the arbitrators and was, therefore, legal and valid. Even if the Magistrate's order be held to be not warranted by the provisions of section 145, clause (4), the order at most would be illegal and not a nullity. The Magistrate had jurisdiction to institute the proceedings under section 145 and if, instead of dropping the proceedings under the circumstances, the Magistrate passed an order in favour of the defendants first party he

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acted illegally in the exercise of his jurisdiction. The order must be without jurisdiction in the strict sense of the term and not in the loose sense in which it is used for the purpose of section 15 of the Charter Act. Refers to *Paladugu Parasuramayya v. Valli Ramachandradu* (1), *Yar Mohammad Saha v. Hayat Mohammad Saha* (2). The Magistrate's order though illegal is valid and binding on the parties, until reversed by a superior Court. Refers to *Mungul Pershad Ditch v. Grista Kant Lahira Chowdhury* (3). Here the order, even conceding the same to be illegal, was not set aside by any superior Court and is, therefore, binding on the parties. The suit having been brought more than six years from the date of the order by the Magistrate is, therefore, barred by Article 47 of the Indian Limitation Act.

Babu Hemendra Kumar Das (with him Babu Jotindra Mohon Choudhury), for the Respondents.—The appeal is concluded by the findings of fact. The fact that the matter was settled by the arbitrators was brought to the notice of the Magistrate before the passing of the final order. But, therefore, the effect of that in doing away with the dispute which was the subject-matter of the proceedings under section 145 was not considered by the Magistrate which he was bound to do. Refers to clause (5) of section 145, Criminal Procedure Code. The cases referred to in *Paladugu Parasuramayya v. Valli Ramachandradu* (1) and *Yar Mohammad Saha v. Hayat Mohammad Saha* (2), are clearly distinguishable. Hence I submit, the matter having been settled by the award of the arbitrators, the Magistrate was not any longer competent to deal with it under section 145. That being so, the provisions of Article 47, Limitation Act, do not at all affect my case. The case would be governed, as has been rightly by the learned Judge, by Article 142, and not Article 47.

Babu Birendra Chandra Dev, replied in brief.

## JUDGMENT.

MOOREJEE, ACTG. C. J.—This is an appeal

(1) 21 Ind. Cas. 564; 38 M. 432; 14 M. L. T. 392; (1913) M. W. N. 871.

(2) 42 Ind. Cas. 768; 22 C. W. N. 342; 18 Cr. L. J. 1024

(3) 8 I. A. 123; 8 C. 51 (P. C.); 11 C. L. R. 113; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32.

by three of the defendants in a suit for recovery of possession of land on establishment of title.

The Court of first instance dismissed the suit as barred by limitation under Article 47 of the Schedule to the Indian Limitation Act.

Upon appeal the Subordinate Judge has held that the case is governed, not by Article 47 but by Article 142, and has made a decree in favour of the plaintiff with regard to five of the plots in suit.

On the present appeal, the decision of the Subordinate Judge has been challenged on the ground that Article 47 should have been held applicable. In our opinion, this contention is not well-founded.

Article 47 provides that a suit "by any person bound by an order respecting the possession of immoveable property made under the Code of Criminal Procedure, 1893 . . . . or by any one claiming under such person, to recover the property comprised in such order" must be instituted within three years from the date of the final order in the case. It cannot be disputed that, to attract the operation of Article 47, it must be shown that the order mentioned was an order made with jurisdiction, for if the order was made without jurisdiction, there is not, in the eye of law, an impediment to be removed, and the person who instituted the suit cannot be deemed to be bound thereby. In the present case, the plaintiff contended that the order under section 145 of the Criminal Procedure Code was made without jurisdiction. The records of the proceeding under section 145 have been destroyed and the only proof of the order is an entry in the register of criminal proceedings which shows that, on the 15th October 1902, the Magistrate made an order that the disputed land do remain in the possession of the first party. *Prima facie*, an order of this description was made with jurisdiction. But the plaintiff has given evidence to establish, and that evidence has been accepted by the Subordinate Judge, that on the 14th October 1902 the disputing parties referred the matters in difference between them to arbitration. The submission has been produced and shows that the parties had come to a settlement as to the possession of the disputed property. They had agreed that the produce would be taken by one of the parties, while the other

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would receive mesne profits, and that they would hold possession according to such decision as might be given by the arbitrators. The evidence further shows that this reference to arbitration was brought to the notice of the Magistrate before the order was made on the day following. Consequently, the case was covered by sub-section (5) of section 145 of the Criminal Procedure Code, which provides as follows:—"Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed, and in such case, the Magistrate shall cancel his said order and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final." In the case before us what happened was that, after the initial order of the Magistrate had been made with jurisdiction, the dispute between the parties ceased and there was no longer an apprehension of a breach of the peace. Consequently, it became incumbent on the Magistrate to cancel his order. The fact that he did not cancel the order cannot give validity to the order that he made. This view is supported by the decisions in *Kalanand Singh v. Kameshwar Singh* (4) and *Sadhu Biswas v. Mahamad Ali Biswas* (5).

Reference has been made on behalf of the appellant to the cases of *Yar Mohammad Saha v. Hyat Mohammad Saha* (2) and *Paladugu Parasuramayya v. Valli Ramachandradu* (1), which are clearly distinguishable. In the first of these cases, there was no compromise between the disputing parties and it was impossible to say that the dispute between them had come to an end so as to terminate the jurisdiction of the Magistrate to make an order so as to avert the apprehended breach of the peace. What happened in reality was that one of the parties found his evidence so unsatisfactory that he collapsed and practically abandoned the proceeding. In the second case also, the order was not made without jurisdiction. The order was made without proper enquiry, but an order so made by a Court of competent jurisdiction cannot be said to be an order made

without jurisdiction, it was at best an order made by a Court of competent jurisdiction which acted in the exercise of its jurisdiction illegally or with material irregularity. The same observations apply to *Paladugu Parasuramayya v. Valli Ramachandradu* (1), *Gangadharam Aiyar v. Sankarappa Naidu* (6) and *Bhagwan Das v. Bhana Mal* (7).

We are of opinion that in the present case the Subordinate Judge correctly held that the order under section 145 was made without jurisdiction and the suit was consequently governed by Article 142.

As regards the merits, the decision of the Subordinate Judge does not involve any error of law. The appeal is, consequently dismissed with costs.

FLETCHER, J.—I agree.

*Appeal dismissed.*

(6) 9 Ind. Cas. 255; 9 M. L. T. 91; 12 Cr. L. J. 47.

(7) 14 Ind. Cas. 586; 51 P. R. 1912; 137 P. W. R. 1912.

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1979 OF 1920.

January 27, 1921.

Present:—Mr. Justice Chevis.

Musammat UTTMI—PLAINTIFF—  
APPELLANT

versus

NIHAL CHAND—DEFENDANT—  
RESPONDENT.

*Punjab Tenancy Act (XVI of 1887), s. 53—Joint tenancy and tenancy-in-common, distinction between—Survivorship, principle of, applicability of.*

The principle of survivorship applies only in the case of a joint tenancy. [p. 864, col. 1.]

Where there are defined shares in a tenancy, it is not a case of a joint tenancy but merely one of tenancy-in-common. [p. 863, col. 2.]

Second appeal from the decree of the District Judge, Amritsar, dated the 20th May 1920, reversing that of the Munsif, First Class, Amritsar, dated the 2nd December 1918.

Lala Kahan Chand, for the Appellant.

Lala Shaukat Rai, for the Respondent.

(4) 8 Ind. Cas. 592; 15 C. W. N. 271; 11 Cr. L. J. 729.

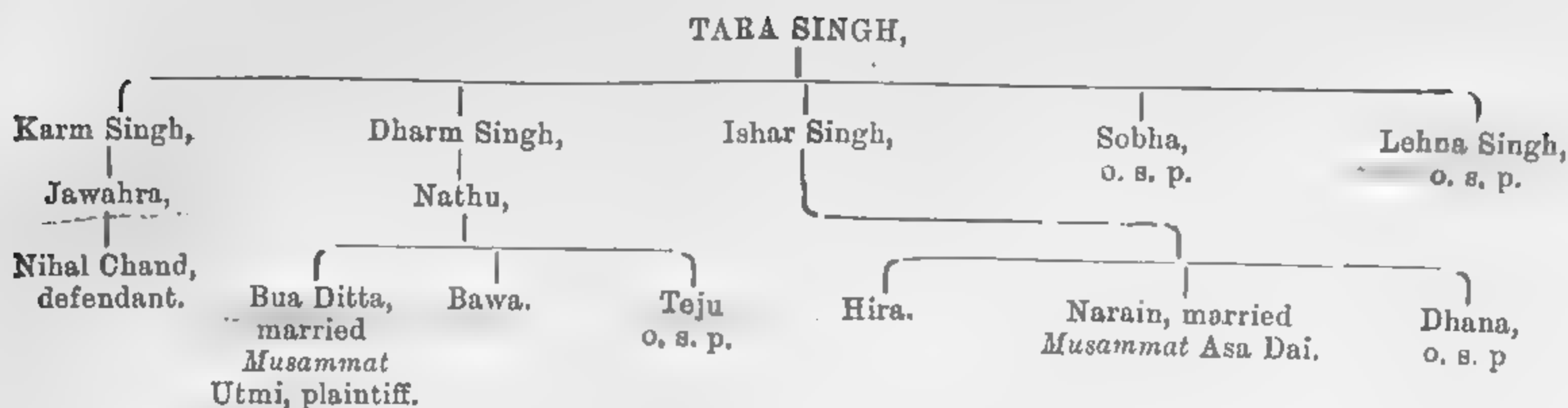
(5) 9 Ind. Cas. 167; 15 C. W. N. 568; 12 Cr. L. J. 32.



UTTAMI C. NIHAL CHAND.

## JUDGMENT.

The genealogical tree is as follows:—



The suit relates to the land of which Lehna Singh was the occupancy tenant. The whole land was held up to 1903 in the following shares:—

Lehna Singh	...	$\frac{1}{2}$
Bua Ditta, Bawa and Teju, sons of Nathu...	...	$\frac{1}{2}$

On the death of Lehna Singh a mutation entry was written up by the Patwari in May 1903, in which it was stated as the cause of the mutation entry, that Lehna Singh had died on the 5th November 1902. The new entry was made as follows:—

Jawahra, son of Karam Singh	...	$\frac{1}{2}$ by $\frac{1}{2}$
Musammat Utmi, widow of Bua Ditta and Bawa...	...	$\frac{1}{2}$ by $\frac{1}{2}$
Hira and Musammat Asa Dai	...	$\frac{1}{2}$ by $\frac{1}{2}$
Musammat Utmi and Bawa	...	$\frac{1}{2}$

It is evident from the new entry that not only Lehna Singh had died but Bua Ditta and Teju had also died before the date of the entry. Musammat Utmi now sues to recover possession of that share which was taken by Jawahra in 1902. Her suit has been dismissed by the learned District Judge who holds that, under section 59 of the Tenancy Act, Musammat Utmi has no right of succession to the occupancy land held by her husband's collaterals. Throughout the proceedings, it seems to have been assumed that Bua Ditta died before Lehna Singh. In this Court, however, it has been urged that Bua Ditta survived Lehna Singh and that he, therefore, succeeded to his share of Lehna Singh's land and that his widow now has a right to succeed to her husband. In support of this contention the plaintiff has produced a copy of an entry in the death register, showing that Bua Ditta died on the 8th January 1903. The defendant has, however, retaliated with a copy of an entry in the

death register, showing that Lehna Singh died on the 8th February 1903. I take it that these entries are reliable, and I certainly regard them as much more reliable than the entry made in May 1903 by the Patwari, who presumably would not be very particular as to the date which he gave of the death of Lehna Singh. An incorrect entry as to date would not in any way effect the merits of the new entry which was to be made as regards ownership. I consider, therefore, that the lower Courts have rightly gone on the assumption that Bua Ditta predeceased Lehna Singh.

On behalf of the plaintiff it is urged that the tenancy was a joint tenancy and that, even if Bua Ditta died before Lehna Singh, his widow would still succeed and that Jawahra had no right whatever to take a share as he was not one of the tenants holding jointly along with Lehna Singh. Reliance is placed on two Revenue Rulings, *Agar Singh v. Dhana* (1) and *Ohanda Singh v. Jiwan Singh* (2), in support of the proposition that this was a joint tenancy. These rulings make no distinction between joint tenancies and tenancies-in-common, and have never, to the best of my knowledge, been followed by this Court; and the principle laid down by this Court [see *Mohru v. Mutsaddi* (3) and *Khan Singh v. Hardit Singh* (4)] is that, where there are defined shares in a tenancy, it is not a case of a joint tenancy but merely one of tenancy-in-common. In the present case the shares have all along been defined, and

(1) 6 P. R. 1902 Rev.; 11 P. L. R. 1903.

(2) 42 Ind. Cas. 87; 6 P. R. 1917 Rev.; 5 P. W. R. 1917 Rev.

(3) 109 P. R. 1894 (F. B.).

(4) 100 P. R. 1908; 46 P. W. R. 1907.

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I hold that the tenancy was not a joint tenancy and that the principle of survivorship does not apply. Under section 59 of the Tenancy Act, the widow of a collateral has no right of succession and, therefore, I consider that *Musammam Utni*, the present plaintiff, was not entitled to any share in the occupancy tenure of *Lehna Singh*. This being so, it, of course, follows that she has no right to recover possession from the son of *Jawahra*, even if it be assumed that *Jawahra*, too, had no right to get any share in the occupancy of *Lehna Singh*. The learned District Judge's decision dismissing the suit must, therefore, stand. I may remark that the tenancy was partitioned in 1913 and, therefore, in any case, the plaintiff would only be entitled to recover her share, i.e., one-fourth of the land for which she has sued.

The appeal is dismissed with costs.

*Appeal dismissed.*

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 670  
OF 1918.

August 10, 1920.

Present :—Sir Asutosh Mookerjee, Kt,  
Acting Chief Justice, and Justice Sir  
Ernest Fletcher, Kt.,

KANDARPA NAG—PLAINTIFF

—APPELLANT

*versus*

BANWARI LAL NAG AND OTHERS—  
RESPONDENTS.

*Consent-decree—Relief against forfeiture, principle of, applicability of—Consent-decree providing for payment of money on certain date—Time for payment, whether can be extended.*

Where a consent-decree gives effect to an agreement which embodies a right to forfeiture, the Court, in the exercise of its equitable jurisdiction, is competent to grant such relief against forfeiture, as it might have granted if there had been no consent-decree and a suit had been instituted to enforce the compromise. [p. 866 col. 2]

Where a consent-decree provides for the payment of money on a prescribed date, time is not of the essence of the contract, and the Court is competent to grant an extension of time for making the payment. [p. 868 col. 2.]

Appeal from the decrees of the District Judge, Bankura, dated the 9th of January 1918, reversing the decree of the Munsif, First Court, at Bishnupur, dated the 22nd of March 1915.

FACTS appear from the judgment.

*Babu Monmothanth Mitter*, for *Babu Kishori Lal Chatterjee*, for the Appellant.—It is true that the time for payment of the money was originally fixed by consent of parties, but the Trial Court was quite competent to extend the time and to afford relief against forfeiture. Section 148 of the Code of Civil Procedure might not in terms apply, but there is nothing to prevent the Court from acting on principles of equity. The District Judge is clearly wrong in laying down the general proposition that, where the time for performance of an agreement has been fixed by a consent order, the time cannot be enlarged except by consent. The rights and liabilities of the plaintiff and the defendant are embodied in the contract of the parties which is contained in the consent-decree. The contract is not the less a contract because there is superadded the command of the Judge. See *Wentworth v. Bullen* (1). The consent-order was, therefore, subject to the ordinary incidents of a contract. The agreement between the parties embodied a right to forfeiture. It was, therefore, subject to the ordinary incident of such an agreement, viz., relief against forfeiture. The fact that the agreement was evidenced by a consent-decree cannot take away the ordinary incident attached to such an agreement. The Court, in the exercise of its equitable jurisdiction, is competent to grant such relief against forfeiture as it might have granted if there had been no consent decree and a suit had been instituted to enforce the compromise. See *Krishna Bai v. Hari Govind Kulkarni* (2). Refer also to *Nagappa v. Venkat Row* (3), *Lakshmanaswami Naidu v. Rangamma* (4), *Kumara Venkata Perumal v. Thatha Ramaswamy Ohelly* (5). The doctrine of the applicability of the

(1) (1829) 9 B. & C. 840; 33 R. R. 353; 9 L. J. (o. s.) K. B. 33; 109 E. R. 313.

(2) 31 B. 15; 8 Bom. L. R. 813; 1 M. L. T. 870.

(3) 24 M. 265.

(4) 26 M. 81.

(5) 9 Ind. Cas. 575; 85 M. 75; (1911) 1 M. W. N. 290; 9 M. L. T. 457; 21 M. L. J. 709.

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principle of relief against forfeiture to consent decrees is of very extensive application. See *Ramgopal Mookerjee v. Masseyk* (6) and *Balkishen Das v. Run Bahadur Singh* (7). Refers also to *Jamir Fakir v. Ram Lal Ghose Chowdhury* (8) and *Shashi Bhushan Banerjee v. Oharushila Debi* (9) and *Mahadeo Prosad v. Narain Chandra* (10), *Surendra Nath Banerjee v. Secretary of State for India in Council* (11).

Babu Peari Mohan Chatterjee (with him Babu Krishnalal Banerjee), for the Respondent.—A consent-decree can be varied only by consent. Section 148 of the Civil Procedure Code is of no assistance to the appellant. The appellant having entered into an agreement cannot, on his failure to perform his part of the contract, seek the assistance of the Court of Equity to grant him relief against forfeiture. He had no title to the disputed land and, therefore, no forfeiture could occur. Even if he had any, he is not entitled to any relief against forfeiture as he made several defaults. The agreement must be strictly enforced. Time was of the essence of the contract. Refers to *Lachiram v. Jana Yesu Mang* (12). Refers also to *Harakh Singh v. Sakeb Singh* (13), *Chandanbala Debi v. Irolodh Chandra Roy* (14), *Sajjadi Begam v. Dilawar Hussein* (15).

Babu Manmathanath Mitter replied.

## JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal by the plaintiff in a suit for recovery of possession of land upon declaration of title. The disputed property belonged to one Dina Nath Nag who left four sons, Kandarpa Nag (the plaintiff), Banwari Lal Nag (the first defendant), Pashupati Nag (the second defendant) and Sasi Bhushan Nag, since deceased. The third and fourth defendants hold a decree for money against the Nag

brothers and in execution thereof purchased the property at an auction-sale held in 1911. The case for the plaintiff is that, as the ancestral homestead of the Nags was situated on the property sold, the execution-purchasers agreed, on their request, to re-convey the property to them upon payment of Rs. 250 and costs incidental to the sale, but that the first two defendants, his brothers, fraudulently took a conveyance on the 9th September 1913, in their names alone. The plaintiff accordingly prayed that his brothers might be directed to transfer to him his one-fourth share upon receipt of a proportionate amount of the purchase-money. The Nag defendants repudiated the claim as unfounded. During the pendency of the trial in the Court of first instance, the plaintiff and his brothers arrived at a settlement on the 22nd March 1916. The terms of the compromise were, that the plaintiff would get a decree declaring his title to the one-fourth share; that the plaintiff would pay to his brothers in two instalments Rs. 195 as the value of the share as also the amount of the costs of the suit; that the first instalment of Rs. 100 would be paid on the 21st April 1916; that the second instalment of Rs. 95 would be paid on the 21st May 1916, and that if payment was not made on the due dates, the defendants would become owners of the entire property. The petition of compromise was filed in Court on the same date and a preliminary decree was made thereon by consent of parties. No money, however, was paid by the plaintiff on either of the dates mentioned, but on the 22nd May 1916, he applied to the Court for extension of time, explaining that what had prevented performance of his part of the bargain, was, not his laches but the conduct of the defendants. The Court extended the time for payment till the 21st June 1916. On that date Rs. 145 was paid and an application made for a further extension of time. On the 5th July 1916, the balance due was deposited and accepted. The defendants contended that the plaintiff had forfeited his rights under the compromise and the consent decree, and that the Court had no authority to extend the time under section 148, Civil Procedure Code. The objection was overruled on the 4th August 1916, and the preliminary decree was made absolute on the 5th September 1916. Upon appeal, the District Judge has reversed that decision

(6) (1857) 13 S. D. A. 101; 15 Ind. Dec. (o. s.) 549.

(7) 10 I. A. 162; 10 C. 305 (P. C.); 13 C. L. R. 392; 7 Ind. Jur. 554; 4 Sar. P. C. J. 465; 5 Ind. Dec. (N. S.) 204.

(8) 32 Ind. Cas. 697.

(9) 36 Ind. Cas. 309.

(10) 57 Ind. Cas. 121; 24 C. W. N. 330; 30 C. L. J. 224.

(11) 57 Ind. Cas. 643; 24 C. W. N. 545.

(12) 27 Ind. Cas. 830; 16 Bom. L. R. 668.

(13) 6 C. L. J. 176.

(14) 2 Ind. Cas. 338; 26 C. 422; 9 C. L. J. 251.

(15) 47 Ind. Cas. 4; 40 A. 579; 16 A. L. J. 625.



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and has dismissed the suit on the ground that section 148, Civil Procedure Code, had no application, and that, where the time for performance has been fixed by a consent order, the time cannot be enlarged except by consent. The plaintiff has now appealed to this Court and has argued that, although section 148, Civil Procedure Code might not in terms apply, the Trial Court was competent, on principles of equity, to afford relief against forfeiture, even though the time for performance had been fixed originally by consent of parties and a consent-decree made on the basis thereof. The question raised is by no means free from difficulty, and requires careful examination.

Two principles are well-settled with regard to the nature and operation of consent-decrees. In the first place, there is high authority for the proposition that a consent-decree is just as binding on the parties thereto as a decree after a contentious trial, *South American and Mexican Co., In re* (16), *The Belcairn* (17), *Jenkins v. Robertson* (18), *Thomson v. Moore* (19), *Irish Land Commission v. Ryan* (20). This rule has been repeatedly recognised and applied in Indian Courts, *Nicholas v. Asphar* (21), *Baylakshmi Dassee v. Katyayani Dassee* (22), *Fateh Chand v. Narsingh Das* (23), *Amrita Sundari v. Sherajuddin Ahamed* (24), *Kumara Venkata Perumal v. Thatha Ramaswamy Chetty* (5), *Thiruvambala Desikar v. Ohinna Pandaram* (25). In the second place, it is equally well-settled that a consent-decree cannot have greater validity than the compromise itself. As was observed by the Court of Appeal in *Huddersfield Banking Co. v. Lister* (26), the real truth of the matter is that a consent order is a mere creature of the agreement, and if greater sanctity were attributed to it than to the

original agreement itself, it would be to give the branch an existence which is independent of the tree. To use the language of Kay, L. J., the consent order is only the order of the Court carrying out the agreement between the parties. The same idea was expressed in different terms when Parke, J., said in *Wentworth v. Bullen* (1), that "the contract of the parties is not the less a contract and subject to the incidents of a contract, because there is superadded the command of the Judge." This statement was quoted with approval by Erle, O. J., in *Livesley v. Gilmore* (27), and by Chitty, J., in *Conolan v. Leyland* (28). The doctrine has been recognised and applied in a long series of cases in this Court; *Raylakshmi Dassee v. Katyayani Dassee* (22), *Kahetra Moni Dasi v. Amodini Dasi* (29), *Keshab Panda v. Bhojani Panda* (30), *Umeshananda Dut Jhav. Mohendra Prasad Jhr* (31), *Lal Behary Mitra v. Nagendra Nath Chatterjee* (32), *Amrita Sundari v. Kherajuddin Ahamed* (24), *Galstaun v. Woomesh Chandra Bannerjee* (33).

From the second of the two principles enunciated above, Jenkins, O. J., in *Krishna Bai v. Hari Govind Kulkarni* (2) drew the conclusion that, where the consent-decree gives effect to an agreement which embodies a right to forfeiture, the Court, in the exercise of its equitable jurisdiction, is competent to grant such relief against forfeiture as it might have granted if there had been no consent decree and a suit had been instituted to enforce the compromise. It was pointed out that as, under the Code of Civil Procedure, Order XXIII, rule 3, the decree is to be in accordance with the agreement, it cannot be deemed to have altered the relations of the parties as they existed under the agreement, and as it was an incident of those relations that the right of forfeiture was subject to relief that incident must still apply when those relations are established by a decree passed in accordance with the agreement. This

(16) (1895) 1 Ch. 37; 12 R. 1; 71 L. T. 594; 43 W. R. 131; 64 L. J. Ch. 189.

(17) (1885) 10 P. D. 161; 55 L. J. P. 2; 5 Asp. M. C. 503; 53 L. T. 696; 34 W. R. 55.

(18) (1867) 1 Sc. & Div. 117.

(19) (1889) 23 L. R. Ir. 599.

(20) (1906) 2 Ir. Rep. 565 at p. 584; 5 Ir. L. R. 518.

(21) 24 O. 216; 12 Ind. Dec. (N. S.) 810.

(22) 12 Ind. Cas. 464; 38 C. 639 at p. 674.

(23) 16 Ind. Cas. 968; 22 O. L. J. 383.

(24) 29 Ind. Cas. 156; 19 C. W. N. 565.

(25) 34 Ind. Cas. 57; 40 M. 177; 30 M. L. J. 274; (1916) 2 M. W. N. 43; 4 L. W. 306.

(26) (1895) 2 Ch. 273; 64 L. J. Ch. 523; 12 R. 331; 72 L. T. 703; 43 W. R. 567.

(27) (1866) 1 O. P. 570; 1 H. & R. 849; 35 L. J. C. P. 351; 12 Jur. (N. S.) 874; 15 L. T. 386.

(28) (1884) 27 Ch. D. 632; 54 L. J. Ch. 123; 51 L. T. 895.

(29) 16 Ind. Cas. 611.

(30) 21 Ind. Cas. 539; 18 C. L. J. 187.

(31) 11 Ind. Cas. 240; 14 O. L. J. 337 at p. 345.

(32) 16 Ind. Cas. 630; 22 O. L. J. 267.

(33) 35 Ind. Cas. 850; 44 C. 789; 25 O. L. J. 303.

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coincides with the view previously expressed by the Madras High Court in *Nagappa v. Venkat Row* (3), and *Lakshmanaswami Naidu v. Rangamma* (4) followed in *Kumara Venkata Perumal v. Thatha Ramaswamy Chetty* (5); Beaman, J., amplified the same point of view when he stated, referring to the decision in *Great North West Central Railway v. Ocharlebois* (34), that by private agreement converted into a decree, parties could not empower themselves to do what they could not have done by private agreement alone. This logically leads to the conclusion that the Court could not be compelled to enforce the agreement unquestioningly and literally; the decree is to be deemed, so long as it stands, as only the indisputably correct presentment of the contract, subject necessarily to the incidents of such a contract which include equitable relief against a forfeiture as not the least important and well-established. A party to a contract embodied in a consent decree cannot be held to have renounced any incidental advantages for equitable relief of which, upon the face of the contract itself as presented in the decree, he might ordinarily have claimed the benefit: *Kumara Venkata Perumal v. Thatha Ramaswamy Chetty* (5).

In *Krishna Bai v. Hari Govind Kulkarni* (2) the right to forfeiture was contained in a consent-decree whereby the status of landlord and tenant was established between the plaintiff and defendant, and the principle enunciated therein has been applied in subsequent cases between landlords and tenants, as in *Balambhat Ravjibhat v. Vinayak Ganpat-rao* (35), *Surendra Nath Banerjee v. Secretary of State for India in Council* (11), *Thayyammalachi v. Rajali* (36). It is plain, however, from the judgments of Jenkins, O. J., and Beaman, J., in *Krishna Bai v. Hari Govind Kulkarni* (2), that the principle enunciated therein was not intended to be restricted to cases where the relationship of landlord and tenant is created or recognised by the decree. An examination of the cases in the reports shows that the doctrine of the applicability of the principle of relief against

forfeiture to consent-decrees is of very extensive application and has been at least twice recognised by the Judicial Committee. The principle was invoked as early as 1857 by the Sadar Dewani Adalat in the case of *Ramgopal Mookerjee v. Masseyk* (6), where an agreement had been made for the settlement of a litigation between A. and O. This agreement recited that C. was indebted to A. in a certain sum which O. agreed to pay, upon remission by A. of part of his claim, by two instalments at specified dates. The agreement then provided that if default was made by O. in payment of the instalments the remitted money was to be held due to A. by O. and secured upon certain property in addition to the personal liability of O. The agreement was made the foundation of the decree in the suit. Default was made in the payment of the instalments, whereupon A. brought an action against O. to recover the sum remitted. O. resisted the claim on the ground, that the default, if any, was not attributable to laches on his part but was due to accident and that, in the circumstances, he was entitled to relief against forfeiture. A Full Bench of the Sadar Dewani Adalat upheld this contention. The case was then taken on appeal to the Judicial Committee. *Ram Gopal Mookerjee v. Samuel Masseyk* (37). Lord Kingsdown, in an elaborate judgment reviewed the circumstances of the case and held that the conduct of the parties justified the grant of relief against forfeiture to the defendant. A similar view was adopted by the Judicial Committee in the case of *Balkishen Das v. Run Bahadur Singh* (7); remarks made therein show that consent-decrees were assumed to be subject to the application of the principle of relief against forfeiture although it was ultimately held that, in the events which had happened, relief should not be granted against the forfeiture incurred under the clause contained in the consent decree for the payment of sums of money in instalments. The same view was adopted by this Court in the case of *Jamir Fakir v. Ram Lal Ghose Chowdhury* (8) where money was payable on a specified date under a consent-decree and forfeiture was to ensue in default of punctual pay-

(34) (1899) A. C. 114; 68 L. J. P. C. 25; 79 L. T. 85.

(35) 10 Ind. Cas. 746; 35 B. 239; 13 Bom. L. R. 154.

(36) 12 Ind. Cas. 334; (1911) 2 M. W. N. 827; 10 M. L. T. 326.

(37) 8 M. L. A. 239; 2 W. R. P. C. 43; 1 Suth. P. C. J. 409; 1 Ser. P. C. J. 760; 19 E. R. 521.

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ment. Illustrations of the application of this principle will be found in some recent decisions of the Madras High Court. Thus, in *Ana Sheikh Mohidin Thiragan v. Vadivalaigianambia Pillai* (38) relief was granted against forfeiture under a consent-decree which provided that the defendant should give up possession of the land decreed to him on his failure to pay the plaintiff a sum certain on a date fixed. This was followed in the case of *Bheema Venkataramana v. Bommini Gurappa* (39), where also the compromise decree provided that the plaintiff should recover the property in suit unless the defendant paid into Court a certain sum of money within a certain date. To the same effect is the decision in *Ramayanam Jogamma v. Enamantra Lakshmi* (40), where the consent-decree in a suit by a Hindu widow for recovery of land from the reversioners of her husband provided that she should obtain possession, unless the defendants punctually paid into Court a prescribed amount as maintenance within a specified period. It was ruled that time was not of the essence of the contract, and that relief should be granted against forfeiture on the ground that the power of the Court to grant relief against the enforcement of a penal clause is not confined to contracts between landlords and tenants incorporated in a compromise decree but extends to compromise decrees generally. The substance of the matter then is that the circumstance that a consent-decree has been passed on the basis of a compromise, does not oust the jurisdiction of the Court to grant relief against forfeiture, the Court must determine whether, on equitable grounds, relief would have been granted against forfeiture if it had been called upon to enforce the agreement itself. An exhaustive enumeration of all the classes of cases where Courts of Equity have granted relief against forfeiture need not be attempted here. It is sufficient to point out that the general principle just enunciated explains and justifies the decisions in *Uttam Chandra Krithy v. Khetra Nath Chatto-padhya* (41), *Harakh Singh v. Sahib Singh*

(13), *Chandanbala Debi v. Probodh Chandra Roy* (14) and *Snashi Bhushan Banerjee v. Oharushila Debi* (9) which uniformly recognised the principle that time is of the essence of the agreement, when, in the course of proceedings by the judgment-debtor to set aside an execution sale, a compromise is made among the decree-holder, judgment-debtor and execution-purchaser that on payment of the judgment debt within a prescribed period the sale shall stand cancelled, while upon failure to make such payment the sale shall stand confirmed. In such cases, as the parties intended in the first conception of the agreement to make time the essence of the contract, the Court would not be competent to extend the time, except by consent of all the parties concerned. On the other hand, as we have seen, time has not been deemed to be of the essence of the contract when the agreement is for the payment of money on a prescribed date whether upon default of payment on that date money or land is forfeited. We are not unmindful that in *Bapu v. Vilhal* (42) and *Lechiram v. Jana Yesu Mang* (12), Scott, O. J., who had been a party to the decision in *Balambhat Rajibhat v. Vinayak Ganpatrao* (35) strictly applied the dictum of North, J., in *Australasian Automatic Weighing Machine Co. v. Walter* (43) that a consent-decree can only be varied by consent, expressed himself in favour of restriction of the rule to cases of landlords and tenants and declined to treat it as applicable to cases of vendors and purchasers. In this connection, it must be remembered that the judgment of Scott, O. J., in *Burjorji Dhunjibhai v. Jamsheer Khodaram Irani* (44) where he had held that time was of the essence of the contract in agreements for the sale of land had not yet been reversed by the Judicial Committee; *Jamsheer Khodaram Irani v. Burjorji Dhunjibhai* (45). It is, however, well-settled now by the decision of the Judicial Committee that in

(38) 22 Ind. Cas. 37; (1914) M. W. N. 92.

(39) 28 Ind. Cas. 970; 28 M. L. J. 488; 2 L. W. 537.

(40) 30 Ind. Cas. 248; 3 L. W. 635.

(41) 29 C. 577.

(42) 27 Ind. Cas. 134; 16 Bom. L. R. 670 (note).

(43) (1891) W. N. (Eng.) 170.

(44) 20 Ind. Cas. 469; 33 B. 77; 15 Bom. L. R. 405.

(45) 32 Ind. Cas. 246; 43 I. A. 26; 40 B. 289; 23 C. L. J. 358; 30 M. L. J. 186; 3 L. W. 239; 19 M. L. T. 184; 14 A. L. J. 225; (1916) 1 M. W. N. 229; 18 Bom. L. R. 163; 20 C. W. N. 744 (P. O.).



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cases of specific performance of contracts to sell real estate, equity which governs the rights of the parties looks, not at the letter but at the substance of the agreement, in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. This accords with the doctrine formulated by Lord Cairns in *Tilley v. Thomas* (46) and by Lord Atkinson and Lord Parker in *Stickney v. Keeble* (47). See also *Dagenham (Thames) Dock Co., In re* (48), *Mahadeo Frosad v. Narain Chandra* (10). We may add that we are not concerned here with the question of the right of a Court to grant relief against forfeiture under a decree which is not by consent as in *Sajjadi Begam v. Dilwar Husain* (15) or under a decree made in accordance with statutory provisions which reserves power to the Court to grant an extension of time; *Both Narain v. Mahomed Moosa* (49), *Akkach Mondal v. Aminuddi Mullik* (50). We hold accordingly, first, that in the case before us the jurisdiction of the Trial Court to grant relief against forfeiture was not ousted by the circumstance that the agreement had been followed by a consent-decree and, secondly, that the nature of the agreement was such as entitled the Court to grant relief against forfeiture on equitable grounds. The view taken by the District Judge that as the agreement had crystalized into a decree the Trial Court was deprived of its power to grant relief cannot be supported. It has not been argued here that if the authority of the Trial Court to grant relief against forfeiture were deemed established, its decision could be successfully challenged on the ground that the exercise of its discretion had been so manifestly erroneous as to justify interference of a Court of Appeal, and plainly the question cannot be usefully discussed from that point of

view in a Court of second appeal which cannot investigate the facts.

The result is, that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. There will be no order for costs either here or before the District Judge.

FLETCHER, J.—I agree.

*Appeal allowed.*

### ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1100 OF 1917.

January 21, 1921.

*Present*:—Mr. Justice Ryves and

Mr. Justice Gokul Prasad.

RAM GHULAM AND ANOTHER—PLAINTIFFS—  
APPELLANTS

*versus*

Musmmat MENDA—DEFENDANT

—RESPONDENT.

*Registration Act (XVI of 1908), s. 77—Suit for compulsory registration—Court, duty of.*

In a suit brought for the compulsory registration of a sale-deed all that a Civil Court has to consider is the genuineness of the deed and not its validity.

Second appeal from the decision of the District Judge, Cawnpore, dated the 1st June 1917.

Mr. P. L. Bineri, for the Appellants.

Mr. A. N. Sanyal, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought for the compulsory registration of a sale-deed which was said to be executed by one Harjas on the 2nd of January 1916. The first Court decreed the suit. On appeal however, the learned District Judge held that Harjas did not execute the sale-deed of his own free-will and he allowed the appeal and dismissed the suit. There was no clear finding in his judgment as to whether, as a matter of fact, Harjas had or had not executed the sale deed. We referred this case to the Court below and the finding has been returned to the effect that Harjas did execute the sale deed. No objection has been taken to this finding. It seems to us that all that the Civil Court has to consider is the

(16) (1867) 8 Ch. App. 61; 17 L. T. 422; 16 W. R. 163.

(47) (1915) A. C. 386; 84 L. J. Ch. 259; 112 L. T. 661.

(48) (1873) 8 Ch. App. 1022; 43 L. J. Ch. 261; 21 W. R. 898.

(49) 26 C. 639; 8 C. W. N. 628; 13 Ind. Dec. (N. S.) 1010.

(50) 50 Ind. Cas. 937; 23 C. W. N. 439.

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genuineness and not the validity of the deed. See *Kanhaya Lal v. Sardar Singh* (1). In this view of the case, we allow the appeal and, setting aside the decree of the lower Appellate Court, restore that of the Court of first instance with costs including in this Court fees on the higher scale.

*Appeal allowed.*

(1) 29 A. 284; 4 A. L. J. 171; A. W. N. (1907); 46.

# COURT OF THE ELECTION COMMISSIONERS, CENTRAL PROVINCES.

PETITION UNDER ELECTION RULES.

January 9, 1921.

*Present:*—Messrs. W. R. Dhoble, M. R. Pathak and H. P. Bhargava, Commissioners.  
SADASHEO WAMAN KELKAR—

PETITIONER

*versus*

Rao Sahib R. V. MAHAJANI—RESPONDENT.  
*Berar Electoral Rules, rr. 10 (2), 27, 28, 29 (1), Regulation II, cl. (ii)—Election petition—Governor, power of, to dismiss petition—Election, scheme of—Acts required to be done by proposer or seconder, whether can be delegated—Certificate—Single certificate, whether contemplated—Certificate obtained by candidate, effect of—Election Agent, declaration of, whether should bear stamp—Declaration written on stamp paper and signature attested by Magistrate, effect of—Government of India Act, 1912, Council constituted under, member of, eligibility of, for election to Council constituted by Government of India Act, 1919.*

Under rule 29 (1) of the Berar Electoral Rules, the Governor of the Province has power to dismiss an election petition in those cases only in which the required security for costs is not deposited in accordance with the provisions of rule 28. The figure 27 in rule 29 (1) is a misprint for 28. [p. 87, col. 2.]

The principle of the whole scheme of Elections under the Berar Electoral Rules is, that what is required to be done by the proposer, or by the seconder, or by the candidate, or by an elector, cannot be permitted to be done by his agent, unless there is clear authority for it. Where, therefore, the rules require the nomination paper of a candidate to be transmitted to the Returning Officer by the proposer and seconder, its transmission by the candidate is not a proper transmission and renders the nomination invalid. [p. 876, col. 1.]

The certification of the facts required by clause (ii) of Regulation II of the Berar Electoral Rules, need not necessarily be by means of only a single certificate. The certification of those facts by means of two or more certificates given by different officers would not render a nomination

paper invalid. But where the certificate required to be appended to the nomination paper is obtained and appended by the candidate, instead of by the proposer and seconder, the nomination is invalid. [p. 876, cols. 1 & 2.]

The declaration of an Election Agent made by a candidate does not require to be stamped to render it valid. The mere fact that such a declaration is written on a stamp-paper, and the signature of the candidate is attested by a Sub-Divisional Magistrate, would not alter the nature of the document, and make it an invalid declaration. [p. 877, col. 1.]

The fact that a candidate is, at the time of his nomination, a member of a Legislative Council constituted under the Government of India Act, 1912, does not disqualify him from seeking election to a Legislative Council constituted by the Government of India Act, 1919. [p. 877, col. 2.]

The mere fact that a nomination paper is posted by a peon under the directions of the seconder, does not render the nomination invalid. [p. 878, col. 1.]

Mr. A. S. Athale, for the Petitioner.

Mr. K. G. Damle, R. B., for Respondent No. 1.

Mr. V. K. Rawade, for Respondent No. 2.

REPORT.—For the one seat allotted to the West Berar Non-Muhammadan Urban Constituency of the Central Provinces Legislative Council, there were two candidates, (1) Rao Sahib R. V. Mahajani, respondent No. 1, and (2) Mr. A. V. Khare, Respondent No. 2. The petitioner, Mr. S. W. Kelkar, had proposed Mr. Khare as a candidate and Mr. S. D. Cama, a Pleader of Akola, who is not a party to these proceedings, was the seconder. The nomination papers of the two candidates were sent through post to the Commissioner, Berar, who was the Returning Officer for the Constituency. That officer on scrutinizing Mr. Khare's nomination paper was of opinion that it was on certain grounds invalid and he, therefore, rejected it. He found Rao Sahib Mahajani's nomination paper to be in order and there being thus only one candidate left for the seat, the Returning Officer declared the respondent No. 1 as being duly elected.

2. The petitioner then presented this petition under rule 25 of the Berar Electoral Rules to the Hon'ble the Chief Commissioner—now His Excellency the Governor—who appointed us Commissioners under rule 29 (2) for its trial. To the petition there was originally only one respondent cited, and he was Rao Sahib Mahajani. Mr. Khare was, on his own application, subsequently joined as a co respondent to these proceedings before us.

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3. The petitioner urged that Mr. Khare's nomination paper was perfectly valid and was wrongly rejected by the Returning Officer. He attacked the election of the respondent No. 1 on the grounds that he was not under the rules eligible for election and that his nomination paper was not in order. He, therefore, prayed that the election of the respondent No. 1 should be declared void and that the respondent No. 2 should be declared as duly elected.

4. At the outset, a preliminary objection was taken on behalf of the respondent No. 1 that the election petition was not in order and was liable to be dismissed by the Governor. The ground urged was that the petitioner should have originally joined Mr. Khare as a respondent to the petition as required by rule 27. The learned Pleader for the respondent No. 1, therefore, requested us that the point be referred to the Governor for His Excellency's orders and to keep the enquiry into the petition pending till the final orders were received. On that preliminary objection we framed the following issues:—

- (a) Is the election petition liable to be dismissed because Mr. A. V. Khare was not originally joined to it as a respondent?
- (b) If it was so liable to be dismissed, should the petition be sent back to the Governor for His Excellency's orders?
- (c) Should the present petition be kept pending till the receipt of those orders?

5. We were of opinion that there was no force in the objection and that it was quite unnecessary to return the election petition to the Governor and to keep the present proceedings pending. In order to understand our reasons for overruling the objection, a reference to the rules cited for the respondent No. 1 in his support is necessary. These are rules Nos. 27, 28 and 29 (1) of the Berar Electoral Rules, as published in the *Central Provinces Extraordinary Gazette* of the 5th August 1920. Rule No. 27 lays down that the petitioner, if he claims a declaration that a certain candidate has been elected, shall join as respondents all other candidates who were nominated at the election. Rule 28 requires

a deposit of security for costs by the petitioner. Rule 29 (1) runs as follows:—

"If the provisions of the rule 27 are not complied with, the Governor shall dismiss the petition."

It was thus contended for the respondent No. 1 that, as the petitioner in his petition claimed that Mr. Khare had been duly elected, he was under rule 27 bound to join him as a respondent and his not having done so, the petition was liable to be dismissed.

6. To us, it appears that the figure 27 mentioned in rule 29 (1) was a misprint for 28. This will be apparent, if we compare these rules with their corresponding draft rules published in the *Central Provinces Gazette* of July 10th last, and also with the corresponding rules for the Central Provinces. The Central Provinces Rules corresponding to 27, 28 and 29 are respectively 32, 33 and 34. The wording of these rules is identical. Under rule 34 (1) of the Central Provinces Rules, the election petition is liable for dismissal, only if the provisions of rule 33 are not complied with. In rule 34 (1) no mention whatsoever is made of rule 32.

Similarly, in the draft rules the corresponding numbers were 26, 27 and 28. In rule 23 (1) of the draft rules, mention is made of rule 27 and not of 26. It, therefore, appears that, when the rules were finally passed, they were re-numbered as 27, 28 and 29 and that through inadvertence the original figure of 27 appearing in the last rule was left uncorrected.

This will show that the Governor has been given power to dismiss an election petition only in case the required security for costs is not deposited. The petition is thus not liable to be dismissed for the non-joinder of any party.

7. Even assuming that the figure 27, as given in rule 29 (1), is not a misprint for 28, and even assuming that the petition was liable to be dismissed by the Governor, the Commissioners had no power to return it. They could not go behind their own appointment and refer back the petition to the Governor, on the ground that it was not in proper form and was, therefore, liable to be dismissed. Moreover, there is a distinct statement by the Governor in the order appointing the present Commission that the petition had fully complied with the rules



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in this behalf. On these grounds we overruled the preliminary objection and proceeded with the hearing of the election petition.

8. In order to understand the grounds on which the validity of Mr. Khare's nomination paper is questioned, it is necessary to state how it was prepared and how it was sent to the Returning Officer. The proposer, the seconder and the candidate all three appeared before the District Judge on 21st October 1920, and made their signatures on it in his presence. They requested the District Judge to endorse on the nomination paper a certificate that they had signed it in his presence and that they were electors in the Constituency, as required by Regulation II (ii) under rule 12. The District Judge made an endorsement on the nomination paper to the effect that the proposer, the seconder and the candidate had signed it in his presence, but as regards the second part of the certificate he told them that he could not give it, as the final Electoral Rolls for the Constituency were not in his office. Mr. Khare then took the nomination paper to the Deputy Commissioner, who endorsed on it a certificate that the candidate, the proposer and the seconder were electors in the Constituency. This nomination paper remained with Mr. Khare and he sent it on through post to the Returning Officer with a covering letter from him on 23rd October 1920. It was also accompanied by a declaration appointing himself as the Election Agent. That declaration was on a plain paper and was not stamped. In the covering letter Mr. Khare wrote to the Returning Officer that, according to his view, the declaration did not require any stamp, but that if it did require any, an intimation might be sent to him so as to enable him to supply it.

9. It is contended for the respondent No. 1 that Mr. Khare's nomination paper was invalid on the following grounds:—

- (1) That it was sent by Mr. Khare himself, while it should have been sent by the proposer and the seconder.
- (2) That there should have been one certificate from one officer, while in the present case there were two certificates endorsed on the nomination paper from two different officers,

(3) That the certificate should have been obtained and appended by the proposer and the seconder, while in the present case the second certificate was obtained by the candidate himself.

(4) That the declaration of Election Agent made by Mr. Khare required to be on a stamp paper.

10. In answer to these objections, it was urged for the petitioner and the respondent No. 2 that the nomination paper in question was properly prepared; that the certificates endorsed on it were properly obtained; that it was properly sent to the Returning Officer through post, and that nothing that was done in any way offended the wording or the spirit of the rules on the subject. It was further alleged that Mr. Khare was authorised by both the proposer and the seconder to obtain the second certificate, to do all things necessary for the completion of the nomination paper and to send it by post to the Returning Officer. According to them the declaration did not require any stamp.

11. The following points were fixed by us for determination:—

(1) Were the two certificates on the nomination paper of Mr. Khare obtained under the circumstances alleged by the petitioner?

(2) Are the two certificates valid under the Regulation II (ii), made under rule 12?

(3) (a) Was the nomination paper of Mr. Khare sent through post by him at the instance and under instructions of the petitioner or the seconder or both as alleged?

(b) If so, was such sending by Mr. Khare valid and sufficient?

(4) What is the requirement of the Regulation II with regard to the sending of the nomination paper by post?

(5) Did the declaration of Election Agent by Mr. Khare require to be on a stamp-paper, and if so, is the nomination paper rendered void for want of it? Is this declaration of appointment of Election Agent also void, because of its not mentioning the Constituency?

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- (6) Is the nomination paper of Mr. Khare, if otherwise valid, rendered void by reason of his sending a letter along with it?
- (7) Are the defects in the nomination paper of Mr. Khare trivial and such as will not vitiate his nomination?
- (8) (a) Is the document filed by Rao Sahab Mahajani a declaration of appointment of an Election Agent as required by rule 10 (2)?
- (b) Is the declaration of appointment of Election Agent by Rao Sahab Mahajani invalid for reasons given by the petitioner?
- (9) Does the fact of Rao Sahab Mahajani being a member of the existing Central Provinces Legislative Council render his nomination and election void?
- (10) Is the nomination paper of Rao Sahab Mahajani bad for reasons alleged by the petitioner and respondent, Mr. A. V. Khare?
- (11) Who should bear the costs of this election petition and to what extent?

12. The circumstances under which Mr. Khare's nomination paper was prepared and sent to the Returning Officer have already been narrated. As regards the petitioner's allegations that Mr. Khare was authorised by the proposer and the seconder to get the second certificate from the Deputy Commissioner, to do all that was necessary for completing the nomination paper and to send it by post on their behalf to the Returning Officer, we have the affidavits of the petitioner and the respondent No. 2. No counter affidavit has been filed by the respondent No. 1. It must, therefore, for the purposes of these proceedings, be taken that both Mr. Cama and Mr. Kelkar had asked Mr. Khare to go to the Deputy Commissioner's office for obtaining the second certificate from him on their behalf. Mr. Cama had asked Mr. Khare to do all that was necessary for the completion of the nomination form. Both Mr. Cama and Mr. Kelkar were engaged in other work and so they asked Mr. Khare to do the needful. On 23rd October 1920 Mr. Kelkar had got to go to Basim and he went to Mr. Khare's

house and instructed him to send the nomination paper for him by ordinary post. These facts have been substantiated by the affidavits. This disposes of Issues Nos. 1 and 3 (a).

13. Before discussing the questions as regards the interpretation of the rules, it seems necessary to refer to the rules bearing on the subject. Regulations under rule 12 of the Berar Electoral Rules are published in the *Central Provinces Gazette* for July 31st last. Regulation I describes how nomination of any candidate is to be made. Nomination is to be made by means of a nomination paper, which is to be subscribed by two electors in the Constituency as proposer and seconder, the candidate himself signing it in token of his having assented to his nomination. Regulation II is more important and we think it necessary to quote it *in extenso*.

"2 (i) Save as provided in clause (ii)

Presentation of every nomination paper shall be presented to the Returning Officer at his head-quarters office by the proposer and seconder after the re-publication of the roll and before the date appointed by Government for the scrutiny of nomination papers. Provided that the candidate has signed the nomination paper in token of assent, he need not attend before the Returning Officer.

(ii) A candidate may be nominated by a nomination paper sent by post so as to reach the Returning Officer before the expiry of the period aforesaid. The proposer and seconder shall append to such nomination paper a certificate from a gazetted, revenue or judicial officer, that they have signed the paper in his presence and that they are electors in the Constituency."

14. It was very earnestly represented to us on behalf of the petitioner that the election rules should be interpreted liberally and that a natural and common-sense interpretation should be put upon them, especially in view of the fact that the new Reformed Councils affected a large number of electors, a very large majority of whom were not at all experienced in these matters. The object of the new Government of India Act was to considerably extend the franchise and to

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include in it as many electors as possible. In the old Councils there was always a very large proportion of lawyers and one of the foremost objects of the new Reform Scheme was "to ensure that men of other classes and occupations found a sufficient number of seats in the new Councils."\* It was, therefore, urged that the framers of the rules could never have expected a strict, tight and literal compliance with them, and that all what they wanted was a common sense and reasonable compliance with their spirit, as the rules had to be interpreted and followed by ordinary common villagers. There is undoubtedly a very considerable force in this argument and we are in general agreement with it. At the same time, we cannot condone or overlook any direct breach of or non-compliance with an express rule, the effect of which would be to substantially offend the wording and the spirit thereof. This would be beyond our power to do. When the words are perfectly clear, the ordinary rule for the interpretation of Statutes is to take them in their simple and literal sense.

15. At this stage, it must be made clear that the right to vote and to elect is a personal and individual right and all idea of agency in connection therewith must be excluded, unless otherwise expressly permitted. The right is not capable of being transferred or exercised through agents. The general principle, that whatever one is entitled or required to do can be done by his duly appointed agent, has, therefore, no application to the exercise of the right conferred by the Government of India Act. "An agent may be appointed for the purpose of executing any deed, or making any contract, or doing any other act on behalf of the principal, which the principal might himself execute, make, or do; except for the purpose of exercising a power or authority conferred, or of performing a duty imposed, on the principal personally, the exercise or performance of which involves discretion or skill, or for the purpose of doing an act which the principal is required, by or pursuant to any Statute, to do in his own proper person."† The exercise of the right to vote and to elect or to stand as a candidate is a personal and individual right and it cannot be delegated.

What is required under the rules to be done by the proposer, or by the seconder, or by the candidate, or by an elector cannot be permitted to be done by his agent, unless there is a clear authority for it. This we consider as being the principle of the whole scheme of elections.

Regulation II (1) prescribes that the nomination paper should be presented to the Returning Officer by the proposer and the seconder and we do not think that it could ever have been the intention of the framers that this duty could be done through agents. Though the words "in person" or "themselves" are not to be found in the Regulation, it could not be said that the proposer and the seconder could employ an agent and could do the presentation through him. As an elector cannot give his vote through an agent, except in certain specified cases in which it is expressly permitted, the nomination paper has to be transmitted to the Returning Officer personally by the proposer and seconder. If they cannot personally go, permission is given to them to send it to the Returning Officer through post on the observance of a certain procedure.

16. In paragraph 13 above, we have quoted at full length Regulation II bearing on the subject. It consists of two clauses (i) and (ii); the first sentence of the second clause is in the passive form and is silent as to by whom the nomination paper is to be sent. It is, therefore, contended for the petitioner that the nomination paper could be sent by the candidate himself and that it was not necessary for its validity that it should be sent only by the proposer and the seconder. According to the petitioner's learned Pleader, the absence of the subject in the first sentence was to indicate that the nomination paper could be sent even by a total stranger. In this connection, we have to read both the clauses together. The two clauses constitute one rule of procedure, the second clause being merely proviso to the first. The principal and the primary mode by which the nomination paper was to be prepared and transmitted to the Returning Officer, is prescribed by the first clause, an exception to it being given in the second. The second clause merely gives an exception and permits a departure in procedure from that laid down in clause (i), inasmuch as it permits the sending of the nomination paper

\*Report on Indian Constitutional Reforms, page 55.

†Bowstead on Agency, 111 Edition, pages 9 and 10.



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through post. The two clauses are to be read together, and on reading them we come to the conclusion that the duty of transmitting the nomination paper to the Returning Officer has been cast upon the proposer and the seconder. They are to either personally present it to the Returning Officer at his head quarters or to send it through post. The very second sentence in sub-clause (ii) would show that the whole work in connection with the nomination paper and in connection with its transmission to the Returning Officer was to be done by the proposer and the seconder, and that a candidate was to have no hand in it, except to give his assent by signing the nomination paper.

17. Our attention has been drawn to the rule framed for certain other provinces, which permit the presentation of the nomination paper by the candidate himself and we are therefore, asked to hold that the taking of a part by the candidate in his own nomination could not have been objected to by the framers of the Central Provinces and Berar Regulations. It has to be mentioned that Regulations differ province by province and those of other provinces cannot, therefore, guide us in the interpretation of our own, when these are clear. It is worth mentioning that in the Punjab, it is not necessary that the person who delivers the nomination paper should be either the candidate or his proposer or seconder, and that it could be delivered even by a mere stranger. Different circumstances prevail in different provinces and that probably accounts for the necessity of prescribing different procedure for them. When a nomination paper has to be delivered by the candidate or by his proposer or seconder, its presentation by a stranger is invalid. See *Monks v. Jackson*.\* Because in the Punjab the delivery of a nomination paper by a stranger is not considered objectionable, it would not follow that its presentation by a stranger in the Central Provinces or in Berar should be considered as valid. Similarly, because in certain other provinces the presentation of a nomination paper is permitted to be made by the candidate, it does not follow that it could be made by the candidate in our pro-

vince, when our rules do not permit this to be done. It is not possible for us to say why in Berar and in the Central Provinces the presentation of a nomination paper to the Returning Officer was required to be made by the proposer and the seconder, and why it was not permitted to be made by the candidate himself, as in Bihar and Orissa, or by a stranger, as in the Punjab. But if we could hazard a guess, the object of the framers of the Regulations for the Central Provinces and Berar appears to have been to keep the whole thing in connection with the nomination in the hands of the proposer and the seconder, uninfluenced by the candidate, who was to remain in the background. The object was apparently to give a free choice to the proposer and the seconder and to give them the liberty of changing their minds even at the last moment.

18. In the present case the nomination paper was, as a matter of fact, sent by Mr. Khare. It is no doubt, true that he was directed by the proposer and the seconder to send it but, as we have already observed, the duty could not be delegated. It was not a mere mechanical act which was done by Mr. Khare. A separate letter from himself was sent along with the nomination paper and its wording would show that he was the real sender. In that letter no mention whatsoever was made that Mr. Khare was forwarding the nomination paper on behalf of the proposer and the seconder, or that he was acting as their agent and on their behalf. He purported to send the nomination paper for himself. The intelligent part of sending the nomination paper was done by him. It seems necessary to point out that there is a great difference in the meanings of the expression "sending" and of "despatching" or "posting." Despatching and posting in the post-box is a mechanical act which should not be confounded with the act of sending. The mechanical act can be done by anybody, even by a servant. The sending of a letter is an intelligent act and it has to be performed by the proposer and the seconder. An illiterate person may get a letter written for him by another but he will be the sender, and the letter, though that letter may be taken to the Post Office by a third person and the address on the envelope may be written by a stranger. In the present case Mr. Khare who sent the nomination

\*See Indian Election Guide by I. C. S., Pages 4 Ind 7; 1876; 1 C. P. D. 184; 46 L. J. O. P. 164; 35 L. T. 95.

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tion paper in his own name with a covering letter from himself. He was thus the actual sender. This intelligent act of sending which is entirely different from the act of despatching or posting in the post-box could not be delegated by the proposer and the seconder. They had got to do it personally and in our opinion, therefore, the nomination paper was not in this case properly sent and was, therefore, invalid. This settles Issue Nos. 3 (b), 4 and 6.

19. As already stated, there were two certificates separately endorsed on Mr. Khare's nomination paper by two different officers. It was urged for the respondent No. 1 that this was not in conformity with the requirements of clause (ii) of Regulation II, and that it required one certificate certifying both the facts and signed by one officer. We were asked to interpret the second sentence of clause (ii) by putting upon it a strictly grammatical construction, and in this connection there was a very interesting argument addressed to us. According to one side, the sentence was a complex one, while, on the other, it was urged that it was compound. In our opinion, it is unnecessary to go into the grammatical construction of the sentence as the meaning is plain enough. All what the rule requires, is the certification of certain facts by an officer of a certain status. It is immaterial whether those facts are certified by means of one certificate from one officer or by two or more certificates given by different officers. It is a well known rule of interpretation that words in the singular include the plural and *vice versa*, unless there is anything repugnant in the subject or context.\* By the mere fact that, before the word "certificate" the article "a" is put in it does not follow that one certificate was intended and that the plurality thereof was meant to be excluded. There is nothing in the Regulation indicating the necessity or importance of only one certificate. Our opinion, therefore, is that Mr. Khare's nomination paper was not invalid, merely on the ground that there were two certificates endorsed on it instead of one. The requirements of the certificate were substantially complied with, except in one particular which shall be presently mentioned.

\*C. P. General Clauses Act I of 1914, section 12.

20. The rule requires that the certificate is to be appended by the proposer and the seconder. In the present case, the second certificate was obtained by Mr. Khare. It was, therefore, he, who must be considered to have appended it. The fact that the certificate was endorsed on the back of the nomination paper itself and was not separately attached to it does not make any difference. The Regulation required that the certificate was to be appended by the proposer and the seconder and this duty could not be delegated. The candidate could not undertake this duty on their behalf. Neither the proposer nor the seconder was present at the time the second certificate was obtained by Mr. Khare. Our opinion, therefore, is that the second certificate was not obtained or appended as required by the Regulation and thus the nomination paper was invalid. This settles Issue No. 2.

21. The defects pointed out above were not trivial or insignificant, and they did not amount to a mere irregularity. When a certain procedure is laid down it must be presumed that it was meant to be followed and that its non-observance would make the proceeding inoperative and invalid. The procedure prescribed in this case was substantially disregarded, making Mr. Khare's nomination invalid. This is as regards Issue No. 7.

22. It was contended that the declaration of the Election Agent made by Mr. Khare required to be on a one-rupee stamp, Article 4, Schedule I of the Stamp Act being quoted in support thereof. The Article runs as follows:—

"AFFIDAVIT.—Including an affirmation or declaration in the case of persons by law allowed to affirm or declare instead of swearing.—One rupee."

The declaration required by rule 10 (2) of the Berar Electoral Rules cannot be classed as an affidavit. It is not required to be made before a Magistrate or a Judge or an officer having power to administer an oath or affirmation. The Article of the Stamp Act, in our opinion, presupposes that the affidavit or declaration has to be made before a person having an authority to administer an oath or to call upon a deponent to make a declaration.

The declaration under rule 10 (2) cannot

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also be considered as a power-of-attorney. In our opinion, therefore, the declaration of an Election Agent made by Mr. Khare did not require any stamp. It was also not bad, because it did not specifically mention the Constituency. The nomination paper, along with which it was sent, would show that it was in respect of his candidature for the West Berar Non-Muhammadan Urban Constituency. This disposes of the Issue No. 5.

23. Next, we come to the election of the respondent No. 1, Rao Sahab Mahajani. His declaration of the Election Agent was written on one rupee general stamp and his signature was attested by the Sub-Divisional Magistrate Akola. These facts, according to the learned Pleader for the respondent No. 2, made the declaration a general power-of-attorney and it was, therefore, invalid. We must frankly confess that we were unable to follow the reasoning of the learned Pleader. The mere fact of the declaration having been written on a stamp-paper and the mere fact that the executant made his signature in the presence of the Sub-Divisional Magistrate could not alter its nature. Perhaps, Rao Sahab Mahajani was too careful and did not want to take any risks and, therefore, followed all this lengthy and unnecessary procedure. The wording of the document will, however, clearly show that this document was meant to be a declaration under rule 10 (2) of the Berar Electoral Rules. It has been expressly so stated in the document itself. The fact that the seal of the Court was affixed before the respondent No. 1 made his signature, would not affect its validity, even if it were true. We have, however, the affidavit of Rao Sahab Mahajani to the effect that he put his signature after the whole body of the document was written. The stamp-paper and the Magistrate's attestation may be considered as mere superfluities and these would not alter the nature of the document. The answer to the question put in Issue No. 8 (a) must, therefore, be in the affirmative and that in 8 (b) in the negative.

24. At the time the respondent Rao Sahab Mahajani was nominated and stood as a candidate for the new Council he was a member of the Central Provinces

Legislative Council then existing. It was, therefore, contended that, under rule 4 (6), he was not eligible for election. Under that rule a person who is already a member of a Legislative body constituted under the Act is not eligible for election under the rules. The expression 'the Act' means the Government of India Act, see rule 2 (1) (a). The principal Act of 1915, amended by any Act for the time being in force, is cited as the Government of India Act, see section 47 of the Government of India Act, 1919. The Central Provinces Legislative Council, of which the respondent Rao Sahab Mahajani was a member, was constituted under the Government of India Act of 1912 and was not constituted under the Government of India Act of 1915, as amended by the Act of 1916, and further amended by that of 1919. It could not have been the intention of the framers of the rules to exclude members of the already existing Councils. If we were to accept the interpretation sought to be put upon the rule by the petitioner, we would have to suppose that the Government of India or the Houses of Parliament intended to exclude from the new Councils the members of the existing Councils unless they were prepared to resign their seats on them. This could not have been the intention and such an important body of public men could never have been intended to be excluded. What we mean to say is, that the Council which has been substituted by the new Council and of which Rao Sahab Mahajani was a member was constituted by the Government of India Act, 1912, and not by the Government of India Act, 1915, as amended by the Acts of 1916 and 1919. The membership of the present Council is not a bar to candidature to the new Council. The existing Council was not, in our opinion, a Council within the meaning of the amended Government of India Act and the rules made thereunder. In our opinion, therefore, Rao Sahab Mahajani was not ineligible on account of the mere fact of his being a member of the Central Provinces Legislative Council existing on 23rd October 1920. This disposes of Issue No. 9.

25. The nomination paper of Rao Sahab Mahajani was attacked by the petitioner and the respondent No. 2 on the same grounds.



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on which Mr. Khare's nomination paper was attacked by him. The nomination paper of Rao Saheb Mahajani was prepared and signed by both the proposer and the seconder. A covering letter addressed to the Returning Officer signed by the proposer and the seconder was attached to the nomination paper. The nomination paper and the covering letter were then put in a cover, the address on which was written by one Mr. Dharnadikari under their orders. The packet was actually posted by a peon under the seconder's directions. The covering letter would show that it was the proposer and the seconder who were the actual senders of the nomination paper and the mere fact that the address on the cover was written and the packet was posted in the post-box by others would not make the nomination paper invalid. The intelligent act of the sending was that of the proposer and the seconder, and others, including the candidate, had no hand in it. The 10th issue is thus answered in the negative.

26. Our conclusions, therefore, are,—

- (1) The nomination of the respondent No. 2, Mr. A. V. Khare, was not valid;
- (2) The nomination and election of the respondent No. 1, Rao Saheb R. V. Mahajani, was valid, and
- (3) The petition is liable to be dismissed.

We recommend that the costs of the respondent No. 1 should be paid by the petitioner, his own costs and those of the respondent No. 2 being borne by themselves. We assess Pleaders' fees at Rs 250.

27. Before concluding, we have to express our thanks to the learned Pleaders who appeared for the parties for the very able manner in which they argued their respective cases. Their arguments were of considerable help to us.

*Order accordingly.*

## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 711 OF 1918.

November 23, 1920.

*Present:*—Mr. Justice Figgott and  
Mr. Justice Walsh.

RAJJAB SHAH AND OTHERS—PLAINTIFFS—  
APPELLANTS

*versus*

TAHIR SHAH AND OTHERS—DEFENDANTS  
—RESPONDENTS.

*Partition of fractional share of estate—Estate not  
capable of partition—Decree, proper.*

Where in a suit for possession, by partition, of a fractional share of an estate, the Courts are unable, owing to the impartible nature of the estate, to separate by metes and bounds the plaintiff's share from the rest, the proper course is not to dismiss the suit, but to give the plaintiff a decree for joint possession over such share as is found lawfully to belong to him. [p. 872, col. 1.]

Second appeal from a decree of the District Judge, Cawnpore, dated the 7th of March 1918.

Mr. N. P. Upadhyaya, for the Appellants.

Dr. S. M. Sulaiman, for the Respondents.

**JUDGMENT.**—The essential point for determination in these two connected second appeals is a simple one, and seems to us almost too clear for argument. The plaintiffs came into Court alleging in substance that they were entitled to a fractional share in certain property by reason of inheritance from one Pir or Pira Shah. They alleged that the defendants had wholly dispossessed them were denying their title and keeping the entire profits of the property to themselves. They asked for possession by partition, that is to say, to have the fractional share, to which they claimed title, separated from the rest by metes and bounds and handed over to them. The defence set up raised a number of issues all of which were tried out by the Court of first instance. On many questions of fact, the findings of that Court were in favour of the plaintiffs, but on two points the decision went against them. The Court held that the property in suit was not susceptible of division by metes and bounds. It held, further, that the suit was barred by the twelve years rule of limitation. On appeal by the plaintiffs the lower Appellate Court held that the suit was within time, but still dismissed the entire suit upon a finding that the property was not susceptible of partition and that the

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plaintiffs, having sought no other relief, could obtain no other. It is clear that, in argument at any rate, the point was taken on behalf of the plaintiffs that they might in the alternative be given relief by way of a decree declaring their title, but the lower Appellate Court overruled this contention, virtually on the ground that to grant it would change the entire nature of the suit. The plaintiffs filed this appeal against the decision of the lower Appellate Court, but also instituted another suit out of which Second Appeal No. 22 of 1919 has arisen. In this suit they asked for a mere declaration of their title; but the question of law involved has now been differently decided in the Courts below, and this second suit has been dismissed on the ground that relief by way of declaration, not only might have been sought in the former suit, but necessarily should have been claimed in the alternative. It is obviously unjust to the plaintiffs that both these decisions should stand, and, as a matter of fact, we think the decision of the Courts below in the first suit was clearly wrong. Even before the passing of the present Code of Civil Procedure, Act No. V of 1908, it was held that upon a suit for actual possession the plaintiff might, in the discretion of the Court, obtain a decree for a declaration of title, if for any reason the Court found it impossible to grant relief by way of actual delivery of possession. As authority for this it is sufficient to cite the case of *Govind Rao v. Sita Ram Kesho* (1). Under the present Code, however, provision has been made in Order XXI, rule 35, clause (2), for the execution of a decree for delivery of joint possession over immoveable property, an amendment of the law which clears up certain difficulties which had previously been felt by the Courts. If, therefore, the only difficulty in the way of the plaintiffs in the first suit was the impartible nature of the property, it seems obvious that the Courts, finding themselves unable to separate by metes and bounds the plaintiffs' share from the rest, should have granted as much of the plaintiffs' prayer as they could and given the plaintiffs a decree for joint possession over such share as they found lawfully to belong to

them. There has been some argument before us about the decision of the Courts below regarding one particular item of property, in respect of which the suit seems to have been dismissed upon a different finding which is clearly a finding against the plaintiffs on the question of title. It looks like a finding of fact; but it is not necessary for us to go further into the matter, because, in our opinion, the case will have to go back to the lower Court for decision on the merits. The suit has been dismissed in that Court upon the finding that the plaintiffs, by reason of the nature of the relief sought in their plaint, must either get a decree for partition by metes and bounds or no decree at all. We reverse that finding, holding that the plaintiffs, if their title is established, should receive a decree for joint possession over such fractional share in the property in suit as the Court finds to be their rightful due. The case must now go back to the lower Appellate Court in order that the defendants-respondents may have an opportunity, if they wish to do so, of supporting the decree of the Court of first instance on any of the points which have been decided in favour of the plaintiffs. In fact, the lower Appellate Court will have to try the suit on the merits, unless the defendants now withdraw any of the pleas upon which issues were framed in the Court of first instance. Our order, therefore, on Second Appeal No. 711 of 1918 is that we set aside the decree of the lower Appellate Court and remand the case to that Court, with orders to re-admit the same on to its file of pending appeals and to dispose of it on the merits. We think that the plaintiffs are clearly entitled to their costs of this appeal and we order accordingly.

*Decree set aside.*

(1) 21 A. 53 (P. C.); 2 C. W. N. 681; 25 I. A. 195; 7 Sar. P. C. J. 370; 9 Ind. Dec. (N. S.) 744.

APURBA KRISHNA SETT V. RASH BEHARY DUTT.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL NO. 73

OF 1919

IN SUIT NO. 71 OF 1904,

February 13, 1920.

Present:—Justice Sir Asutosh Mookerjee, Kt.,

and Justice Sir Ernest Fletcher, Kt.

APURBA KRISHNA SETT—APPELLANT

versus

RASH BEHARY DUTT—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Art. 183—  
Mortgage—Order absolute for sale—Application to  
enforce order—Limitation.*

An application to enforce an order absolute for sale made by the High Court in a suit for the enforcement of a mortgage-security must be made within 12 years from the date when the present right to enforce the order accrues; that is to say, the date when the order absolute for sale was made.

Appeal against the judgment of Mr. Justice Rankin.

Mr. H. D. Bose, for the Appellant.

JUDGMENT.

MOOKERJEE, J.—This appeal raises the question, whether an application by the appellant to enforce a judgment of this Court, made in the exercise of its ordinary original civil jurisdiction, is or is not barred by limitation. The suit was instituted for the enforcement of a mortgage-security. On the 30th June 1904, the usual preliminary decree under section 58 of the Transfer of Property Act was made. On the 26th January 1905, the Registrar submitted a report on the accounts, and the 18th August 1905 was fixed for re-payment. But the amount was not paid, and on the 22nd March 1907 an order absolute was made in accordance with the provisions of section 89. It was, however, not till the 18th May 1919 that the representative of the decree holder (who had died in the meantime) applied to the Court to enforce his rights and realise his dues under the judgment. Mr. Justice Rankin has held that the application is barred by limitation.

Article 183 of the Schedule to the Indian Limitation Act provides that an application to enforce a judgment, decree or order of any Court established by Royal Charter, in the exercise of its ordinary original civil jurisdiction, must be made within 12 years from the date when a present right to enforce the judgment, decree or order accrues to some person capable of realising the right. There

is a proviso to the Article which lays down that the period of 12 years shall be computed from the date of payment, acknowledgment or revivor where there has been such payment, acknowledgment or revivor. It is not disputed that the facts of the present case do not bring it within the proviso. Consequently, the question is, has the application been made within 12 years from the date when a present right to enforce the judgment or decree or order accrued to some person capable of realising the right. Such right, in our opinion, accrued to the decree-holder when the order absolute for sale was made on the 22nd March 1907. It has been finally suggested on behalf of the appellant that the right could not accrue till the order had been filed; but no attempt has been made to support this contention by reference to principle or authorities. The reason is obvious; if the contention of the appellant were to prevail, the result would follow that the period of limitation might be indefinitely extended by reason of the laches of the decree-holder, who might not, as has happened in the case before us, file the decree for years. We may add that no attempt has been made in this Court to reiterate the desperate argument advanced before Mr. Justice Rankin and rightly overruled by him, that no rule of limitation applies to this matter. In our opinion, the application has been properly dismissed as barred by limitation and this appeal must be dismissed, with separate costs to the two sets of respondents.

FLETCHER, J.—I agree.

*Appeal dismissed.*



MAHADEO PRASAD v. DIRGBIJAI SINGH.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1399 OF 1917.

October 26, 1920.

Present :—Mr. Justice Piggott and  
Mr. Justice Walsh.Chaudhri MAHADEO PRASAD—  
DEFENDANT—APPELLANT

versus:

Raja DIRGBIJAI SINGH AND  
ANOTHER—PLAINTIFFS—

RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O XXI, r. 46—Money deposited by third party as due to judgment-debtor—Payment out to decree-holder—Deposit operating as discharge—Suit to recover money paid to decree-holder, whether maintainable—Contract Act (IX of 1872), s. 72, applicability of.*

*M* held a decree against *L* and in execution thereof applied for the attachment of any debt due by *P* to *L*, this attachment was made under Order XXI rule 46 of the Civil Procedure Code, and an order was passed directing *P* to pay a certain sum of money into Court. *P* objected but admitted that, upon a settlement of accounts between himself and *L*, the sum demanded would be found due by him to *L*. The executing Court directed payment of the amount by a certain date, and ultimately ordered the attachment and sale of *P*'s house unless the money was paid: *P*, under this pressure, paid the money into Court unconditionally, and it was divided between *M* and *H*, another decree-holder against *L*. *P* thereupon brought the present suit to recover from *M* and *H* the amount he had deposited:

*Held*, that as *P* had made the deposit under an admission that he was in fact indebted to *L* at least to that extent, and obtained a valid discharge *pro tanto* of his debt to *L*, he had no claim in equity to recover from *M* and *H*. [p. 882, col. 2; p. 885, col. 1.]

Section 72 of the Contract Act, which lays down that a person to whom money has been paid by mistake or under coercion must re-pay or return it, implies that the money was not really due to the person to whom it was paid. [p. 883, col. 2.]

Second appeal from the decision of the District Judge, Allahabad, dated the 6th of July 1916.

Messrs. Gokul Prasad and Kanhaiya Lal and Dr. S. N. Sen, for the Appellant.

Messrs. A. P. Dube and L. P. Zutshi, for the Respondents.

## JUDGMENT.

Piggott, J.—The facts out of which these two connected second appeals arise may conveniently be stated as follows:—Raja Dirgbijai Singh, the plaintiff respondent in this Court, employed one Lala Manni Lal as a contractor to build a house for him. It has never been denied that, on a settlement of accounts, some money would

be found due to Manni Lal from the Raja in consequence of the performance of this contract, but there was a very decided difference of opinion between the parties concerned as to the amount so due. In the meantime, Manni Lal seems to have got into financial difficulties. At any rate, we know that more than one decree was in execution against him and that he was not prepared to pay up even the small amounts involved in the two decrees which will be presently referred to. The holder of one of these decrees was Mahadeo Prasad, the appellant in Second Appeal No. 1399 of 1917. He took out execution and applied to the Execution Court, that of the Munsif of Allahabad, to attach for his benefit any debt which might be due to Manni Lal from Raja Dirgbijai Singh. This attachment was made under the provisions of Order XXI, rule 46, of the Civil Procedure Code, and, so far, the proceedings of the Execution Court were admittedly correct. The learned Munsif, however, went on to pass an order directing the Raja to pay into Court a sum of money, apparently Rs. 1,000, for the benefit of the decree-holder, Mahadeo Prasad. It is not denied now that, under the Code of Civil Procedure, the Munsif had no right to make any such order. The Raja presented a petition of objection on the 11th of February 1914 in which he put forward various reasons why the Execution Court should not require him to pay in this money; but in this petition he made the important admission that, although the accounts between himself and Manni Lal were still unsettled, he had no doubt that a sum of, at any rate, Rs. 1,000, or thereabouts, would be found due from him to Manni Lal upon proper settlement. The learned Munsif, acting on this admission, overruled all the objections preferred by the Raja and passed a positive order that the money should be paid into Court by a fixed date. This date was postponed from time to time and, in the month of July 1914, we find the Raja petitioning the Court for two months' further time within which to make the required payment. Finally, in the month of January 1915, the Munsif passed an order that a house belonging to Raja Dirgbijai Singh should be attached and sold unless the required deposit of Rs. 1,000

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were made. Here, again, it is admitted that the Execution Court was wrong, the learned Munsif not having power under any provision of the Code of Civil Procedure to pass such an order. Under pressure of this order, the Raja finally paid into Court a sum of Rs. 975. This was accepted as sufficient and was eventually divided between Mahadeo Prasad, the original attaching creditor, and one Sheikh Habibullah, the holder of another decree against Lala Manni Lal, who applied for rateable distribution. The present suit was originally brought by Raja Dirgbijai Singh against Mahadeo Prasad only; but Sheikh Habibullah was subsequently added as a defendant, and the claim was to recover from each of these defendants, with interest, the money which he had taken out of the Munsif's Court from the deposit of Rs. 975. The suit was resisted on various grounds and disposed of by the learned Subordinate Judge in a very brief and summary judgment. The Trial Court seems to have held that it was quite sufficient to give the plaintiff a cause of action that he had paid in the sum of Rs. 975 under pressure of an attachment order which the Execution Court ought not to have passed. In dealing with the merits of the case he discussed one point only, and that was in connection with a plea taken by the defendants. It appears that Manni Lal made an assignment of whatever money might be due to him from the Raja to two persons, Bishehar Das and Paras Ram, the latter of whom was his sister's husband. These persons brought a suit against the Raja as assignees limiting their claim to a sum of Rs. 15,000. In his written statement Raja Dirgbijai Singh distinctly pleaded that the sum of Rs. 975 deposited by him in the Court of the Munsif of Allahabad was a good and valid discharge of his debt to Manni Lal *pro tanto*, and that this payment should be taken into account in settling the amount, if any, due to the plaintiffs. As it happened, this suit was not tried out but the Raja compromised with the plaintiffs for a sum of Rs. 4,250 and a consent-decree was passed accordingly. In the suit out of which the two appeals now before us arise, the defendants made it part of their case that, in settling the terms of this compromise, the Raja had in fact received

credit for this sum of Rs. 975, so that he was no loser by reason of the deposit made by him in the Execution Court. The learned Subordinate Judge held that it was not proved by convincing evidence that credit had been given for this item to the Raja in settling the terms of the compromise, and he seems to have accepted Raja Dirgbijai Singh's statement to the effect that credit was not given him. Upon this finding, the suit was decreed against both defendants in proportion to their liabilities as set forth in the amended plaint. Both defendants appealed to the District Judge. In the memorandum of appeal filed by Mahadeo Prasad the point is distinctly taken that the plaintiff had failed to show that he had suffered any loss or damage and, further, that he had admitted his liability as debtor to Lala Manni Lal, to the extent of at least Rs. 1,000, before he made the payment of Rs. 975 into the Execution Court. These pleas obviously go direct to the merits of the case; connected with them was a further plea of a legal nature, to the effect that the deposit in the Execution Court was made under the provisions of Order XXI, rule 46, of the Code of Civil Procedure, without any condition whatever, and that no suit would lie to recover any sum of money so paid. The learned District Judge disposed of the two appeals in a careful judgment, the greater part of which, however, is devoted to a discussion of the supposed legal difficulties in the way of the plaintiff's maintaining the suit. On the merits of the case he says exceedingly little, and what he does say is distinctly less favourable to the plaintiff than is the finding of the Trial Court. In dealing with the question of the compromise under which the Raja paid Rs. 4,250 to Bishehar Das and Paras Ram as assignees of Manni Lal, the learned District Judge says that he is not prepared to find on the evidence before him, affirmatively, that this item was taken into account in settling the terms of the compromise. He does not say that the plaintiff had satisfied him, either by his own statement or by any other evidence on the record, that the item in question was not so taken into account. On the appeal of Habibullah the learned District Judge had to deal with one plea peculiar to this defendant. It was contended that, even, if any tort had

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been committed entitling the plaintiff to relief, the responsibility for the same lay wholly on the shoulders of Mahadeo Prasad, Habibullah having had nothing to do with obtaining from the Execution Court any of the orders the validity of which was impeached in the plaint, but having merely applied for rateable distribution in respect of a sum of Rs. 975 which was lying to the credit of the judgment debtor Lala Manni Lal in the Court of the Munsif of Allahabad. With regard to this plea the learned District Judge contents himself with saying that Habibullah had got hold of money of the Raja's, which the Raja was under no legal obligation to pay, and that for this reason alone the Raja was entitled to get it back from him. Mahadeo Prasad and Sheikh Habibullah have filed separate appeals in this Court; but, except as regards the last point above noticed, these appeals proceed upon common grounds. There has been a good deal of argument before us with regard to certain questions of law supposed to be raised by the pleadings. On behalf of the plaintiff-respondent we have been referred to a number of cases, of which it is sufficient to mention that relied upon by the District Judge, the case of *Kanhaiya Lal v. National Bank of India* (1). The principle involved in these rulings I understand to be this, that if a decree holder obtains an order for attachment of property belonging to a third person, representing the same as the property of his judgment debtor, it is open to the third person so aggrieved to protect himself by paying into Court under protest the amount of the decree and subsequently maintaining a suit to recover the same from the decree-holder. It does not seem to me that this principle has any real application to the facts of the present case. Broadly speaking, my opinion regarding these two appeals is, that the Courts below have assumed in favour of the plaintiff that he is entitled to equitable relief and have then proceeded to hold that there is nothing in law to prevent him from obtaining that relief by means of a suit against the two decree-holders who divided between them the money deposited by him in the Execution

Court. The real question, however, is whether the plaintiff, on whom the burden of proof lay, has made out any case for equitable relief. In argument before us, it has been sought to support the claim with reference to rules 58 and 65 of Order XXI of the Code of Civil Procedure, and also with reference to the equitable principle embodied in section 72 of the Indian Contract Act. I do not myself think that it would be possible, without violent straining of language, to bring this case within the provisions of rule 58 above mentioned; but even if it were so, the only effect would be to give rise to an objection absolutely fatal to the plaintiff's suit. The order of the Execution Court which really prejudices the rights of Raja Dirgbijai Singh was the order of the 11th of February 1914, overruling his objection and directing him positively to deposit in Court a sum of Rs. 1,000 for the benefit of Mahadeo Prasad, decree-holder. If any cause of action did accrue to the Raja under the rules to which reference has been made, it accrued to him on that date, and the present suit having been filed on the 21st of February 1916, is well beyond limitation from the date of the said order. It is even beyond limitation if reference be made to the date of the attachment of Raja Dirgbijai Singh's house, having been brought a little over a year after the date of the said attachment. The plaintiff's suit can only succeed, if at all, with reference to the equitable principle embodied in section 72 of Act No. 1X of 1872 to which reference has already been made. That section lays down that a person to whom money has been paid by mistake or under coercion must re-pay or return it. Obviously, the section implies that the money was not really due to the person to whom it was paid and this is made clear by the illustrations. The whole point in this case is, in my opinion, that Raja Dirgbijai Singh, when he made his deposit of Rs. 975 in the Court of the Munsif, did so under an admission that he was in fact indebted to Lala Manni Lal at least to this extent.

When this point was made clear in the course of argument in this Court, the learned counsel for the plaintiff's respondents, who argued his client's case throughout with great keenness and ability, fell back upon a contention to which no reference whatever

(1) 18 Ind. Cas. 949; 40 O. 598; 17 C. W. N. 541; 1913) M. W. N. 506; 13 M. L. T. 406; 11 A. L. J. 413; 17 C. L. J. 478; 18 Bom. L. R. 472; 184 P. L. R. 1918; 25 M. L. J. 104; 40 I. A. 56 (P. C.).



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is to be found in either of the judgments of the Courts below. He called attention to the fact that from the documentary evidence on the record it would appear that the assignment made by Lala Manni Lal of the debt due to him by Raja Dirgbijai Singh, in favour of Bisheeshar Das and Paras Ram, had been made in the month of September 1913, that is to say, before the order of the Munsif of Allahabad directing him to pay money into his Court for the benefit of Mahadeo Prasad, and long before that payment was actually made. On this we were asked to hold that, as a matter of fact, no debt was due from Raja Dirgbijai Singh to Manni Lal at the time when Mahadeo Prasad obtained his order of attachment and brought pressure to bear through the Court on Raja Dirgbijai Singh to pay this sum of Rs. 975 for his benefit. The only difficulty I have felt is, whether this contention ought to be allowed to prevail. It involves a very definite shifting of position on the part of Raja Dirgbijai Singh from that taken up by him in the Execution Court. It is quite true that, in one of his petitions of objection addressed to the Munsif of Allahabad, he mentions the fact that Bisheeshar Das, as assignee of some part at any rate of the debt due to Manni Lal, was pressing him with notices to pay the same. He puts this forward as one of the reasons why the Court should not order him to make any deposit on account of that debt. This plea is, in my opinion, obviously controlled and governed by the Raja's express admission that, upon a settlement of accounts, a sum of at least Rs. 1,000 would be found due from him to Manni Lal, and in view of what took place in the Execution Court, I very much doubt whether, in any event, Raja Dirgbijai Singh could have been allowed to maintain a suit for recovery of the money upon a plea wholly inconsistent with this admission. My principal point against him, however, is that there is no indication of such a plea in his plaint. He nowhere makes it a ground for relief that he was not indebted to Manni Lal at all at the time when he paid the sum of Rs. 975 into the Munsif's Court. He bases his claim to relief purely and simply on the ground upon which it has been decreed by the Courts below, namely, that he had paid the money under compulsion of a process

of attachment issued against him by the Execution Court which was contrary to law and wholly outside the powers of such Court to issue. On the facts of the case as a whole, having regard to what is apparent from the record as to Manni Lal's circumstances, and taking into consideration the fact that the claim brought against Raja Dirgbijai Singh by Manni Lal's transferees was compromised for less than a one-third of its amount, I have formed a very poor opinion of the plaintiff's case on equitable grounds. I certainly do not think that he ought to be allowed to succeed in this Court upon a plea to which no reference is to be found in his plaint, or in either of the judgments of the Courts below. If the defendants, Mahadeo Prasad and Habibullah, had definitely been put on their guard by the pleadings that the plaintiff's case was, that Mahadeo Prasad had misled the Court upon a question of fact, when he alleged that there was a debt due from Raja Dirgbijai Singh to Lala Manni Lal and sought an attachment of the same for his benefit, obviously these defendants would have been entitled to ask the Court to go into the whole question of the alleged transfer of that debt by Manni Lal, and they would have been in no way bound by the fact that Raja Dirgbijai Singh had seen fit to deal with the transferees on the basis of there being a valid transfer in their favour. As the record stands, I think the defendants are clearly entitled to hold the Raja to the admission made by him in his pleading before the Execution Court, to the effect that there was a debt of at least Rs. 1,000 due from him to Manni Lal, and to no one else. If this view is correct, it follows beyond all question that the third clause of rule 46 of Order XXI, of the Code of Civil Procedure came into operation and that the payment made into Court by Raja Dirgbijai Singh discharged him from liability towards Manni Lal to the extent of Rs. 975, as effectively as if he had made the payment direct to Manni Lal and obtained a receipt from the latter. The Courts below seem to me to have wholly overlooked the effect of this provision. It operates quite independently of any question as to the circumstances under which the payment was made, or the motive which may have influenced Raja Dirgbijai Singh in making it. If he really owed Rs. 975 to Manni Lal, and paid

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it into Court, and thereby obtained a valid discharge to this extent, he has no claim in equity to recover that money from Mahadeo Prasad or Habibullah, who got possession of it under the orders of a competent Court as money belonging to their judgment-debtor, Manni Lal, and lying to his credit in the Execution Court. I have said enough to dispose of these appeals and I do not think it necessary to discuss in detail the special plea taken by Habibullah; but I feel bound to say that I do not see what cause of action against Habibullah is disclosed by the plaint or made out by the evidence produced in the two Courts below. For these reasons, I would allow both these appeals, set aside the decrees of both the Courts below, and dismiss the plaintiffs' suit with costs throughout, including in this Court-fees on the higher scale.

WALSH, J.—I entirely agree. Having regard to the way in which the case was fought, both parties treated Manni Lal and his transferees as being in substance the same person, and the transfer as making no difference to the real merits which had to be decided.

In my opinion, at the time when the compromise was entered into, the Raja could not have been ignorant of or have forgotten the sum of money which had been paid into Court. Either he intended to treat it as a good payment to Manni Lal or his transferees, or he intended to keep it up his sleeve and when the compromise was carried out, to bring a suit to get the money back. He must have known that Manni Lal regarded the money as having been paid *pro tanto* as a discharge of his debt to Mahadeo Prasad. In my opinion, the Raja could not in equity enter into the compromise with the intention of bringing a suit to recover this sum of money, without making it one of the terms of the compromise that the compromise was entered into without prejudice to his right to recover the Rs. 975. In other words, the compromise undoubtedly involved on the part of the creditors the payment of a sum of Rs. 4,975, and the Raja was perfectly well aware of that fact when he entered into the compromise. That being so, this action is an abuse of the process of the Court and, therefore, ought to be dismissed.

By THE COURT.—The order of the Court is that we allow both these appeals, set aside the decrees of both the Courts below and dismiss the plaintiffs' suit with costs throughout, including in this Court fees on the higher scale.

*Appeal allowed.*

### BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 963 OF 1919.

August 16, 1920.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

DATTATRAYA PURSHOTTAM

PARNEKAR—PLAINTIFF—APPELLANT

*versus*

RADHABAI BALKRISHNA TRIMBAK

—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), ss. 2, 97—Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 2, 13—Finding that party is agriculturist, whether preliminary decree—Appeal, whether lies.*

A finding that a party is an agriculturist is not by itself an adjudication which can be embodied in a decree and is not appealable, though it may result in the plaint being returned for presentation in the proper Court. Therefore, a Judge should never accede to an application to draw up in the form of a decree a finding on the question whether a party is an agriculturist or not. [p. 868, cols. 1 & 2.]

Second appeal from the decision of the District Judge, Nasik, in Appeal No. 82 of 1919, confirming the decree passed by the Joint Subordinate Judge at Nasik, in Civil Suit No. 293 of 1918.

Mr. D. O. Virkar, for the Appellants.

Mr. D. R. Patwardhan, for the Respondent.

### JUDGMENT.

MACLEOD, C. J.—The plaintiffs sued to recover Rs. 3,637, being the balance due on two mortgage-deeds, dated 28th June 1891 and 26th September 1892. The defendant in his written statement contended that he was an agriculturist and that the suit should be tried under the Dekkhan Agriculturists' Relief Act. The following issues were raised as preliminary issues:—

(1) Whether the defendant is an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act?

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(2) Whether the suit is maintainable without a Succession Certificate? And

(3) Whether a certificate under the Pensions Act is necessary?

On the first issue the Judge found that the defendant was an agriculturist. The second issue was found in the affirmative and the third in the negative. Further issues were then drawn up:—

1. Whether the mortgage-bonds in suit are proved?

2. What is proved to be the consideration of the said bonds?

3. What is proved to be the amount received by plaintiffs towards satisfaction of the said bonds?

4. Whether the suit is within time?

5. What is found due on taking accounts under the Dekkhan Agriculturists' Relief Act?

6. How should the amount due be made payable?

Unfortunately, the plaintiff applied to the Court to draw up a decree on the finding on the first issue and a decree was drawn up.

An appeal was filed against that decree which was admitted by the District Judge. The appeal was dismissed, the learned Judge being of opinion that the defendant was rightly held to be an agriculturist. I think he was wrong in holding that an appeal lay, and he failed to appreciate in the right way the remarks of Mr. Justice Heaton in *Municipal Committee of Nasik v. Collector of Nasik* (1).

The importance of the question arises from section 97 of the Code, which enacts that if a party aggrieved by a preliminary decree passed after the commencement of the Code does not appeal from such decree he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree, thus giving effect to the opinion of the dissenting Judges in *Khadem Hossein v. Emdad Hossein* (2), that in an appeal against the final decree in a partition suit it was not open to the appellant to question the correctness of the preliminary order or decree for partition when no appeal was preferred against such order within the

time allowed by law. Such an order was, according to legal phraseology, a preliminary or interlocutory decree, but it was not a decree as defined by section 2 of the Civil Procedure Code of 1882 although it was appealable as if it had been a decree.

In section 2 of the Code of 1908 'decree' was defined so as to bring preliminary or interlocutory decrees within the definition of a decree, but the only change in procedure introduced by the definition of decree in section 2, combined with section 97, was in respect of the right of an aggrieved party to appeal from a preliminary decree. The right which he had before to wait until the final decree was passed and then appeal from both the preliminary and the final decree was taken away.

But the impression has gained ground that the kind of preliminary decrees which can be passed has been indefinitely extended by the Code of 1908. Constant applications are made to the Judges in the Mofussil Courts to embody in the form of decrees judicial pronouncements which are not judgments according to the Code, on the ground that the aggrieved party may be debarred from raising the question in an appeal from the final decree. This apprehension may be genuine in some cases but it too often is merely the cover for deliberate obstructions to the final decision of the suit. The object is easy of attainment. The Judge is asked to draw up a decree on the ground that he has decided something which conclusively determines the right of the parties with regard to one of the matters in controversy in the suit. The Judge declines. An application is made to compel him to draw up a decree. Whether successful or not, the hearing of the suit is delayed for months. If the Judge consents, there is at once an appeal. In this way, litigation, which is in any event sufficiently protracted, can be indefinitely prolonged.

In my opinion, the above impression is entirely erroneous and has arisen chiefly from the failure to observe the rules of procedure laid down by the Civil Procedure Code, 1908, with regard to the institution and hearing of suits. The solution of the question before us is to be found not in any of the numerous cases which deal with the question but by a careful consideration of those rules which, with some minor alterations, re-enact the corresponding sections of the Code of 1882.

(1) 28 Ind. Cas. 589; 17 Bom. L. R. 324; 39 B. 422.

(2) 29 O. 768 (F. B.); 5 O. W. N. 617.



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They prescribe when and in what circumstances the Court is to pronounce judgment and it is only when a judgment has been pronounced in conformity with those rules that it can be embodied in a decree.

The real question, therefore, seems to me to be not what is or what is not a preliminary decree, but when may a Trial Judge pronounce a judgment which has to be embodied in a decree. Then the stage of the case at which judgment is pronounced will determine whether the decree is preliminary or final. It may be as well to set out, as briefly as possible, the course a suit should follow under the rules. When a suit has been duly instituted a summons may be issued to the defendant to appear: Order V, rule 1. The Court shall determine at the time of issuing the summons whether it shall be for the settlement of issues only, or for the final disposal of the suit: Order V, rule 5. Order XIV deals with the settlement of issues. At the first hearing of the suit the Court shall proceed to frame and record the issues on which the right decision of the case appears to depend: Order XIV, rule 1 (5).

Where issues both of law and of fact arise in the same suit and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined: Order XIV, rule 2. Nothing is said regarding the procedure at the trial of such issues, but following the analogy of Order XV, rule 3, judgment should only be pronounced when the finding disposes of the case or a part of the case which would then be final *pro tanto*. Order XV deals with the disposal of a suit at the first hearing. Rule 3 seems to amplify Order XIV, rule 2, as it refers to issues of fact as well as of law. If the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and if the finding thereon is sufficient for the decision may pronounce judgment accordingly. If the finding is not sufficient for the decision the

Court shall postpone the further hearing and shall fix a day for proceeding with the suit. Although this rule appears to be applicable only to the first hearing of a suit it seems obvious that it must also apply, by reason of Order XVII, to a further hearing of a case after all the issues or issues of law only have been settled at the first hearing.

It is only when the finding on an issue is sufficient for the decision of the suit or a part of the suit that the Court may pronounce judgment. When the finding is not sufficient for the decision, the suit must be postponed for further hearing.

Under section 33 the Court, after the case has been heard, shall pronounce judgment and on such judgment a decree shall follow.

Order XX deals with judgment and decree. Before rule 12 of that Order there is no provision in the Code for any other judgments except (1) those which are given at the end of the hearing, (2) those which decide the case or presumably a part of the case by findings on certain issues only.

Order XX, rules 12 to 16 and 18, and Order XXXIV, rules 2, 4 and 7, deal with certain classes of suits in which there can be an adjudication which, though it determines the rights of the parties with regard to the matter in controversy in the suit, does not completely dispose of the suit. They enable the Court to pronounce a judgment which must be embodied in a decree, before the end of the suit, but they carefully prescribe on what points judgment shall be given.

The suits referred to above are the most common in which preliminary decrees can be passed. I may also mention suits for damages in which the plaintiff establishes his right to receive damages but an inquiry is necessary as to the amount before a final decree can be passed. The principle remains the same. The judgment should ordinarily come at the end of the case. But there are cases where, although the Court can decide all questions relating to the rights and liabilities of the parties, the details of the decree have to be ascertained by a further inquiry, or time is allowed to a defendant before the decision becomes final.

I do not see why this principle should not be applied to suits under the Dekkhan

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**Agriculturists' Relief Act.** If the rights and liabilities of the parties can be determined and accounts taken at one hearing no difficulty arises although for form's sake it may be necessary to draw up a preliminary and a final decree. If the Court arrives at a stage where the rights and liabilities of the parties have been determined but an inquiry is necessary to ascertain the state of accounts between the parties judgment may be given on which a preliminary decree can be drawn up. But the finding that a party is an agriculturist is not by itself an adjudication which can be embodied in a decree though it may result in the plaint being returned for presentation in the proper Court.

Issues of law on which a case may be disposed of most often raise questions of jurisdiction or of limitation. But a finding that the Court has jurisdiction or that the plaintiff has brought his suit within the time prescribed by the law of limitation, does not determine the rights of the parties with regard to all or any of the matters in controversy in the suit, it merely enables the Court to proceed to inquire into those rights. So, too, an issue of *res judicata* found in the plaintiff's favour enables the Court to deal with the merits of the case.

It has been contended that decisions in the plaintiff's favour on such issues as these determine his right to sue which is a matter of controversy in the suit but a consideration of the analysis of rights in Holland's Jurisprudence will make it clear that there is no such right known to law as the 'right to sue'. A plaintiff in a suit claims to be entitled to a remedial right on the consequence of an infraction of an antecedent right.

"A remedial right is in itself a mere potentiality deriving its value from the support which it can obtain from the power of the State. The mode in which that support may be secured in order to the realisation of a remedial right is prescribed by that department of law which has been called adjective, because it exists only for the sake of substantive law, but is probably better known as procedure. It comprises the rules for, (i) selecting the jurisdiction which has cognizance of the matter in question, (ii) ascertaining the Court which

is appropriate for the decision of the matter, (iii) setting in motion the machinery of the Court so as to procure its decision, etc." Holland's Jurisprudence, pages 280, 291.

The opinion I have expressed on this question in no way affects the rights of an aggrieved party to obtain relief when appealing to a higher Court. I have only made it clear when he must appeal and I have shown that he is not debarred from appealing at the end of the case from certain findings during the hearing of the cases which merely decide that the suit must proceed, or which decide questions without disposing wholly or partially of the case. This will put an end to the applications which are constantly being made to the High Court to compel the Trial Courts to draw up decrees based on such findings instead of waiting until the end of the case, thus enabling a party to prolong the hearing of the suit for an indefinite time and paralysing the administration of justice. One thing is perfectly clear and that is, that a formal expression by a decree of a finding by a Court that a party is an agriculturist cannot conclusively determine the rights of the parties with regard to any or all of the matters in controversy in the suit. Nothing is said in the Code about a preliminary issue, but a decree is preliminary when a further proceeding is to be taken before the suit is disposed of. It follows then, in my opinion, that a Judge should never accede to an application to draw up in the form of a decree a finding on the question whether a party is an agriculturist or not. Undoubtedly, that is an issue which is the first issue to be tried in the case, and a decision may be given on it; but it by no means follows that because that is the first issue to be tried, therefore, it is a preliminary issue on which a decree can be drawn up. The whole case must be decided first before the judgment can be pronounced. There will be then a judgment deciding the rights of the parties with regard to all or any of the matters in controversy in suit, and then it will rightly be the subject of a decree. The result will be, in this case, that as there was no appeal, the case must go back to the Trial Court to continue the hearing from the point at which it

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was left off. This appeal is dismissed with costs.

FAWCETT, J.—I quite agree in the general principles laid down by the learned Chief Justice in the judgment just pronounced. In regard to the decision in *Municipal Committee of Nasik v. Collector of Nasik* (1) I think Mr. Justice Heaton never intended to say that the Court should frame a preliminary decree directing accounts to be taken under section 13, Dekkhan Agriculturists' Relief Act, until the proper stage had been arrived at for such a preliminary decree. The principle applicable is that judicially laid down in regard to references for inquiry and report. This is that the power to order such a reference is only exercised in cases where the question cannot conveniently be decided in the usual way by the Court, as, for instance, where a prolonged examination of documents or accounts, or some specific or local investigation is necessary, or where, as may be the case when damages have to be assessed, the inquiry involves questions of detail which would occupy too much time in Court [Halsbury's Laws of England, Volume I, Article 1000, at page 484, and *D. N. Ghose & Bros v. Loput Narain* (3)]. Accordingly, it is a general rule in cases falling under Order XX, rule 16, of the Code that the main points at issue in the case should be decided first by the Court, and a preliminary decree framed only when nothing more remains to be done than the ministerial function of drawing up the account in accordance with the directions of the Court. It is, in my opinion, an abuse of the procedure intended by the Code to draw up a preliminary decree directing accounts to be taken under section 13 of the Dekkhan Agriculturists' Relief Act, before, for instance, as in this case, it had been even decided whether the mortgage sued upon was proved. Personally I am inclined to think that it will be seldom necessary under the Dekkhan Agriculturists' Relief Act to draw up a preliminary decree under Order XX, rule 16. That is a provision of a general nature and does not, in my opinion, detract from the power given to the Court by a special Act, namely, section 13 of the Dekkhan Agriculturists' Relief Act, to take an account

in accordance with the provisions of that section. My experience is that, in ordinary cases, the Court can itself take the account with the help of a clerk for any former calculations, and that there is no real necessity for a preliminary decree under which a Commissioner would have to be formally appointed and the ultimate decision of the suit almost inevitably delayed. I think, therefore, it is only in exceptional cases, that there should be a preliminary decree of the kind referred to in Mr. Justice Heaton's judgment already mentioned.

*Appeal dismissed.*

CALCUTTA HIGH COURT.  
INSOLVENCY SUIT No. 120 of 1914.  
February 10, 1920.

*Present:*—Mr. Justice Greaves.

*In re* LALBIHARI SHAH—Insolvent.

*Presidency Towns Insolvency Act (III of 1907), s. 10, Sch. II, s. 18—Registrar in Insolvency, reference to—Mortgage, validity of, power of Registrar to decide—Appeal from order of Registrar—Limitation.*

Where a reference is made to the Registrar in Insolvency under section 18, Schedule II of the Presidency Towns Insolvency Act, upon the application of certain persons alleging themselves to be mortgagees of an insolvent's estate directing them to prove their mortgage before him, the Registrar has no jurisdiction to deal with the question of the validity of the mortgage even though the parties consent and agree to his doing so, and by his decision adversely affect parties interested who are not *sui juris*. [p. 892, col. 1.]

The period of 90 days provided by section 101 of the Presidency Towns Insolvency Act runs not from the date of the findings being filed or signed, but from the date of the matter being completed, and the report being signed. [p. 891, col. 2.]

Appeal from the decision of the Insolvency Registrar of the Calcutta High Court.

Mr. H. D. Foss (with him Mr. B. K. Ghose), for Kacharath Saha, Atindra Nath Saha and Jaganendra Nath Saha.

Mr. A. N. Chaudhuri (with him Sir B. C. Mukherjee, Messrs. S. N. Benerjee and N. N. Basu) for the Appellants.

JUDGMENT.—This matter comes before me by way of an appeal from a decision of

(3) 30 Ind. Cas. 690; 42 C. 819; 19 C. W. N. 639.



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the Insolvency Registrar of this Court. The facts are shortly as follows:—On the 23rd July 1914 Lalbehari Shah and others were adjudicated insolvents upon the petition of a creditor, one Motilal Boid. He was a creditor for Rs. 6,43,000, and he filed a retainer through an Attorney Mr. S. M. Datt to represent him in the insolvency proceedings. Motilal Boid is the father of the present appellants before me. He died on the 29th February 1916 leaving him surviving his widow, Panni Bibee, and the appellants his infant sons. He also left a brother Dhonraj Boid. On the 7th August, 1916 an application was made by the brother as next friend of the infants for examination of certain witnesses under section 36 of the Insolvency Act. The retainer was signed by him and he made an affidavit that he had no interest adverse to the infants. He signed as next friend and the retainer that he gave to his Attorney was in respect of all the proceedings. On the 23rd August 1916 the mortgagees got an order to prove their mortgage before the Registrar in insolvency under section 16 of the Second Schedule of the Insolvency Act, and the Official Assignee was directed to sell the premises No. 3/2, Shovabazar. On the 1st September 1916 Panni Bibee was appointed, under the Guardians and Wards Act, as guardian of her infant sons and on the 16th September 1916 she gave to her brother-in-law Dhonraj Boid a power-of-attorney to act on her behalf. On the 18th September 1916 the mortgaged properties were sold by the Official Assignee. On the 2nd February 1917, Panni Bibee applied for an order to examine the mortgagees under section 36 of the Insolvency Act and an order was made for their examination. It is said that Panni Bibee made the application really as next friend of the infants and in error of the fact that she was not their next friend. Be that as it may, it appears that all the proceedings before the Registrar in Insolvency were conducted on behalf of Panni Bibee not as next friend of the infants but as a creditor of the insolvents' estate and, of course, she was a creditor of her husband's estate by reason of her position as his widow. On the 6th July 1918 the examination of the witnesses took place, that is to say, of the mortgagees, for a period of two days and the Assistant Referee, who

was then acting as the Registrar in Insolvency, stated that he would go into the question of the validity of the mortgages, although I understand that he arrived at no final decision on that day. On the 3rd February 1919 Mr. Ramfry, the Registrar in Insolvency, stated that he thought that he would go into the question of the validity of the mortgages and, on the 17th February 1919 the parties agreed to the question of the validity of the mortgages being gone into before him. From the 21st to the 27th February the witnesses on behalf of the mortgagees were examined before him and from the 19th March to the 10th April the witnesses called on behalf of the appellants were examined. On the 12th July 1919 the Registrar in Insolvency signed his findings and, just before the figures of the amount due on the mortgage occurs this, "I, therefore, find and report that there is now due on the mortgage the sum of Rs. 27,000, for principal and interest." Those findings were filed on the 15th July 1919. On the 25th July 1919 the report of the Registrar in Insolvency was settled and passed and he there states that he had gone into the question of the validity of the mortgages and considered the facts placed before him and he holds that the mortgage is a valid one and that the consideration alleged therein was duly paid, and then he goes to state what is due to the mortgagees. On the 14th August 1919 the report was signed and filed on that day and on the 3rd September 1919 the present appeal was filed. Some dispute has arisen as to whether in fact it was presented on the 3rd September 1919, or on the 4th September. What happened, I understand, was that on the 3rd September it was tendered on the Original Side in the English Department and that the Attorney who tendered the appeal was then told that it should have been presented in the Insolvency Jurisdiction of the Court and apparently it was presented in the Insolvency Jurisdiction of the Court on the 4th September 1919. It is not contested, certainly for the purpose of this application, that the time to file the appeal, if otherwise in time, would have extended until the re-opening of the Courts after the long vacation. Accordingly, it does not seem to me to matter whether it was in fact filed on the 3rd or 4th September. On these facts being stated to me,

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two preliminary objections were taken on behalf of the mortgagees. First, it was said that the appeal is made or presented by infants without their having any next friend and I have an application made by the mortgagees asking that the appeal should be dismissed with costs to be paid by the Attorney on the ground that no next friend had been named on behalf of the infants. On the other hand, I have another application before me for the amendment of the appeal by inserting the name of the next friend. It seems to me that, having regard to the provisions of Order XXXII, rule 2, I have a discretion as to how I shall deal with the matter, when a plaint or other proceedings have been taken without the infant being represented by a next friend, and it does not seem to me, therefore, that there is any substance in this preliminary objection because I shall accede to the application to amend the appeal upon the addition of the name of the next friend, upon the costs of the mortgagees of appearing on this application and the costs of their application, to which I have already referred, being paid. But there is a more substantial preliminary objection, and that is that the appeal was filed out of time. It is said that the Registrar's findings having been signed on the 12th July 1919 and filed on the 15th, time runs as from one or other of these dates or, in any case, at the very latest, from the 25th July 1919, when the report was settled and passed. On the other hand, it is said on behalf of the appellants that time did not commence to run until the report was signed by the Registrar on the 14th August 1919. Now, it appears that, in accordance with the practice of the office, time is taken to run as from the time that the report is signed because I find a note on the application for appeal "report signed 14th August 1918—appeal in time"—this being signed by the Registrar in Insolvency. It, therefore, remains to consider the provisions of section 101 of the Presidency Towns Insolvency Act in order to ascertain whether the preliminary objection on this point should prevail or not. Section 101 provides that the period of limitation for an appeal from any act or decision of the Official Assignee or from an order made by an officer of the Court empowered under section 6 shall be 20 days from the date of

such act, decision or order, as the case may be. Some discussion took place before me on this preliminary question as to whether the Registrar was a person empowered under section 6 of the Act. It is not necessary for me to deal with that now, for that is a question which will arise if I decide that the preliminary objection is not well-founded. So it only remains for me to decide whether the order of an officer of the Court referred to in section 101 is, under the circumstances, the findings that were filed on the 15th July or the report that was actually signed on the 14th August. The conclusion that I have come to is, that the 20 days provided by section 101 run not as from the findings being filed or signed, but as from the matter being completed and the report being signed. That is to say, when the matter is completed and the parties know their position. That, therefore, disposes of the preliminary objection and it now remains for me to deal with the appeal on its merits; but before I do so, I should add, as the matter has been ventilated, that it does not seem to me to matter whether Panni Bibee was alone before the Registrar or whether the infants, unrepresented by a next friend, were before the Registrar, because, even if the infants were not before the Registrar, it is conceded that, being affected by the order that the Registrar has made, they are entitled in any case to appeal. That disposes, then, of the preliminary objection and the two applications that are made, that is to say, with regard to the amendment of the application and with regard to the dismissal of the appeal. I now proceed to deal with the appeal on its merits.

I now come to deal with the appeal as presented. The *first* ground of appeal is, that the Registrar had no jurisdiction to go into the question of the validity or otherwise of the said mortgage in the reference directed to him, and that he erred in adjudicating on the same although the parties consented to that course being adopted.

The other grounds of appeal are, *secondly* that the mortgage transaction was fictitious; *thirdly*, that he should have found on the evidence that the adjudication was collusive, and so on.

Counsel appearing on behalf of the appellants has stated before me that all he desires to do at the present time is to question the jurisdiction of the Registrar to deal with the

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validity of the mortgage under the reference to him under Schedule II, section 18 of the Presidency Towns Insolvency Act, and he asks that there should be deleted from the report all the findings of the Registrar in Insolvency with regard to the validity of the mortgage, and that is the only question that is now before me on this appeal. It seems to me that, although the Registrar dealt with this question by the consent and agreement of the parties, he had no jurisdiction to deal with a question of this kind. Section 6 of the Insolvency Act states what are the matters that can be referred to the Registrar in Insolvency, viz. to hear debtors' petitions; to hold public examinations of insolvents; to make any order or exercise any jurisdiction prescribed as proper to be made or exercised in Chambers; to hear and determine any unopposed or *ex parte* application; to examine any person under section 35. The only one of these headings which this could possibly come under would be heading 6 (2) (c), but that heading only deals with matters to be dealt with in Chambers, and rule 5 of the Insolvency Rules specifically lays down what are the matters that are to be heard and determined in open Court which are, among others, 5 (d), applications to set aside or avoid any settlement, conveyance, transfer security or payment or to declare for or against the title of the Official Assignee to any property adversely claimed. It seems to me that you only have to read section 6 of the Presidency Towns Insolvency Act and rule 5 to arrive at the conclusion that the Registrar in Insolvency, as indeed I think he thought himself, had no jurisdiction to deal with a matter of this kind, apart from consent of parties. He did so, having regard to the consent and on the footing that all the parties interested were *sui juris* which turns out not to be the case. In this view, the appeal succeeds upon the only point which is now raised before me, that is to say, as to whether the Registrar in Insolvency had any jurisdiction to deal with this question and by his decision adversely affect the infants. I am expressing no opinion on this appeal with regard to the validity of the mortgage and whether it is now open to the appellants to attack the mortgage or not. I make no order as to costs.

*Appeal allowed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEALS NOS. 534 AND 597  
of 1919.

August 17, 1920.

*Present:*—Sir Norman Macleod, Kt.,  
Chief Justice, and Mr. Justice Fawcett.  
BHIMABAI PADAPPA DESAI—PLAINTIFF  
—APPELLANT

*versus*

SWAMIRAO SHRINIWAS PARWATI—  
DEFENDANT—RESPONDENT

*Limitation Act (IX of 1908), Sch. I, Arts. 131, 144—  
Inamdar—Suit to recover assessment—Adverse possession—Limitation—Contract Act (IX of 1872), s. 69,  
applicability of—Judi, payment of, by Inamdar—Sum paid, whether recoverable from occupancy tenants.*

A suit to recover assessment by an Inamdar against a person who claims to have purchased the Inamdar's rights is governed by Article 144 and not by Article 131 of Schedule I to the Limitation Act, and limitation begins to run from the date of the first non-payment of assessment [p. 843, col. 1.]

Article 141 of Schedule I to the Limitation Act applies only where the relationship of landlord and tenant or superior holder and occupant is established. Where no such relationship has ever existed, that Article is not applicable. [p. 843, col. 1.]

Section 69 of the Contract Act only applies when a person is interested in the payment of money which any other is bound by law to pay, and, therefore, if he pays it, he is entitled to be reimbursed by the other. [p. 493, col. 1.]

Judi is payable by an Inamdar to Government, and where he has been so remiss as to lose his right of levying assessment on occupancy tenants, he cannot recover the sum paid by him as judi from them under section 49 of the Contract Act, inasmuch as the tenants are not bound by law to pay judi. [p. 843, col. 2.]

Second appeal from the decision of the District Judge, Bijapur, in Appeals Nos. 138 and 139 of 1917, confirming the decree passed by the Subordinate Judge at Muddebihal, in Civil Suit No. 191 of 1916.

Mr. Jayakor (with him Mr. S. S. Patkar, Government Pleader, and Mr. V. D. Limaye), for the Appellant.

Mr. Nadkarni (with him Mr. A. G. Desai), for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to recover from the defendant as inferior holder the assessment and local fund cess for 1912-13 of certain lands in five villages. The Trial Court held that the plaintiff was not entitled to recover as Inamdar, but allowed the claim for and judi local fund cess for the lands in suit to the extent of Rs. 140 10  $\frac{1}{2}$  under section 64 of the Indian Contract Act. The lower Appellate Court dismissed the suit



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altogether. The learned Judge held that the plaintiff was barred from recovering the assessment for the suit lands by the principle of *res judicata*, because certain suits had been filed by the defendant to recover possession of the land and mesne profits from the tenants and the plaintiff's husband was a party to those suits. But I do not think that the question, which is now in issue whether plaintiff is entitled to levy assessment against the defendant, was in issue in these suits though Padappa was a party. The learned Appellate Judge does not seem to have considered the question whether the defendant had acquired a right to the suit-lands by adverse possession. But it is admitted that these lands were purchased by the defendant in execution of a decree obtained against Kalava, the then Inamdar, in 1874. Therefore, he purchased all the Inamdar's rights including the right to levy assessment on the suit lands. No doubt, it was held in the litigation regarding other lands belonging to the Inamdars that the defendant had not purchased anything beyond the rights of Kalava, and that on her death Padappa was entitled to succeed. But, as a consequence of succeeding in that suit, Padappa took no steps either to levy assessment or to recover possession of the suit lands. It cannot be disputed that the present respondent has been in possession of the suit-lands for more than twelve years adversely against the plaintiff. It was suggested that the right to levy assessment was a recurring right and the period of limitation should be as prescribed by Article 131, according to which time begins to run when there has been a demand and refusal. That may very well be if the relationship of landlord and tenant or superior holder and occupant has ever existed. Once that relationship is established, then the mere non payment of rent or assessment would not be sufficient to enable the tenant or occupant to begin to set up a title by adverse possession. There must be some overt act, such as a refusal to pay the rent or assessment, before time begins to run. But here there was no relationship as regards the suit-lands between the Inamdar and the respondent. By the purchase at the sale at which the Inamdar's rights were put up for sale he was not recognized as in any way liable to pay assessment. Therefore, it cannot be said that

there was any recurring right in the appellant, who now occupies the position of Inamdar, to recover the assessment. The decision, therefore, in *Ganesh Vinayak v. Sitabai Narayan* (1) can be distinguished. In my opinion, therefore, the respondent has clearly established a right to hold this land against the Inamdar free of assessment by adverse possession.

As regards the claim of the plaintiff which was allowed by the Trial Court, to recover *judi* and local fund cess, I agree with the learned Appellate Judge that it should be disallowed. The *judi* is payable in the lump sum by the Inamdar to Government, and if the Inamdar is so remiss as to lose his right of getting the assessment from the occupancy tenants, it cannot be said that the obligation to pay *judi* for those lands for which the payment of assessment was lost, falls upon the persons in occupation of them. Section 69 only applies when a person is interested in the payment of money which any other is bound by law to pay, and, therefore, if he pays it, he is entitled to be reimbursed by the other. Here it has not been proved that the defendant is bound by law to pay the *judi*. Therefore, if the plaintiff pays it, it must be considered it has been paid in his own interest and he certainly cannot be entitled to recover it from the defendant under section 69.

Therefore, the decision of the learned Appellate Judge must be confirmed and the appeal dismissed with costs.

Fawcett, J.—I concur. Reliance was placed for the appellant on the view taken in some reported cases that, under Article 131, in order that a recurring right of the kind specified in that Article should be time-barred, it is necessary for the defendant to show that there has been a definite demand and refusal. In my opinion, that view should be limited to cases where the circumstances are such that mere non compliance with the right does not of itself amount to a refusal. I would point out that, under Article 131, third column, limitation does not run from the time when the enjoyment of the right is first demanded and refused, but when the plaintiff is first refused the enjoyment of the right. If we compare this Article with Articles 85, 89 and 103, where the words used are 'demanded and refused,'

(1) 35 Ind. C. L. 54; 18 Bom. L. R. 950; 41 B. 159.

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it will be seen that it is rather reading into the Article words which are deliberately omitted from it, to say that under Article 131 there must be shown a definite demand, to which there was a refusal. In the present case the circumstances, in my opinion, are such that the non-payment of any rent or assessment by the defendant to the plaintiff necessarily constitute a refusal within the meaning of this Article. The defendant had acquired the right, title and interest of the Inamdar at the Court auction. There had been a lengthy litigation between the parties and the defendant was admittedly in adverse possession of the lands for a period which absolutely barred the plaintiff's right to recover them, although the plaintiff was successful in the litigation which went to the Privy Council.

I think, therefore, that, even supposing the case does fall under Article 131, the plaintiff was first refused the enjoyment of the right over twelve years before the institution of the present suit, and that his claim to levy any assessment is clearly barred.

On other points I agree with the learned Chief Justice.

*Decree confirmed.*

### ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 1205 OF 1919.

November 17, 1920.

*Present:*—Mr. Justice Piggott and  
Mr. Justice Walsh.

REOTI RAM—DECREE HOLDER—APPELLANT  
*versus*

SITA RAM—JUDGMENT-DEBTOR—  
RESPONDENT.

*Limitation—Decree directing payment within certain time—Court closed on last day—Payment made on day of re-opening—Decree, whether complied with.*

Where a party is required by a decree to pay a certain sum of money within a certain period, and on the last day of that period the Court is closed, the payment of the money on the first day on which the Court re-opens is a payment in compliance with the decree.

Execution second appeal from a decree of the District Judge, Farrukhabad, dated the 7th August 1919.

FACTS appear from the following judgment of the lower Appellate Court:—

This is an appeal against an order of the learned Munsif of Kanauj, holding that a sum of Rs. 500, deposited in Court by the judgment-debtor on 6th February 1919, has not been deposited in time. The decree in this suit for settlement of accounts was passed on 6th January 1919 and ordered that Rs. 500 was to be paid to the plaintiff within thirty days, and if the money was not paid within that period the plaintiff was to get a decree for the whole amount claimed with costs.

Application was made for tender on 4th February and as the Court was closed on 5th February owing to Basant Panchmi holiday the deposit was not made till 6th February.

As the first day is not counted, the period expired on 5th February. Under Order XXI, rule 1, Civil Procedure Code, all money payable under a decree shall be paid either, (a) into Court, or (b) out of Court to the decree-holder, or etc. The judgment-debtor had the choice of methods (a) and (b). He might have employed (b) on 5th February. He could not employ (b) on 6th February as it was then time-barred. But by a number of rulings, *Dabi Din Rai v. Muhammad Ali* (1), for money paid under a pre-emption decree, *Aratamudas Ayyangar v. Samiyappa Nadan* (2), the payment on 6th February was in time, because the Court was closed on the last day of the period. The fact that (b) was barred is no reason why (a) should be barred when the Order XXI, rule 1, allows choice of either method. The appellant wrongly refers to section 5 of the Limitation Act. The analogy is with section 4 not section 5. I allow the appeal and hold that the Rs. 500, has been deposited in time.

Mr. Kailas Nath Katju, for the Appellant.

Dr. S. M. Sulaiman, for the Respondent.

JUDGMENT.—In our opinion there is authority of this Court in the case of *Dabi Din Rai v. Muhammad Ali* (1), which justified the learned Judge in the Court below in holding, that the condition had been complied with. The case of *Shooshee Bhushan Rudro v. Gobind Ohunder Roy* (3) and the case of *Sambasiva Chari v. Ramasami*

(1) 3 A. 850; A. W. N. (1881), 100; 2 Ind. Dec. (N. S.) 573.

(2) 21 M. 385; 7 Ind. Dec. (N. S.) 629.

(3) 18 O. 231; 9 Ind. Dec. (N. S.) 154.

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*Reddi* (4), bear out this view. The argument on behalf of the appellant seeks to confine the judgment-debtor in one alternative, to only 29 days to pay the money. The appeal is dismissed with costs.

*Appeal dismissed.*

(4) 22 M. 179; 8 M. L. J. 265; 8 Ind. Dec. (N. S.) 127.

### CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL NO. 82  
OF 1919.

February 16, 1920.

*Present*:—Justice Sir Asutosh Mookerjee, Kt.,  
and Justice Sir Ernest Fletcher, Kt.

RAM PROSAD SURAJMULL—DEFENDANT  
—APPELLANT

*versus*

MOHAN LAL LACHMINARAIN—  
—RESPONDENT.

*Arbitration*—Contract containing arbitration clause  
—Reference, after institution of suit—Suit not stayed  
—Award, effect of.

Where an action has been commenced upon a contract which contains a provision for reference to arbitration, even if a reference to arbitration has been made before the commencement of the suit, the award is of no effect unless the suit has been stayed pending the arbitration. [p. 895, col. 2.]

If the Court has refused to stay the action or if the defendant has abstained from asking it to do so, the Court has seisin of the dispute, and it is by its decision, and by its decision alone, that the rights of the parties are settled. [p. 895, col. 2.]

Appeal from the judgment of Mr. Justice Greaves.

Sir B. C. Mitter (with him Mr. B. L. Mitter), for the Appellants.

Messrs. Langford James and S. C. Bose, for the Respondents.

### JUDGMENT.

MOOKERJEE, J.—This is an appeal from a judgment of Mr. Justice Greaves, whereby he has, on an application by the respondents, directed an award made by the Bengal Chamber of Commerce Arbitration Tribunal on the 20th June 1919 to be taken off the file as of no effect.

The events which led to the award are not in controversy and may be briefly recited. On the 16th August 1918 the respondents

sold to the appellants 100 bales of Japanese grey shirtings which had been purchased by them from the Nippon Munka Kabushiki Kaisha (Japan Cotton Trading Co.). The respondents allege that the appellants failed to take delivery, with the result that they had to re-sell the goods at a loss. On the 3rd May 1919 the buyers made a reference to the Arbitration Tribunal of the Bengal Chamber of Commerce under the arbitration clause contained in the contract. On the 21st May 1919 the sellers instituted a suit for damages for breach of contract. On the 20th June 1919 the award was made, and on the 1st July following, it was filed in Court. On the 22nd July the sellers applied to set aside the award. Mr. Justice Greaves has granted that application on the ground that, where an action has been commenced upon a contract which contains a provision for reference to arbitration, even if a reference to arbitration has been made before the commencement of the suit, the award is of no effect unless the suit has been stayed pending the arbitration. In support of this view, reliance has been placed upon the decision of the majority of the Court of Appeal in *Doleman & Sons v. Ossett Corporation* (1), which has been applied in this country in *Dinabandhu Jana v. Durga Prasad Jana* (2) and *Appavu Rowther v. Seeni Rowther* (3).

In *Doleman & Sons v. Ossett Corporation* (1) Fletcher Moulton, L. J., explained the position of the parties, when, notwithstanding an arbitration clause in the contract between them, a suit has been instituted by one of them, the law will not enforce the specific performance of an agreement to refer to arbitration, but if duly appealed to, it has the power, in its discretion, to refuse to a party the alternative of having the dispute settled by a Court of Law, and thus to leave him in the position of having no other remedy than to proceed by arbitration. If the Court has refused to stay an action or if the defendant has abstained from asking it to do so, the Court has seisin of the dispute and it is by its decision and by its decision alone,

(1) (1912) 3 K. B. 257; 81 L. J. K. B. 1032; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915.

(2) 51 Ind. Cas. 80; 46 C. 1041; 29 C. L. J. 399; 23 C. W. N. 716.

(3) 42 Ind. Cas. 514; 11 M. 115; 33 M. L. J. 177; 6 L. W. 213.



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that the rights of the parties are settled. It follows that, in the latter case, the private tribunal, if it has ever come into existence, is *functus officio*, unless the parties agree *de novo* that the dispute shall be tried by arbitration and that the action itself shall be referred. There cannot be two tribunals, each with jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. This is clearly involved in the proposition that the Courts will not allow their jurisdiction to be ousted. The same view was adopted by Farwell, L. J., when he stated that the plaintiff cannot be deprived of their right to have recourse to the Court when the agreement is a mere agreement to refer, unless the Court makes an order to that effect under section 4 of the English Arbitration Act, 1832, (corresponding to section 19 of the Indian Arbitration Act, 1899). They can, of course, deprive themselves of such rights by their own act after writ, as, for example, by going on with the arbitration and obtaining an award; but when nothing has been done by them since writ, and the only matter relied upon is an award made since writ, without their knowledge or consent, under an agreement antecedent to the action, the plea is in fact and in truth a plea of the agreement and is bad, because there is no act of the plaintiffs subsequent to the writ on which reliance can be placed. It is not a question of revoking the submission; it is a question of construction of section 4 of the Act. The appellants have contended before us that the present case falls within the exception formulated by Farwell, L. J., by reason of the letter, dated the 10th June 1913, written by the respondents to the appellants. The letter, in our opinion, has no such effect; but we must not be taken to endorse the view that the respondents could deprive themselves of their right of suit by their own acts, a position which may be difficult to reconcile with the view taken by Fletcher-Moulton, L. J., namely, that as soon as a suit is instituted the private tribunal becomes *functus officio*. Our conclusion, therefore, is that the view taken by Mr. Justice Greaves is right and that this appeal must be dismissed with costs.

FLETCHER, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.  
SECOND CIVIL APPEAL No. 774 OF 1918.  
February 2, 1921.

Present :—Mr. Justice Rafique and  
Mr. Justice Stuart.

RAM CHAND *alias* RATAN SINGH—  
PLAINTIFF—APPELLANT

*versus*

MATHURA CHAND AND ANOTHER—  
DEFENDANTS—RESPONDENTS.

*Transfer of Property Act IV of 1882, s. 53—Hindu Law—Joint family—Transfer of family property by one member to another—Decree against transferor—Property transferred, whether liable to attachment and sale—Execution of decree—Attachment of property—Claim based on transfer deed, failure of—Declaration, suit for—Decree holder, whether can plead that transfer fraudulent—Transfer, whether can be questioned by subsequent creditor.*

Inasmuch as a transfer by one member of a joint undivided Hindu family of a portion of the joint family property to another member of the family is illegal, a suit by the transferee against the holder of a decree against the transferor for a declaration that the property so transferred is not liable to attachment and sale in execution of that decree, is not maintainable. [p 847, col. .]

Per Stuart, J.—When a decree-holder attaches property which he states to be the property of the judgment-debtor, and a third party objects that the property is not the property of the judgment-debtor, because it has been transferred by a good and valid deed, and is met with the reply that the deed is a fraudulent deed, and the Court in execution decides that the deed is a fraudulent deed and upholds the attachment, it is open to the decree-holder to plead, in a subsequent suit brought against him by that third party for a declaration that the deed is a valid deed, that the deed is fraudulent. It is not necessary, in such a case, for the decree-holder to bring a suit to declare the fraudulent nature of the transfer. [p 84, col. 1.]

Where a man makes a fraudulent transfer in order to evade his existing obligations, that transfer can be impeached by creditors whose obligations are of a later date [p. 848, col. 1.]

Second appeal from the decision of the District Judge, Mainpuri, dated the 22nd/24th of May 1913.

Mr. Iqbal Ahmad, for the Appellant.

Dr. J. N. Misra, for the Respondents.

JUDGMENT.

RAFIQUE, J.—It appears that Maharaj Singh and his son, Ram Chandra *alias* Ratan Singh, were members of a joint undivided Hindu family and had some joint family property. During the time that the family was joint, a certain item of property was acquired by right of pre-emption. On the 27th of February 1903 Maharaj Singh executed a *famliknama* in favour of his son

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Ram Chandra in respect of the said property. On the 12th of December 1914 Mathura Prasad and Parbhu Dayal obtained a decree for their share of profits in a certain village against Maharaj Singh. In execution of that decree they attached the property that had been conveyed by the *tamliknama* of the 27th of February 1903 to Ram Chandra, the son of Maharaj Singh. He objected to the attachment on the ground that the property attached belonged to him. The objection was disallowed on the 7th of July 1917. Thereupon the suit out of which this appeal has arisen was instituted by Ram Chandra against the decree-holders, Mathura Prasad and Parbhu Dayal, for a declaration that the property sought to be attached by them was not liable to attachment and sale in execution of their decree. The claim was resisted on various grounds. It was urged on behalf of the defence that the *tamliknama* relied upon by the plaintiff conveyed no title to him inasmuch as the property, the subject of the *tamliknama*, was part of the joint family property and the family being joint one member of it could not transfer any portion of the joint property to the other. Moreover, section 53 of Act IV of 1882 was also pleaded in bar of the claim. The Court of first instance dismissed the claim. On appeal the decree of the first Court was affirmed. In second appeal to this Court it is contended on behalf of Ram Chandra that the defence under section 53 of Act IV of 1882 is not open to the defendants, inasmuch as they did not bring, as they ought to have brought, a regular suit to have it declared that the *tamliknama* of the 27th of February 1903 was inoperative and not binding against the creditors of Maharaj Singh. This contention is based on the case of *Subramania Ayyar v. Muthia Chettiar* (1). The contention for the plaintiff appellant is, no doubt, borne out by the case relied upon by him but it appears to me that, on the findings of the Courts below, this appeal can be disposed of without expressing an opinion on the question whether the defence under section 53 of Act IV of 1882 is open to the defendants in the present case. It has been found by the lower Appellate Court that Maharaj

Singh and Ramchandra were members of a joint undivided Hindu family at the time that the *tamliknama* was executed and that the property conveyed by the said deed was part of the joint family property. Under these circumstances, the deed of the 27th of February 1903 was an invalid deed that conveyed nothing to Ramchandra. A member of a joint undivided Hindu family cannot legally transfer a portion of the joint family property to another member of the family. The transfer being, therefore, merely a paper transaction, under which no interest passed to the transferee, the case relied upon by the learned Vakil for the plaintiff appellant is not in point. The plaintiff cannot, therefore, maintain the present suit on the basis of the deed of the 27th of February 1903. The conclusion arrived at by the lower Appellate Court, in my opinion, was a correct one and I would dismiss the appeal.

STUART, J.—While concurring with the decision of my learned colleague, that the finding to the effect that the property, which the *tamliknama* purported to transfer, was the joint property of a joint Hindu family governed by the Mitakshara Law, is fatal to the success of the appeal, I think it advisable to note a decision on two legal points, which have been argued by the learned Vakil for the appellant. The first point is this. He argued that, inasmuch as the debt due from Maharaj Singh which formed the basis of the simple money-decree against him had not been incurred (and could not necessarily have been incurred) at the time that the *tamliknama* of the 27th of February 1903 was executed, the provisions of section 53 of Act IV of 1882 had no application. His case here was, that the provisions of that section did not protect future creditors. It has usually been considered settled law that the provisions of that section do protect future creditors, but I have not been referred to any decision of this Court to support the proposition. There is, however, a decision of the Madras High Court in *Thomas Tilley v. Muthurama Chettiar* (2), which decides, that subsequent creditors are within the rule enunciated in the first clause of section 53 Act IV of 1882. The section in question reproduces the provisions

(1) 43 Ind. Cas. 651; 41 M. 612 (P. B.); 6 L. W. 750; 33 M. L. J. 705.

(2) 4 Ind. Cas. 301; 33 M. 205; 19 M. L. J. 717, (1910) M. W. N. 285; 7 M. L. T. 28.

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of the Statute of Elizabeth, 13 Eliz. C. 5, and in the interpretation of the words of that section guidance may be sought from English decisions upon the subject. The Bench of the Madras High Court, which arrived at the decision that I have just quoted, have cited certain English cases in support of their decision. I add the dictum of Wood, V. C., in *Holmes v. Penney* (3): "Where, in order to evade the Statute, a person, being considerably indebted, makes a voluntary settlement, which would be void if impeached by those who were then his creditors, and afterwards pays them off, and a new set of creditors stand in their places. . . . such a settlement would be void against the subsequent creditors, because it would be a fraud upon the Statute." It is unnecessary to quote other authorities. As I understand it, the law is clear. Where a man makes a fraudulent transfer in order to evade his existing obligations, that transfer can be impeached by creditors whose obligations are of a later date.

The second point taken by the learned Vakil is this. A Full Bench case reported as *Subramania Ayyar v. Muthia Chettiar* (1), lays down the proposition that, when a decree-holder attaches property which he states to be the property of the judgment debtor, and a third party pleads in execution that that property is not the property of the judgment-debtor, because it has been transferred by a good and valid deed, and is met with the reply that the deed is a fraudulent deed, and when the Court of execution decides that the deed is a fraudulent deed and upholds the attachment, it is not open to the decree-holder to plead, in a subsequent suit brought against him by that third party for a declaration, that the deed is a valid deed, that the deed is fraudulent, unless he has previously himself filed a suit for a declaration that the deed is fraudulent and obtained a decree. This is a decision of a very far-reaching nature. It decides finally a most important question of procedure. It drives such a decree-holder into Court to bring a regular suit, and deprives him of the right, which, at first sight, he would appear to have, to impeach the validity of a fraudulent document. It remains to be seen what

arguments were advanced by the learned Judges of the Madras High Court who arrived at this conclusion.

The judgments are very short. Ayling, J., who gave the first decision, stated that he based it entirely upon a previous decision of a Bench of the Madras High Court. He recognised the fact that the view which he took was opposed to the view taken by a Bench of the Calcutta High Court in the case of *Abdul Kader v. Ali Meah* (4). Seshagiri Aiyar, J., who had been a party to the previous decision on which Ayling, J., relied, stated that he saw no reason to change the view at which he had arrived in the former case. Bakewell, J., agreed. It is, therefore, necessary to examine the views taken by the learned Judges who decided the previous case. That case is reported as *Palaniandi Chetti v. Appavu Chettiar* (5). The facts closely resemble the facts in the appeal before us. A decree-holder attached certain property in execution of his decree; a third party came forward and claimed that property by virtue of a deed of transfer from the judgment debtor. The Court of execution found the deed of transfer to be void or voidable at the instance of the decree-holder. The attachment was upheld. The third party then brought a suit against the decree-holder for a declaration that the transfer was good. The learned Judges, who heard the appeal, decided that it was not open to the decree-holder as a defendant to challenge the validity of the deed. They held that, unless and until he had obtained a decree as plaintiff declaring the deed to be invalid, his mouth was closed, and that such a plea was not open to him.

Conlts-Trotter, J., (the learned Judge whose decision appears first in the report) stated that section 53 was a re-production of the Statute, 13 Eliz. C. 5, and that the English decisions on that Statute were authorities on the construction of the Indian section. I agree with that view. It appears to me that the next conclusion drawn by that Judge does not follow from the previous conclusion. The next conclusion is

(4) 14 Ind. Cas. 715; 15 C. L. J. 649; 16 C. W. N. 717.

(5) 34 Ind. Cas. 778; 30 M. L. J. 565; 19 M. L. T. 390.

(3) (1856) 3 K. & J. 90 at p. 99; 26 L. J. Ch. 179; 3 Jur. (N. S.) 80; 5 W. R. 132; 112 R. R. 49; 69 E. R. 1035.



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that, unless the English procedure permits the decree-holder to plead in subsequent proceedings that a transaction is fraudulent, he cannot be permitted to take such a plea in an Indian Court. For the interpretation of section 53 the Courts would undoubtedly go to the English authorities, as the section in effect contains the rule of law in England upon the point, but with regard to the question of procedure, it does not appear to me that the practice in England can bind Courts in India as the procedures in Courts in India and Courts in England are based upon different rules of practice and different enactments. Courts-Trotter, J., went carefully into the question whether such a decree-holder in England, as the decree holder in the case before him, could raise such a plea by way of a defense in a suit in which he was a defendant. He arrived at the conclusion that, in an English Court, he would not be permitted to raise such a plea. I need not discuss whether such a person in England could raise such a plea. The question which we have to decide is, whether he can raise such a plea in India, and it depends for its answer on a decision whether there is anything in the Civil Procedure Code or elsewhere which forbids him to take such an attitude. I have been unable to discover anything in the Civil Procedure Code, or any other law, which prevents such a person from taking such an attitude, and, in the circumstances, applying the general principles that Courts should not add anything to the existing law, and not narrow the door open to litigants, I decide that it was open to the respondents to take the position that they did. The decision of the other Judge, Seshagiri Aiyar, J., was to the same effect as the decision of Courts-Trotter, J. The view of the Madras High Court is opposed to the view taken by the High Court in Calcutta. In *Abdul Kader v. Ali Meek* (4) two learned Judges of the Calcutta High Court laid down that, in such circumstances, the decree holder could bring an independent suit himself, but that he could also do as a defendant what he could have done as a plaintiff. In *Hen Ohandra Sarkar v. Lalit Mohan* (6) a Bench of the Calcutta High Court arrived at the same principle in slightly different circum-

stances. That Bench laid down that, where a mortgage executed by a guardian legally appointed for a minor, was executed without the permission of the Court the mortgage was voidable at the instance of the minor. The decision proceeds that it is not necessary for the minor after attaining majority to set aside the transaction, but he may declare his will to rescind by way of defense in an action against him. The views taken in Calcutta appear to me to be based upon a correct construction of the law on the subject. I, therefore, consider that there is no force in either of the pleas raised by the learned Vakil for the appellant and concur in the order dismissing this appeal with costs.

By the Court.—The order of the Court is, that the appeal fails and is dismissed with costs.

*Appeal dismissed.*

# ALLAHABAD HIGH COURT.

Civil Revision No. 157 of 1919.

November 16, 1920.

Present:—Mr. Justice Piggott and  
Mr. Justice Walsh.

RATAN LAL AND ANOTHER—APPLICANTS  
versus

MUHAMMAD HAMIDULLAH KHAN—  
OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), s. 115, O. XXIII, r. 1—Withdrewal of suit not permitted by Trial Court—Permission granted by Appellate Court—Reason—Discretion of Judge—High Court, whether will interfere.*

The High Court will not interfere in revision in a case in which the lower Court has exercised a judicial discretion in a proper manner. [p. 900, col. 2.]

Plaintiff applied to the Trial Court for permission to withdraw his suit with liberty to bring a fresh suit; the application was disallowed and the suit eventually dismissed. On appeal, the application was allowed and was also allowed on the ground, among others, that there was a formal defect in the framing of the issue.

But, the order was an undoubted exercise of judicial discretion by the Appellate Court, the High Court would not interfere. [p. 900, col. 2.]

(6) 14 Ind. Cas 515; 16 C. W. N 715; 16 C. L. J. 537.

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Civil revision from an order of Additional Judge, Sabaranpur, dated the 30th May 1919.

Messrs. S. A. Haidar and Surendro Nath Sen, for the Appellants.

Dr. S. M. Sulaiman, for the Opposite Party.

**JUDGMENT.**—This is an application in revision against an order by which a Court of first appeal, setting aside the decree of the Trial Court dismissing the suit, substituted for that decree an order under Order XXII, rule 1, of the Code of Civil Procedure, permitting the plaintiff to withdraw from the suit with liberty to institute a fresh suit in respect of the subject matter of the same. The jurisdiction of an Appellate Court to pass such an order has not been challenged, at any rate since the decision of a Bench of this Court in the case of *Afsul Begam v. Akbari Khanam* (1). It is contended that the lower Appellate Court, in the present instance, acted in the exercise of its jurisdiction illegally and with material irregularity, because it has not given any reasons for granting the plaintiff permission to withdraw, such as to satisfy the requirements of Order XXIII, rule 1, clause (2) of the Code of Civil Procedure. The case has been referred to a Bench of two Judges, because of a presumed conflict of authority as to the limits of the revisional jurisdiction of this Court in such a matter. If we confine our attention to cases decided by a Bench of two Judges, there are only three cases calling for notice. There are *Radha Rawan v. Tula Ram* (2), *Afsul Begam v. Akbari Khanam* (1) and *Jhunku Lal v. Bisheshwar Das* (3). These cases are not irreconcilable, and, in our opinion, they were all three rightly decided. The first lays down the proposition that, where in the judgment of a Subordinate Court there is nothing to show that that Court, when granting a plaintiff permission to withdraw from his suit with liberty to institute a fresh suit, applied its mind to the provisions of the Legislature on this point, or came to any judicial decision as to whether or not the plaintiff had made out an adequate case for the granting of such permission, this Court will interfere in revision.

It is worth noticing that in the case of *Radha Rawan v. Tula Ram* (2), this Court merely ordered the Court below to take the case back on to its register of pending cases and to dispose of it according to law. The order of this Court does not preclude the Court below, upon a proper application based upon valid grounds, from re-considering the question whether the plaintiff in that particular litigation ought or ought not to have been allowed the permission which he sought. The other two cases are authority for this proposition that, where a judicial discretion has been exercised, this Court will not interfere, merely on the ground that, had the matter come before this Court as a substantive application, or by way of appeal, it might not have taken the same view of the facts of the case in their application to the provisions of Order XXIII, rule 1 of the Code of Civil Procedure as commended itself to the Court below. Applying this proposition of law to the facts before us, we think that, in this case, the lower Appellate Court did apply its mind judicially to the question properly in issue before it. As a matter of fact, the plaintiff's application for leave to withdraw had been made in the first instance to the Trial Court and rejected by that Court, so that the Appellate Court, was re-considering a matter upon which the Trial Court had pronounced a judicial opinion. The learned District Judge has recorded his opinion that there was a formal defect in the frame of the suit, and that there were otherwise sufficient grounds in law for allowing the plaintiff to withdraw and to institute a fresh suit on the same subject matter. We think that, in this case, a judicial discretion was undoubtedly exercised and that it is not for us in revision to pursue the matter further. We dismiss this application with costs.

*Application dismissed.*

(1) 28 Ind. Cas. 857; 13 A. L. J. 444; 37 A. 326.

(2) 17 Ind. Cas. 647; 10 A. L. J. 393.

(3) 46 Ind. Cas. 71; 16 A. L. J. 405; 40 A. 612.

JAGJIVAN HARIBHAI V. KALIDAS MULJI.

MOHAMMAD ASKARI V. NISAR HUSAIN.

## BOMBAY HIGH COURT.

SECOND CIVIL APPEALS NOS. 3 AND 8 OF 1919.

August 12, 1920.

*Present*:—Sir Norman Macleod, Kt.,  
Chief Justice, and Mr. Justice Fawcett.

JAGJIVAN HARIBHAI—DEFENDANT—

APPELLANT

versus

KALIDAS MULJI—PLAINTIFF—RESPONDENT

AND

KALIDAS MULJI PLAINTIFF—APPELLANT

versus

JAGJIVAN HARIBHAI—DEFENDANT—

RESPONDENT.

*Custom—Pre-emption—Agricultural land—Hindus of  
Surat—Custom contrary to personal law, when to be  
enforced.*

By a long established custom Hindus in Surat have adopted the Muhammadan law of Pre-emption with regard to houses, but it is doubtful whether they have adopted any law which gives a right of pre-emption with regard to agricultural lands.

It is not advisable to extend any customary law which is in conflict with the personal law of the parties, unless there is evidence that such alien law has been adopted.

Cross-appeals from the decision of the Joint First Class Subordinate Judge, A. P., at Surat, in Appeal No. 50 of 1917, reversing the decrees passed by, and remanding the suit to the Subordinate Judge at Surat, in Civil Suit No 58 of 1916

Messrs. M. H. Mehta and M. R. Vidyarthi,  
for the Plaintiff.

Mr. M. B. Dave, for the Defendants.

**JUDGMENT.**—The plaintiff sued for a declaration that he was entitled to a right of pre-emption in reference to the plaintiff-land, which admittedly was agricultural land. In the Trial Court the second issue was: "Has plaintiff the right of pre-emption with respect to the land in suit whether according to law or to any local custom." The third issue was: "Does defendant show that the right of pre-emption does not extend to or cannot be exercised in respect of agricultural land?" That issue was founded on the contention in the defendants' written statement that the right of pre-emption did not extend to agricultural lands. The Trial Court dismissed the suit, finding Issues Nos. 2 and 3 in the negative. In appeal this decree was set aside and the case was remanded for disposal on the merits after substituting this issue: "Does plaintiff prove the existence of an ancient and invariable custom

of pre-emption among Hindus of the Surat District in respect of agricultural lands." for the original Issues Nos. 2 and 3. I think it can no longer be doubted that this Court has recognised that Hindus in Surat have adopted the Muhammadan Law of Pre-emption by a long established custom with regard to houses. The only cases which have come before the Courts either from the District of Surat or from other Districts of Gujarat have related to houses, and it must be certainly an open question whether Hindus have adopted any law which gives a right of pre-emption with regard to agricultural lands. It even seems doubtful, from the authorities on Muhammadan Law, whether Muhammadans themselves recognised the right of Muhammadans to pre-emption with regard to agricultural lands. However that may be, it is quite possible that, even assuming the Muhammadans themselves recognised that right, Hindus from the District of Surat recognised that the right of pre-emption, as far as they were concerned, should be confined to pre-emption of houses and it may well have been, considering the uncertainty of Muhammadan Law, they did not adopt any such law with regard to agricultural land.

It is certainly not advisable, in my opinion, to extend any customary law which is in conflict with the personal law of the parties unless there is evidence that such alien law has been adopted and it is certainly desirable and right that the issue set out by the learned Appellate Judge should be tried.

I think, therefore, both the appeals fail and should be dismissed with costs.

*Appeals dismissed.*

## ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 24 OF 1920.

November 18, 1920.

*Present*:—Mr. Justice Piggott and  
Mr. Justice Walsh.

S. MOHAMMAD ASKARI—DEFENDANT—

APPELLANT

versus

S. NISAR HUSAIN alias MUNNE

PLAINTIFF—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XL, r. 1

*Plaintiff's application for appointment of a Receiver of the property of the defendant, who is a minor, and for the appointment of a Receiver of the property of the defendant, who is a minor, and for the appointment of a Receiver of the property of the defendant, who is a minor.*



## MOHAMMAD ASKARI v. NISAR HUSAIN.

Where a person is in possession of trust property as manager on behalf of the trust, the mere fact that he is a poor man from whom probably a decree for mesne profits, in the event of such a decree being passed, might prove difficult of realisation, is not an adequate reason for displacing him by the appointment of a Receiver, especially where there is no allegation of waste or misappropriation. [p. 903, col. 1.]

Where in connection with an application for the appointment of a Receiver of trust property by dispossessing the manager of the trustees, the latter's objection to such an appointment is disallowed and the Court proceeds to appoint a Receiver, the mere fact that he suggested the name of a person to be so appointed, would not preclude him from questioning the appointment on appeal. [p. 902, col. 2.]

First appeal from the order of the Subordinate Judge, Basti, dated the 4th of February 1920.

Mr. S. Agha Haider, for the Appellant.

Mr. Mukhtar Ahmad, for the Respondents.

**JUDGMENT.**—The suit out of which this appeal arises relates to property in the Basti District belonging to a lady, named Ashrafunnisa, who died on the 18th of May 1917, possessed of immoveable property of considerable value, not only in the Basti District but also in the Gonda District of Oudh. Admittedly, the said lady had been on bad terms with her brother, Ata Husain, and there had been previous litigation between them in the Oudh Courts. On the 28th of April 1917, it is alleged that *Musummat Ashrafunnisa* had executed a deed of endowment, settling the whole of her immoveable property on certain trustees for certain specific purposes. On her death a dispute broke out between the present respondents and the appellant, Mohammed Askari a former general attorney of the deceased lady, who was named the principal trustee in the deed of endowment. The question of possession over the estate of the deceased lady was fought out in the first instance upon applications for mutation of names in the Revenue Courts both of the Gonda and Basti Districts. In the result Mohammed Askari obtained possession as the manager on behalf of the trust. The present suit was brought in the Court of the Subordinate Judge of Basti and the presentation of the plaint was accompanied by an application for the appointment of a Receiver. This application was supported by a very brief affidavit. The statements made in this affidavit are, that the income of the property in suit is very considerable; that

Mohammed Askari himself is a poor man, possessed of little or no immoveable property, and that, in the event of their succeeding in their suit, the plaintiffs, who claim as heirs-at-law of *Musummat Ashrafunnisa*, would find it difficult to realise from Mohammed Askari any decree for mesne profits which might be passed in their favour. On the basis of this affidavit, the Trial Court passed an order on the 15th of March 1919, stating that it proposed to appoint a Receiver, and called on the parties to suggest the names of suitable persons to take charge of the property in suit in that capacity. Mohammed Askari appealed to this Court against that order, but his appeal failed upon a finding that it was premature, inasmuch as a right of appeal only accrued to him upon the actual appointment of a Receiver. The case then went back to the Trial Court and it is not denied that Mohammed Askari himself suggested to the Court that, if a Receiver were to be appointed, the Deputy Commissioner of Gonda, in his official capacity, would be the most suitable person for such appointment. The Court accordingly passed an order formally appointing the Deputy Commissioner of Gonda to take charge of the property in suit as Receiver and the appeal before us is against this order. It is not denied that an appeal lies. A suggestion has been thrown out that Mohammed Askari is precluded from maintaining this appeal, by reason of the fact that he had himself suggested the Deputy Commissioner of Gonda as a suitable Receiver. Under the circumstances which have already been set forth in this order, we think it clear that Mohammed Askari is entitled to maintain this appeal. He has all along protested that no case was made out for the appointment of a Receiver; that it was neither just nor convenient to any one that the management of the trust property by the trustees should be interrupted, merely by the institution of a claim against the said property. He only suggested the Deputy Commissioner of Gonda as a suitable person to take charge of the property as Receiver, if the Court was bent on appointing one. It would be most unjust, more particularly in view of this Court's order dismissing his previous appeal, to hold that he is precluded from maintaining the present one merely because, when the appointment of a Receiver

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became inevitable, he exerted himself to secure the appointment of a suitable person. On the merits there is very little to be said. The case for the appellant simply is, that the Court below had before it no materials such as to justify the appointment of a Receiver. The allegation that the trustee in actual possession of the property in situ as manager is himself a poor man, from whom personally a decree for mesne profits in the event of such a decree being passed might prove difficult of realisation, is not an adequate reason for passing the order under appeal. The Trial Court, if it thought that steps were necessary to safeguard the interests of the parties *pendente lite*, might have taken upon itself to enquire into such matters as the income of the trust property and the expenses necessarily involved in the immediate carrying out of the objects prescribed for the trust. It is quite possible that, if this had been done, the Court might, with the consent of the defendants to the suit, who are the entire body of trustees, have made arrangements for the submission of accounts *pendente lite* and the deposit of surplus profits in such a manner as fully to safeguard the plaintiffs in the event of their success. The principles which should govern the action of the Courts in the matter of the appointment of a Receiver were laid down long ago in the case of *Srimati Prosonomoyi Devi v. Beni Madhab* (1). We are in full agreement with what is there stated as to the need for careful enquiry and the exercise of due caution before a Trial Court passes an order appointing a Receiver, the effect of which is to dispossess the person or persons for the time being in the enjoyment of immoveable property. It has not been alleged in this case against Mohammed Askari personally, or any of the trustees, that he or they are wasting the corpus of the property, and the Court below had before it no allegation that the trustee, or any of them, were misappropriating the income of the property for purposes other than those laid down in the trust deed. On this state of facts, it seems to us that the order under appeal cannot be maintained. We are naturally reluctant to interfere with the exercise of discretion in such a matter on the part of a Trial Court, more especially after a Government official

(1) 5 A. 556; A. W. N. (1883) 136; 3 Ind. Dec. (N. S.) 511.

has been appointed trustee and has presumably taken charge of the property, but we do not find it possible to uphold the order of the Court below in this case. The result is, that this appeal succeeds, and we set aside the order appointing the Deputy Commissioner of Gonda to take charge of the property in suit as trustee. The Court below will replace the defendants, the trustees under the deed of April 28th, 1917 in such possession as they were previously enjoying. There is nothing, however, to prevent the Court from receiving accounts from the Deputy Commissioner of Gonda regarding his period of management and passing suitable orders as to the disposal of any balance which might have accumulated to the credit of the estate during this period of management. We allow the appellant his costs of this proceeding, here and in the Court below.

*Appeal decreed.*

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 770 OF 1919.

August 12, 1920

Present:—Sir Norman Macleod, Kt.,

Chief Justice, and Mr. Justice Fawcett.

CHHOTALAL KARSANDAS—DEFENDANT

—APPELLANT

versus

VISHNU GANESH GOKHALE—

PLAINTIFF—RESPONDENT.

*Limitation Act IX of 1908, Sch. I, Arts 120, 132—Mortgage, payment of principal—Subsequent mortgage, invalid—Charge, whether created—Declaration of charge, suit for—Limitation.*

Plaintiff lent defendant a sum of money to enable the latter to pay off a mortgage on his property. Defendant executed a mortgage in favour of the plaintiff for the amount of the sum lent which was, however, invalid for want of due attestation:

Held, (1) that the plaintiff was entitled to a declaration that he had a charge upon the property to the extent of the money advanced by him; [p. 904, col. 2.]

(2) that the limitation for a suit to declare the charge was provided in Article 120 of Schedule I to the Limitation Act and began to run from the date on which the money was advanced. [p. 905, col. 1.]

Article 32 of Schedule I to the Limitation Act applies only to a suit brought to enforce a charge in existence and recognised at the date of the suit. [p. 905, col. 1.]

Second appeal from the decision of the Assistant Judge, Thana, in Appeal No. 27 of 1916, reversing the decree passed by the

CHHOTALAL KARSANDAS V. VISHNU GANESH GOXHALE.

Subordinate Judge at Bassein, in Civil Suit No. 143 of 1914.

Mr. Jayakar (with him Mr. W. B. Pradhan), for the Appellant.

Mr. P. B. Shingne, for respondents Nos. 1 to 3.

**JUDGMENT.**—The plaintiff sued to recover the sum of Rs. 3,553-11-0 and costs with future interest by sale of the mortgaged property.

The mortgage is dated 30th of November 1902. It is common ground that the mortgage-deed was not properly attested, and, therefore, the suit on the mortgage must fail. The plaint was allowed to be amended so as to enable the plaintiffs to ask the Court to declare that they were entitled to subrogate and fall back upon the previous deed of the 29th December 1887, and that the claim on that deed was not time-barred as it was acknowledged in the deed of 1902, the Satekhat of 22nd August 1901, and also the *Vasul* mentioned in the plaint.

The facts of the case are simple. In 1887 the mortgage of the plaint-property was executed in favour of four brothers. In 1901, the four brothers partitioned and they were paid off on the day that the last payment was made on account of the mortgage. Ganesh, the son of one of the mortgagees, agreed to pay the mortgagor Rs. 4,000, and we may take it as admitted that Ganesh paid Rs. 4,000 to enable the mortgagor to pay what was required to make the last payment on account of the mortgage of 1887. No doubt, it was intended that Ganesh should get a mortgage of the property to secure the re-payment of the Rs. 4,000 and the parties thought that they had executed a deed of mortgage for that amount in November 1902. That mortgage not having been executed in accordance with law must be ruled out of consideration altogether.

Then the question arises, what is the position of the plaintiff who had, on the 22nd August 1901, advanced the sum of Rs. 4,000 to enable the mortgagor to pay off the mortgage on the understanding that a further mortgage would be executed by the mortgagor? I do not think that there will be the slightest doubt that, though Ganesh had no legal title to the plaint-property, he had a right to get a mortgage or to be placed in the same position as the previous mortgagee,

and that right would be recognized if he came to a Court of Equity.

It may be said that, in India there is no distinction between law and equity, but that makes no difference on a question of this kind, except that it only necessitates a little change in phraseology, and it may be said that Ganesh had no right in law to be considered as having any interest in this property until he came to a Court of law, which administers doctrines of equity, to have his right established. That makes little difference where it can be said that Ganesh can ask the Court for a declaration that he is entitled to a charge on the property to the extent of the money advanced, or that he is entitled to be put in the same position as the mortgagees who have been paid off with his money. We have been referred to the case of *Bu'ler v. Rice* (1) where Warrington, J., at page 282 says: "The statement of claim proceeds on the well-known equitable doctrine that, if a stranger pays off a mortgage on an estate he presumably does not intend to discharge that mortgage, but to keep it alive for his own benefit. The statement of claim asks for a declaration that the plaintiff is entitled to a charge on the Manor Road property for £150 and interest." And, again, at page 283: "The plaintiff did not know there was any other property; he intended to keep alive the security on the Manor Road property, and that intention was not affected by the fact that the Bank also held another security. He is entitled to a declaration that he has a right to a charge on the Manor Road property for £150 and interest at 5 per cent., that being the rate of interest charged by the Bank, and to have his security enforced by the usual foreclosure judgment in the case of an equitable mortgage."

Now, there is no doubt that the payment in 1901 created a set of circumstances which enabled the person who paid the money to establish his right to a charge. But with regard to the property sold, the mere payment would not give the person who paid it any right against the property, either to go into possession or to sell it. It would only give him a right to ask the Court to come to his assistance, on the ground that the facts which he relied upon created a charge. I think,

(1) (1910) 2 Ch. 277 at p. 282; 79 L. J. Ch. 652 103 L. T. 94.



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therefore, the question of limitation in this case is one of primary importance. This is not the case of a party coming into Court to enforce a charge by a suit, which is provided for by Article 132 of the Indian Limitation Act, which only relates to a suit brought to enforce a charge in existence and recognised at the date of the suit.

I cannot agree with the learned Pleader for the respondent when he says that, in a suit of this kind, it is not necessary that the plaintiff should ask for a declaration. That declaration has to be made before the Court can exercise its jurisdiction over the property in suit. Otherwise, the plaintiff can only be considered as a simple creditor who has made a payment to his debtor for a particular purpose.

An equitable mortgagee has a lien or interest in the property. He has possession of the title-deeds, but cannot go into possession, and he cannot assert the right to sell the property unless he comes to a Court and gets a declaratory decree that he is entitled to a charge on the property. It appears to me that the only Article in the Indian Limitation Act which can apply to a suit of this nature is Article 120. Therefore, the plaintiff is barred unless he filed his suit within 6 years of the payment of the Rs. 4,000. Even if the period is twelve years, the plaintiff would be no better off, because the suit was filed in 1914. I think the Trial Judge has taken the right view, when he says at paragraph 29 of the judgment:—"The question thus arises whether the plaintiff's claim on the lien thus created by law is in time. The charge was created on the date of payment, 22nd or 23rd August 1901. The suit is filed on 19th November 1914 and thus the point is, if there are acknowledgments of such part payments or payments of interest as would extend the period of limitation. Payments are not relied upon."

Thus, it is found that there was nothing after the 23rd August 1901 which would start a new period of limitation running. The plaintiff's claim is, therefore, barred by limitation. The result is, that the appeal is allowed and the suit dismissed. There will be no order as to costs.

*Appeal allowed.*

ALLAHABAD HIGH COURT.  
SECOND CIVIL APPEAL No. 336 OF 1919.  
November 18, 1920.

*Present:*—Mr. Justice Piggott and  
Mr. Justice Walsh.

Lala GANPAT RAI—PLAINTIFF—  
APPELLANT

*versus*

Musammât HUSAINI BEGAM AND OTHERS  
—DEFENDANTS—RESPONDENTS.

*Limitation Act IX of '90s), Sch. I, Art. 11A—  
Sale in execution—Auction-purchaser resisted in  
taking possession—Investigation by Court—Court re-  
fusing to put him in possession—Suit to establish title  
—Limitation.*

Where in execution of a decree property is sold, but the auction-purchaser is resisted in taking possession by a third party who claims the property as his, and the Court, after investigation, refuses to put the auction-purchaser in possession, the auction-purchaser's remedy is to institute a suit to establish his right to possession of the property, within the period prescribed by Article 11A of Schedule I to the Limitation Act [n. 906, cols 1 & 2.]

Second appeal from a decree of the Additional Judge, Moradabad, confirming a decree of the Mansif, Bijnor.

Mr. Priya Nath Banerji, for the Appellant.

Mr. Zukhtar Ahmad, for Dr. S. M. Sulaiman, for the Respondents.

JUDGMENT.—The father of the plaintiff in this case held a decree against one Mazhar Husain, in execution of which he brought to sale, as the property of his judgment debtor, one entire house, and himself purchased it at auction on the 25th of February 1905. On attempting to take possession he was resisted by Musammât Iehrat Begam, one of the sisters of Mazhar Husain, who claimed the entire house as her own property. He asked for the assistance of the Court, but after an investigation of his claim the Court refused to put him in possession. The present suit was instituted on the 26th of February 1917, apparently on the last possible day of limitation, assuming that the plaintiff was entitled to bring his suit within twelve years of the date of the auction-purchase. The plaint is wholly silent as to the attempt made to obtain possession through the Court in the year 1906. On the face of it, it is a suit upon title, claiming possession by purchase of a 2/5th share in the house as the property of Mazhar Husain acquired by the plaintiff's father on the 25th of February 1905. There was a long list of defendants, including the heirs of

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Mazhar Husain and the heirs of his sisters. The suit was resisted by the latter and the main defense set up was one of limitation. This plea involved two distinct points. It was pleaded that *Musammât Ishrat Begam*, whatever her title to the house in question, had been in proprietary and adverse possession of the same for a long period and had, in fact, perfected a good title by prescription as against Mazhar Husain, even before the date of the auction-sale. Secondly, the plea taken was with reference to Article 11 A of the First Schedule to the Indian Limitation Act, No. IX of 1908, the point being that the suit should have been brought within one year of the adverse decision of the Execution Court which was dated the 21st of July 1906. The Courts below have dealt with this latter point only. Both Courts have held that the suit is barred under the Article above mentioned. We have before us a second appeal by the plaintiff. The real question is, whether the present suit is or is not one to establish the right to present possession of the property comprised in the order of the 21st of July 1906, claimed in that year by the plaintiff's father. The Court of first instance has relied upon a decision of the Bombay High Court, in the case of *Bhimappa v. Irappa* (1), in which a somewhat similar attempt by a plaintiff to get round the provisions of the Limitation Act was defeated. The case is not entirely on all fours with the present. Indeed, it is obvious that each case of this sort will require to be judged with reference to its own facts. As put before us in argument, the plaintiff's case is that he is not really attacking the decision of July the 21st 1906, but is acquiescing in that decision, inasmuch as he admits that Mazhar Husain was, on the date of the auction sale, the owner of a  $\frac{2}{5}$ th share only in the house in question. He asks us to interpret the decision of the Execution Court as merely affirming the right of *Musammât Ishrat Begam* to some undivided share in the house. Hence, he claims that the provisions of Article 11 A of the Schedule to the Limitation Act have no bearing on the facts of this case, and that he retained his right to sue upon the title acquired by his father on the date of the auction-purchase. A good deal necessarily depends on the interpretation put upon the

Execution Court's order of July 21st 1906. On the whole, we think that the Courts below have proceeded upon a common sense view of the facts and that their decision is a sound one. In 1906 the plaintiff's father claimed the entire house on the strength of the title derived by him at an auction-sale, at which the house had been sold as the property of Mazhar Husain. He now says that he is prepared to admit that Mazhar Husain was the owner of a  $\frac{2}{5}$ th share only in the house and he asks the Court to separate that share by metes and bounds from the rest of the house and to give him possession over the same. On the principle that the greater includes the less, it seems reasonable to hold that the right now claimed to present possession over a portion of the house is included in the right claimed in the year 1906 to present possession over the entire house, so as to bring into operation the provisions of Article 11 A of the Limitation Act Schedule. It must be remembered that the plaintiff's father had been met by a claim to the entire house on the part of *Musammât Ishrat Begam* and not merely to a portion of the same. It is not possible to say with certainty on what precise ground the Execution Court's decision of July 21st, 1906, is to be taken to have proceeded. The broad fact remains that the Court recorded its opinion that the auction-purchaser had failed to make out an adequate case in support of this claim and was not entitled to the assistance of the Court by way of delivery of possession under section 345 of the former Code of Civil Procedure. The order very definitely refers the auction-purchaser to his remedy by way of a regular suit. On the face of the record, there seems something fishy about this claim, held up for such a long period of years after the adverse decision of July 1906 and finally preferred on what, according to the plaintiff himself, was the last possible day of limitation. For these reasons, we think that the decision of the Courts below was correct and we dismiss this appeal with costs.

*Appeal dismissed.*

ANDANISWAMI v. TOTADSWAMI.

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 822 OF 1917.

August 11, 1920.

Present:—Sir Norman Macleod, Kt.,  
Chief Justice and Mr. Justice Fawcett.

ANDANISWAMI—PLAINTIFF—APPELLANT

versus

TOTADSWAMI—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 9, O. XIV, r. (5)—Declaration of right to be carried in procession, suit for, whether maintainable—Civil Court, whether competent to decide purely religious disputes—Issues—Issue inconsistent with plaintiff's case.*

Plaintiff sued for a declaration that he, as Jagadguru, was entitled to be carried in procession through the public streets in a cross-palanquin on certain occasions, and for an injunction restraining the defendant from obstructing him in the exercise of that right:

Held, that the suit was not maintainable. [p. 908, col. 2.]

To decide disputes as to precedence or privilege between purely religious functionaries is no part of the business of the Civil Courts. [p. 909, col. 1.]

An issue, which is inconsistent with the case made out by the plaintiff, ought not to be admitted [p. 908, col. 1.]

Second appeal from the decision of the District Judge Dharwar, in Appeal No. 53 of 1916, confirming the decree passed by the Subordinate Judge at Gadag, in Civil Suit No. 277 of 1914.

Sir Thomas Stringman (with him Mr. S. V. Palekar), for the Appellant.

Mr. B. K. Dhurandhar (with him Mr. V. R. Sirur) for Respondents Nos. 1 to 5 and 8.

## JUDGMENT.

MACLEOD, C. J.—The plaintiff alleges that he is one of the Jagadgurus of the Lingayats that he has many branch Maths in the Presidencies of Bombay and Madras, in the territories of the Patwardhan Chiefs and of His Exalted Highness the Nizam; that plaintiff's Gurus before him had and plaintiff has the right of going in procession seated in a cross palanquin adorned with and accompanied by Panch-Kalash and Birudavali; that they had and have that right as Jagadguru; that they have a right that their disciples should show them that honour in their own village and also when they go out visiting in public streets; that the plaintiff's Gurus had and plaintiff has exercised this their right since ancient times; that this procession in a cross-palanquin is taken out in plaintiff's village Mondarigi every year on Vaishak Sud 10 and 11, last Monday and Tuesday

in every Shrawana, on Ashwin Sud 10 and at the beginning of Margashirsha without fail. It is taken out also when plaintiff is called by his disciples for worshipping his feet at their homes at all times of the year, it is taken out also when the plaintiff enters villages on his tours and visits his disciples' houses for the worshipping of his feet, that the plaintiff intended to take out a cross palanquin procession on last Monday Shrawana of Shaka 1834, that the 1st defendant induced defendant No. 2 to make an application to the 2nd Class Magistrate of Mondarigi on the 6th of September 1912 and the other defendants to the Sub-Divisional Magistrate that there would be a breach of the peace; that the latter Magistrate stopped the plaintiff's procession on the 9th of September 1912, and that appeals were preferred, but failed and hence the suit. The plaintiff prays for an injunction against the defendants that they should not obstruct the plaintiff in going in a cross palanquin procession with a Panch-Kalash and Birudavali on Vaishak Sud 10 and 11, on last Monday and Tuesday in Shrawana, on Ashwin Sud 10 and in the beginning of Margashirsha in Mondarigi and elsewhere at other times.

The defendants Nos. 1 and 3 contend that the Civil Courts have no jurisdiction to try this suit, that the plaintiff is not a Jagadguru but defendant No. 1's disciple; that disciples before him called Andanmari, like the plaintiff, denied that they were defendant No. 1's disciples (Shishyas) and the High Court held that they were defendant No. 1's Shishyas or disciples; that the Andanmari before the plaintiff had admitted that he was defendant No. 1's disciple and had passed a registered deed to that effect that such Maris have no such right of going in a cross palanquin as claimed in the plaint, that they have no right to take out the procession mentioned in the Schedule attached to the plaint, and that the 1st defendant alone has the right to call himself Jagadguru and go in a cross-palanquin with Panch-Kalash and Birudavali and not the plaintiff.

It may be said, therefore, on these pleadings that the plaintiff claimed to have the right of being carried in a cross palanquin in procession as Jagadguru. That was a right of dignity and privilege not for every member of the public, but for himself as



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Jagadguru. It was the plaintiff who claimed to be carried in procession by his disciples in order that they might worship his feet in their homes, and to be carried in procession on particular days of the year.

The first issue raised in the Trial Court was: Is the right to parade in the cross-palanquin as described in the plaint a general right exercisable by any subject of His Majesty? It is difficult to see at first sight how that issue came to be raised. Certainly, it is not relevant to the pleadings. But when issues are raised under Order X.V, rule 1 (5), the Court shall, after reading the plaint and the written statement, if any, and after such examination of the parties as may appear necessary, ascertain upon what material proposition of fact or of law the parties are at variance and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend. It appears from the record that the plaintiff never attended the Court and, therefore, he could not have been examined by the Judge. It seems obvious that the plaintiff's Pleader must have seen the danger he was in of losing his case, as he insisted upon plaintiff's claiming the privilege of being carried in a cross-palanquin for himself only as Jagadguru. He must have argued before the Court that the plaintiff's suit could succeed because he, as a member of the public, had the right to use the road in any way he pleased provided he did not inconvenience the other members of the public who had equal rights themselves. But it appears to me that this issue ought never to have been admitted. It is absolutely inconsistent with the plaintiff's own case and I cannot imagine that a party in the position of the plaintiff would ever have filed this suit claiming the right to be carried in procession in a cross-palanquin not because he was a Jagadguru, but because he was a member of the public. In *Mahomed Buksh Khan v. Hosseini Bibi* (1) their Lordships of the Privy Council dealt with the question of raising issues inconsistent with the case made out by the plaintiff. Their Lordships at page 86 said: "On the 16th of March 1882 issues were settled. Amongst

the issues was this: '2nd. Whether the Hibbanama on behalf of Shahzadi Bibi is genuine and valid and executed with her knowledge and consent, or whether it was manufactured without her knowledge and consent, or whether it was executed under undue influence?' In their Lordships' opinion the latter part of that issue ought not to have been admitted. It was absolutely inconsistent with the case made by plaintiff. It only becomes possible, on the assumption that the alleged cause of action is unfounded. There was another issue which also was only admissible, on that assumption, namely: '3rd. Whether in case the said Hibbanama is proved to be genuine it is invalid on any ground according to Muhammadan Law?'" Applying those remarks to this case, this issue only becomes possible on the assumption that the alleged cause of action in the plaint is unfounded, namely, plaintiff's claim that he as Jagadguru was entitled to be carried in procession in a cross-palanquin as a religious dignity and privilege. That cause of action disappears entirely if the plaintiff were to allege that he was entitled to be carried in that way, not because he was a Jagadguru, but because he happened to be a member of the public entitled to use the street in any reasonable way. The suit was dismissed by the Trial Court as it found on the second issue that this was a special right enjoyable by the defendant No. 1 and other high priests of the Hindus like him, that the plaintiff had no right to ride in a procession seated in a cross palanquin as alleged in the plaint in public streets, and that the first defendant had an exclusive right of riding in a cross palanquin as against the plaintiff. But the lower Court also held that it had no jurisdiction to try the suit. The learned Judge said: "I shall examine whether a suit for this honour and dignity, unaccompanied by any pecuniary profits and not attached to any particular office, shall lie in a Civil Court under section 9 of the Civil Procedure Code. I think that suits for an office are of a civil nature, but, in my opinion, a suit for vindication for a mere dignity, though connected with an office, is not. The present suit is not for a claim to an office, but for a claim to a mere honour and dignity on account of an office and is, I think, not maintainable in a Civil Court. It has been

(1) 15 I. A. 81 at p. 86; 15 C. 684 (P. C.); 12 Ind. Jur. 29; 5 Sar. P. C. J. 175; 7 Ind. Dec. (N. S.) 1040.

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held that the claim by a Swami or arch-priest that he is entitled to be carried on a high road in a cross-palanquin will not be entertained by a Civil Court. What is claimed in such a suit is a mere honour and dignity, a mark attached to the office of a Swami. It has been laid down that Civil Courts should discourage, as far as possible, claims of so unsubstantial and objectionable a nature and they ought not to be involved in the determination of trivial questions of dignity and privilege although connected with an office." Reference was made to *Sri Sunkur Bharti Swami v. Sidha Lingayah Oharanti* (2). In first appeal the learned Judge said: "In considering the authorities the right claimed by the appellant may be regarded in two aspects, first, as a religious dignity and privilege, and secondly, as a right to take a procession through public streets. From either point of view the current of Bombay decisions is against the appellant. In *Madhusudan Parvat v. Shree Madhav Teerth* (3) it has been held that 'to decide disputes as to precedence or privilege between purely religious functionaries is no part of the business of the Civil Courts, nor will they grant injunctions to prevent preachers from preaching where they like, under any title they please, provided no office or property is disturbed or interfered with.' In this case there is not the slightest suggestion that the appellant's office as the head of Mundarigi Math has in any way been affected." The learned Judge also referred to a Madras case—*Sadagopachariar v. Rama Rao* (4)—which was cited for the proposition that every member of the public and every sect has a right to use the public streets in a lawful manner. The learned Judge very rightly remarked that every sect may have the right to carry their leader in a cross-palanquin. The question is, whether the Court will enforce that right without proof of particular damage. It appears, therefore, to me that the authorities are perfectly clear. Civil Courts will not entertain a claim of this nature and, really, the argument that was addressed to us in second appeal was that we ought to deal with the case as if the plaintiff was

suing as a member of the public claiming a such to be entitled to be carried in a cross-palanquin if he chose to adopt that method of procession. As I pointed out, that was not the plaintiff's case and I doubt whether, if we allowed the plaint to be amended, plaintiff would put his signature to such an amendment.

In my opinion, therefore, the appeal fails and the suit should be dismissed with costs.

F. W. C. J.—I agree.

*Appeal dismissed.*

### CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL NO. 106 OF 1919,  
February 27, 1920.

Present:—Justice Sir Asutosh Mookerjee,  
Kr., and Justice Sir Ernest Fletcher, Kt.  
CHATTURBHUJ CHANDUNMULL—

APPELLANT

versus

BASDEODAS DAGA—RESPONDENT.

*Arbitration—Contract containing arbitration clause—Clause, whether imported into another contract by reference—Partial arbitration, whether allowable.*

D. entered into a contract with a firm LJ, for the purchase of 0 bales of dhotis, the contract having embodied in it a clause for arbitration in case of disputes. D sold the identical 30 bales to C. under a contract which was in the following terms:—"We sold the goods as were bought by us of Lakshmichand Jagannath, Batta allowance, chafage, all terms according to Bahar (importing) firms' godown due according to Bazar interest, coolie hire, according to Bhitor (Bazar)." A dispute having arisen between C. and D. the latter instituted a suit in respect of 27 bales, alleging that C. had wrongly refused to accept delivery of the goods, and thereafter referred the matter in respect of the remaining 3 bales to arbitration which resulted in an award in his favour. C. thereupon instituted proceedings for cancellation of the award, and on his application being refused, he appealed questioning the validity of the award on the grounds: First, that the arbitration clause embodied in the contract between the defendant and the importer was not incorporated into the contract between the plaintiff and the defendant, and, secondly, that even if the arbitration clause be deemed to have been incorporated, the defendant by instituting the suit in respect of 27 bales, was not competent to make a reference

(2) 3 M. I. A. 198; 6 W. R. P. C. 39; 1 Suth. P. C. J. 142; 1 Sar. P. C. J. 266; 18 E. R. 473.

(3) 1 Ind. Cas. 331; 23 B. 278; 11 Bom. L. R. 58.

(4) 26 M. 376.

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to arbitration with regard to the three remaining bales:

*Held*, (1) that the arbitration clause contained in the contract between D and LJ was not incorporated into the contract between D and C. and the reference to arbitration by D. was completely *ultra vires*: [p. 911, col. 1.]

(2) that having instituted a suit in respect of 27 bales, D. was not competent to make a reference to arbitration in respect of the remaining three bales even if it be deemed that the arbitration clause in the contract between himself and LJ had been incorporated in his contract with C. [p. 911, col. 2.]

Appeal against the judgment of Mr. Justice Greaves, dated the 17th November 1919.

Sir Binod Mitter (with him Mr. S. C. Bose), for the Appellant.

Mr. B. L. Mitter (with him Mr. S. N. Banerjee), for the Respondent.

## JUDGMENT.

MOOKERJEE, J.—This is an appeal from a judgment of Mr. Justice Greaves, whereby he has refused to set aside an arbitration award. The events which led up to the award in question lie in a narrow compass and may be briefly recited.

On the 4th August 1918, the plaintiffs-appellants bought from the defendant-respondent 30 bales of *dhotis*. The defendant himself had purchased the goods from an importer, Lakshmi Chand Jagannath, under a contract, dated the 29th July 1918. The terms of the contract between the plaintiffs and the defendant were as follows:—"We sold the goods as were bought by us of Lakshmi Chand Jagannath, *Batta* (allowance), *chutage*, all terms according to *Bahar* (importing) firms, godown due according to *Bazar* interest, *coolie* hire, according to *Bhitor* (*bazar*). On the 7th January 1919, the defendant instituted a suit in this Court in respect of 27 out of the 30 bales on the allegation that the plaintiffs had wrongfully refused to accept delivery. On the 11th June 1919, the defendant referred to arbitration by the Bengal Chamber of Commerce a similar dispute in respect of the remaining three bales. On the 28th July 1919 an award was made in his favour and it was filed on the 12th August, 1919. The plaintiffs thereupon instituted the present proceedings and applied for cancellation of the award. Mr. Justice Greaves has refused the application. On the present appeal the validity of the award has been questioned on two grounds: *first*, that the arbitration clause embodied in the contract between

the defendant and the importers was not incorporated into the contract between the plaintiffs and the defendant, and, *secondly*, that even if the arbitration clause be deemed to have been incorporated, the defendant, by reason of the institution of the suit in respect of 27 bales, was not competent to make a reference to arbitration with regard to the three remaining bales. In our opinion, both these contentions are well founded and the award must be set aside, as made without jurisdiction.

As regards the first point, we have to consider the terms of the arbitration clause contained in the contract between the defendant and the importers. The fourth clause of that contract was in these terms: "Any dispute or claim under this contract is to be settled by the Bengal Chamber of Commerce or, at the option of the seller, by two merchants on the 'Bengal Chamber's list, one to be chosen by each party." Now, if we read the contract between the plaintiffs and the defendant, as also the contract between the defendant and the importers, it is impossible to hold that the arbitration clause contained in the latter has become incorporated in the former by virtue of the expression "all terms according to the importing firm." Reliance has been placed by the appellants upon the decision of the House of Lords in the case of *Thomas & Co. Limited v. Portsea Steamship Company, Limited* (1), where the decision of the Court of Appeal in *Hamilton & Co. v. Mackie & Sons* (2) was approved. In the latter case, a bill of lading contained the words "all other terms and conditions as per Charter-party" and the Charter-party contained an arbitration clause. In an action by the ship-owners against the consignees of the cargo and the endorsees of the bill of lading, the Court refused a stay, on the ground that the arbitration clause in the Charter-party was not incorporated in the bill of lading. Lord Esher, M. R., said that where in a bill of lading there was such a condition as "all other conditions as per Charter-party," the conditions of the Charter-party must be read *verbatim* into the bill of lading, as though they were there *in extenso*. Then, if it was that any one of the conditions of the Charter-party on being so read, was inconsistent

1) (1912) A. C. 1; 81 L. J. P. 17; 105 L. T. 257; 12 Asp. M. C. 23; 55 S. J. 615.

(2) (1886) 5 T. L. R. 677.



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with the bill of lading, they were insensible and must be disregarded. The arbitration clause referred to disputes arising not under the bill of lading but under the Charter party. The condition was, therefore, insensible and had no application to the dispute which arose under the bill of lading. This view was approved by the House of Lords. Reference, however, was made on behalf of the respondent to the decision of the Court of Appeal in the case of *Temperley Steam Shipping Co. v. Smyth and Co.* (3). That case, in our opinion, is clearly distinguishable. The arbitration clause in that case, contained in a Charter-party, was held to apply to a dispute as to delay in the unloading of a ship after the completion of the loading, notwithstanding that the Charter-party contained the usual cesser clause, providing that the Charter's liability should cease upon the shipment of the cargo. The bill of lading, however, incorporated "all the terms and exceptions," contained in the Charter-party and gave the owner or master a lien on the cargo, *inter alia*, for demurrage. But the fundamental point in that case was, that the parties to the bill of lading and the Charter-party were the same. In the case before us, the first contract is between the defendant and the importers and the second between the defendant and his purchasers. The clause sought to be incorporated clearly refers to a dispute or claim "under this contract," that is, the contract between the defendant and the importers, and if that clause were incorporated into the contract between the plaintiffs and the defendant, the result would be, that, to use the language of Lord Esher, the contract would be insensible. We must hold, accordingly, that the arbitration clause was not incorporated into the contract between the plaintiffs and the defendant, and the reference to arbitration was completely *ultra vires*.

As regards the second point, we have to examine the effect of the twelfth clause of the contract between the defendant and the importers, assuming that the clause was incorporated by reference in the contract between the plaintiffs and the defendant. The clause was in these terms: "this agreement is to be deemed and construed as a separate

contract in respect of each instalment of goods, and the rights and liabilities of the sellers and buyers respectively shall be the same as though a separate contract had been made out and signed in respect of each instalment." Now, the goods, under the contract between the plaintiffs and the defendant, were to be delivered according to "shipments May and June." Presumably, in the absence of an indication to the contrary [*Bilwiram Thakurdas v. Ezekiel Abraham Gubbay* (4)] the goods were to be delivered in two equal instalments of 15 bales each. Consequently, when the defendant instituted a suit with regard to 27 bales, he must be deemed to have sued in respect of the first instalment and a portion of the second instalment. Now, although the defendant might be at liberty [*Dinabandhu Jana v. Durga Prasad Jana* (5)] to resile from the arbitration clause (assuming the same to have been incorporated into the contract between himself and the plaintiffs) and to have recourse to a suit in respect of either instalment (treated as the subject-matter of a separate contract), he could not, in respect of one portion of an instalment, institute a suit, and, in respect of the remaining portion of that very instalment, take recourse to arbitration. When he instituted the suit for the 27 bales, he made his election with regard to not only the first, but also the second instalment; he cannot now be permitted to resile from the position deliberately taken up by him and to fall back upon the arbitration clause in respect of the remaining 3 bales. We cannot, in this connection, overlook the significant fact that, in his suit, the defendant has obtained leave under Order II, rule 2, of the Code of Civil Procedure, reserving his right against his adversaries in respect of these 3 bales, and has asked for liberty to add to his claim for the 27 bales such sum as he may be entitled to recover on account of the 3 bales. In these circumstances, the conclusion is inevitable that he was not competent to make a reference to arbitration, even if the arbitration clause be deemed to have been incorporated in his contract with the plaintiffs.

The conclusion follows, that the arbitration

(3) (1905) 2 K. B. 791; 74 L. J. K. B. 876; 93 L. T. 471; 54 W. R. 150; 10 Com. Cas. 301; 10 Asp. M. C. 123; 21 T. L. R. 739.

(4) 33 Ind. Cal. 1; 13 C. 305; 23 C. L. J. 62; 20 C. W. N. 240.

(5) 51 Ind. Cas. 80; 46 C. 1041; 20 C. L. J. 309; 23 C. W. N. 716.

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proceedings were held, and the award made, without jurisdiction. The appeal is allowed, and the application to set aside the award is granted, with costs both here and in the Court below.

FLETCHER, J.—I agree.

*Appeal allowed.*

### ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 14 OF 1920.

November 23, 1920.

*Present:*—Mr. Justice Piggott and  
Mr. Justice Walsh.

HUKUM SINGH AND ANOTHER—  
PETITIONERS—APPELLANTS

*versus*

TUNDA SINGH AND OTHERS—OPPOSITE  
PARTIES—RESPONDENTS.

*Compromise—Vakalatnama authorising Vakil to  
compromise—Compromise by Vakil, binding effect  
of.*

Where by a vakalatnama the plaintiffs jointly agree to be bound by all acts of their Pleader in the course of their suit, and they further expressly specify, amongst the acts which the said Pleader might perform on their behalf, the presentation to the Court of petitions relinquishing the claim, compromising the suit and withdrawing from the suit, and the Pleader presents a compromise, and expresses, on behalf of his clients, agreement to its terms, the plaintiffs cannot question his act and are bound thereby.

Appeal from an order of the Subordinate Judge, Muttra, dated the 3rd of January 1920.

The Hon'ble Mr. Narain Prasad Asthana,  
for the Appellants.

Mr. Tanna Lal, for the Respondents.

JUDGMENT.—In the suit out of which this appeal arises there were five plaintiffs and two defendants. At a time when all the five plaintiffs were represented by a single Vakil, a compromise was arranged disposing of the suit on certain terms. This compromise was presented to the Court and verified before it by three plaintiffs in person, by both the defendants in person and by the Pleader, who held a power of attorney on behalf of all the five plaintiffs jointly. At a later date, the two plaintiffs who had not personally signed or presented to the Court the petition of compromise, protested that they had not authorised the Pleader to enter into the same and

were not bound by the terms of the compromise, or by the action of their Pleader in presenting the same to the Court. The Court of first instance, overruled this contention and passed a decree in terms of the compromise. The lower Appellate Court has set aside this decision and remanded the suit to the Court of first instance for trial on the merits. The appeal before us is against this order of remand. In accordance with the principles laid down by a Full Bench of this Court, in the case of *Jang Bahadur Singh v. Shankar Rai* (1), the question must be decided entirely with reference to the terms of the vakalatnama held by the Pleader in question. Other decisions on the question of principle, such, for instance, the case of *Jagapati Mutaliar v. Ekambara Mudaliar* (2), are irrelevant. By the vakalatnama the plaintiffs jointly agreed that they would be bound by all acts of their Pleader in the course of their suit, and they further expressly specified, amongst the acts which the said Pleader might perform on their behalf, the presentation to the Court of petitions relinquishing the claim, compromising the suit or withdrawing from the suit. The actual words in the vakalatnama are:—"ya bazdawa ya sulehnama ya dastbardari dakhil karen." We find it a little difficult to understand what the learned Subordinate Judge means by saying that these words authorise the Pleader to file a compromise and not to make a compromise. The question for determination is, whether all the plaintiffs, including the two who subsequently called in question the authority of the Pleader, are or are not bound by his act in presenting this petition of compromise to the Court and expressing on their behalf agreement to its terms. We think they are so bound. The order under appeal is accordingly set aside and the decree of the Court of first instance restored, with costs to the appellants in this and in the lower Appellate Court.

*Appeal decreed.*

(1) 13 A. 272 (F. B.); A. W. N. (1891) 61; 7 Ind. Dec. (N. S.) 170.

(2) 21 M. 274; 8 M. L. J. 40; 7 Ind. Dec (N. S.) 550.

GITABAI BHAI RAJMANE v. KRISHNA MALHARI SHINDE,

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 811 OF 1919.

August 20, 1920.

Present:—Sir Norman Macleod, Cr., Chief Justice, and Mr. Justice Fawcett.

GITABAI BHAI RAJMANE—PLAINTIFF  
—APPELLANT

versus

KRISHNA MALHARI SHINDE—

DEFENDANT RESPONDENT

*Landlord and tenant—Tenant, whether can acquire miras rights by adverse possession—Mortgage—Tenant, possession of, whether can be adverse against landlord during continuance of mortgage,*

A tenant can set up against his landlord a claim to hold under more favourable terms of tenancy than those which the landlord is prepared to concede, and he can acquire such rights by prescription. [p. 913, col. 1]

Where, however, the landlord has mortgaged his interest in the land, the possession of the tenant cannot be adverse to the landlord till the mortgage is redeemed. [p. 914, col. 1.]

Second appeal from the decision of the Assistant Judge, Satara, in Appeal No. 66 of 1918, reversing the decree passed by the Subordinate Judge at Karad, in Civil Suit No. 215 of 1916.

Mr. Jayakar (with him Mr. P. B. Shingne), for the Appellant.

Mr. K. N. Koya'ee, for the Respondent.

## JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to eject the defendant, to recover possession of the plaint land and for arrears of rent. The defendant claimed that the plaint land belonged to his family from ancient time, by Miras rights. The land originally belonged to one Balaji, who mortgaged it to Shiralkar. The plaintiff purchased the equity of redemption of Balaji on the 18th of October 1910, and acquired the interest of the mortgagee Shiralkar by an award decree in Original Suit No. 636 of 1911. He thereby became full owner of the plaint-land. The defendant claimed that he had become entitled to Miras rights in the land by adverse possession. Undoubtedly, a tenant can set up against his landlord a claim to hold under more favourable terms of tenancy than those which the landlord is prepared to concede, and he can acquire such rights by prescription. The only question in this case is, whether we are satisfied that, under the law, the defendant has acquired the Miras rights by adverse possession. His claim to such title depends entirely upon the fact that

in Suit No. 283 of 1895 he contended that he was a Mirasdar. That suit was filed by the mortgagee Balaji's daughter and heir for redemption of the mortgage against the mortgagee, Krishnaji Shiralkar. The present defendant was joined as a party as he was cultivating one of the mortgaged lands as a tenant under a lease, Exhibit 72, and a *kabuliyat*, Exhibit 73. The Judge said: "The defendant No. 4 also contends that he has been in cultivation of the land, Survey No. 883, for upwards of 100 years and claims Miras rights over it. The rent notes put in here in Exhibits 59 and 77, coupled with plaintiff's admission that she has to contribute Rs. 22-8-0 annually for Survey Nos. 497 and 522, give good reason for saying that the contentions of defendants Nos. 2, 3 and 4 are not without foundation. These contentions cannot conveniently be decided in this suit. The plaintiff, therefore, must be referred to a separate suit in ejectment against defendants Nos. 2, 3 and 4. It has been argued that this contention raised in the former suit has been considered probable by the Court and hence defendant is a Mirasdar. However, nothing can be more clear than the fact that the Court expressly treated that question as not directly and substantially in issue, and the mere expression of opinion as to probabilities in that judgment cannot be regarded as a decision of the question." The learned Trial Judge then considered what was sufficient to constitute a commencement of adverse possession of a superior tenure by a tenant, and he says: "The mere assertion of such a nature is not sufficient to constitute adverse possession. As between the holder of a superior and that of an inferior tenure, where things go on in accordance with the terms of the tenure, no adverse possession on the part of the holder of the under-tenure can arise, and there must be a distinct claim on his part of some right inconsistent with the tenure before his possession can become adverse to his superior landlord. There must be a distinct claim in opposition to the right of the landlord, which is brought to his notice and acquiesced in. The mere fact that the landlord, on hearing of the claim, does not take active steps against the tenant does not necessarily amount to acquiescence." The learned Judge, therefore, considered that the defendant had not become a Mirasdar by adverse possession.



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sion, and passed a decree directing the defendant to put the plaintiff in possession. In first appeal this decree was reversed, the plaintiff's claim for possession was rejected and the defendant was directed to pay enhanced rent. The learned Judge relied on the decision of *Thakore Fatesingji v. Bamanji* (1). I see no reason to dissent from the decision in that case. But the principles laid down there must be applied to the facts of each case as they arise. It appears to me the simple question is, could the mortgagor in this case have filed a suit against the defendant for ejection before he redeemed the mortgage? For, it seems that, if the mortgagor could not file the suit until he redeemed, it would be absurd to say that time had begun to run against him until he did redeem, and that seems to have been the opinion of the Allahabad High Court in *Muhammad Husain v. Mul Chand* (2). That was a very similar case, where the plaintiff purchased the equity of redemption and then brought a suit to redeem. The claim was made by the defendant that he had acquired a title by adverse possession before the mortgage had been redeemed. The learned Judges said: "It has been more than once laid down by the High Courts of this country that possession, which may be adverse to the mortgagee, is not necessarily adverse to the mortgagor, the reason being, that the possession adverse to the mortgagor can only arise after the mortgagor has become entitled to immediate possession. Here the mortgagor was not entitled to such possession, nor would he be entitled to it until he redeemed the mortgage." In this case, although the defendant may have asserted in 1895 that he had the Miras rights, the mortgagor was not entitled to eject him. He was not entitled to take any steps until he redeemed the mortgage, and that really was the effect of the decision in that suit of 1895. The Judge in that case may have told the plaintiff he must file a separate suit in ejection against defendants Nos. 2, 3 and 4, but I cannot think that he thereby decided that the plaintiff had an immediate right to file that suit before he had redeemed the mortgage. Therefore, this is not a case where a party takes proceedings in a certain Court and he is told that he has not appealed

to the proper Court and is referred to another Court. It depends entirely whether he would be entitled, in the circumstances of the case, to appeal immediately to that other Court. It is clear that, if he had filed a separate suit against the defendant, he would have been given the same answer, that as mortgagor before redemption he had no right to file a suit.

In my opinion, therefore, this appeal must be allowed and the decree of the Trial Court restored.

Costs of the appeal and of the lower Appellate Court to follow the event.

FAWCETT, J.—I concur. I think, in the circumstances of the present case, the fact that the mortgagor, whose interests are now vested in the defendant, could not obtain immediate possession until the mortgage had actually been extinguished, is fatal to the plea that the defendant has obtained a title by adverse possession. It might have been different if the defendant had brought a suit under the Mamlatdars' Courts Act against the mortgagor, or, rather, his representative, and obtained an order restraining the latter from interfering with his possession. For, in that case, the circumstances would be similar to those in *Bapu v. Mahadaji* (3), where it was held that the defendant had acquired a title by adverse possession both against the mortgagor and against the mortgagee. But in the present case the redemption-suit of 1895 cannot be treated on the same footing. The decision in that suit merely amounts to saying that a redemption-suit of that kind was not a proper one in which to decide the question of title or the defendant's right to continue in possession. It cannot, therefore, in my opinion, be said that the defendant "successfully resisted" the plaintiff's claim to evict him in that suit within the meaning in which those words are used in *Budesab v. Hanmanta* (4). Nor does the principle laid down in *Thakore Fatesingji v. Bamanji* (1) assist the defendant in this case. There it is said: "If the tenant not only openly asserts, to the knowledge of the owner an adverse interest, but proceeds to enjoy benefits claimable only on the basis of that interest, his possession at once becomes adverse and

(1) 27 B. 515; 5 Bom. L. R. 274.

(2) 27 A. 395 at p. 396; A. W. N. (1905) 4.

(3) 18 B. 348; 9 Ind. Dec. (N. S.) 740.

(4) 21 B. 509; 11 Ind. Dec. (N. S.) 341.

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limitation begins to run against the owner from that time." But in the present case the defendant did not enjoy any benefits other than those derived from his being a tenant under the mortgagee, so that, under the principle there laid down, the defendant's possession was not adverse to the mortgagor.

I concur, therefore, in allowing the appeal.

*Appeal allowed.*

## CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 43 OF 1919.

March 1, 1920.

Present:—Mr. Justice Tennon and  
Mr. Justice Beachcroft.

SATISH CHANDRA CHAUDHURI—

APPELLANT

*versus*

GIRISH CHANDRA CHAKRAVARTY—

RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Art. 182—Execution of decree—Suit against two defendants—Decree against one—Appeal against decree dismissing suit—Dismissal affirmed—Application to execute decree against defendant not joined in appeal—Limitation, commencement of.*

P sued A. and B. upon a hand-note. The suit against A. was decreed, but against B. it was dismissed. P appealed against the decree dismissing his suit and did not implead A as a party. His appeal was dismissed, and within three years of the date of the appellate decree he applied for execution against A. and the question was, whether the application was barred by limitation:

*Held*, that the application was not barred, as time ran from the date of the appellate decree finally dismissing the suit against B [p. 95, col. 2.]

Appeal against the order of the District Judge, Hooghly, dated November 14th, 1918, affirming the order of the Subordinate Judge of that Court, dated March 18th, 1918.

Dr. Saratchandra Basak (with him Babu Manmathanath Ganguli), for the Appellant.

Dr. Jadunath Kamilal (with him Babus Beerendrachandra Das and Nripendrachandra Das), for the Respondent.

## JUDGMENT.

TENNON, J.—In this appeal the question is,

whether an application for execution is barred by limitation.

It appears that the respondent brought a suit on a hand-note against two persons, defendant No. 1, the father, and defendant No. 2, the son. His suit as against No. 1 was dismissed with costs, and as against defendant No. 2 was decreed with costs. This was on the 30th September 1912.

Against the order dismissing the suit against defendant No. 1 plaintiff appealed. Defendant No. 2 was no party to that appeal and did not himself appeal against the decree that was made against him. The plaintiff's appeal against defendant No. 1 was dismissed on the 23rd May 1914.

The plaintiff decree-holder then applied for execution of his decree against defendant No. 2 on the 19th of May 1917. That application was dismissed on default of prosecution, without service of notice on defendant No. 2.

Then followed the present application on the 8th of January 1918. This application is within three years from the first application, dated 19th of May 1917, but the contention of the judgment-debtor, defendant No. 2, is that the first application was itself barred by limitation.

The question in the appeal then is, whether time runs from the date of the decree against defendant No. 2, made in the Court of first instance on the 30th of September 1912, or from the 23rd of May 1914, that is, the date of the decree in the Appellate Court finally dismissing the plaintiff's claim against defendant No. 1.

The question is not free from difficulty. In support of his contention that time runs from the date of the decree of first Court, the appellant before us, the judgment-debtor, cites the cases *Christianz Benshawn v. Benarasi Prasad* (1), *Lokenath Singh v. Gaju Singh* (2) where *Christiana Benshawn v. Benarasi Prasad* (1) is cited or referred to with approval; *Umesh Chandra Roy v. Akrur Chandra Sikdar* (3) and also *Hur Proshad Roy v. Enayet Hossain* (4),

(1) 22 Ind. Cas. 655; 19 C. W. N. 287.

(2) 31 Ind. Cas. 426; 20 C. W. N. 178; 22 C. L. J. 333.

(3) 50 Ind. Cas. 15; 48 C. 25.

(4) 2 C. L. R. 471.

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and the Full Bench in *Gopal Chander Manna v. Gosain Das Kalay* (5).

But the cases cited on behalf of the appellant can be distinguished from the present case, while the cases *Kristnama Chariar v. Mangammal* (6) and *Ari Ohetty v. Theerthamalai Ohetty* (7) support the respondent. So do certain observations to be found in the Full Bench case *Gopal Chander Manna v. Gosain Das Kalay* (5). The case of *Abdul Rahiman v. Maidin Saiba* (8) has also been referred to, but that is the case of a mortgage.

It may further be observed that, if the appeal preferred by the plaintiff had resulted differently, the decree against defendant No. 1 would have been modified, inasmuch as it would then have become a decree under which defendants Nos. 1 and 2 would have been jointly and severally liable.

In the result, we dismiss this appeal with costs.

BEACHCROFT, J.—I agree,

*Appeal dismissed.*

(5) 25 C. 594 (F. B.); 2 C. W. N. 556; 13 Ind. Dec. (N. S.) 392.

(6) 26 M. 91.

(7) 34 Ind. Cas. 791; 3 L. W. 521.

(8) 22 B. 500; 11 Ind. Dec. (N. S.) 915.

# BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 602 OF 1919.

August 17, 1920.

Present:—Mr. Justice Shah.

VISHVANATH PARSHARAM BHAVE

—JUDGMENT-DEBTOR—APPELLANT

*versus*

NARSU TULSIDAS GUJAR—DECREE-

HOLDER—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Art. 182 (5)*  
—Application for time to ascertain judgment-debtor's share in attached property, whether step-in-aid of execution.

An application by a decree-holder for time to enable him to ascertain the share of the judgment-debtor in certain property attached in execution of the decree, is an application to take a step-in-aid of execution within the meaning of clause (5) of Article 182 of Schedule I to the Limitation Act, and operates to save limitation. [p. 917, col. 1.]

Second appeal from the decision of the Assistant Judge, Ratnagiri, in Appeal No. 310 of 1918, confirming the order passed by the Subordinate Judge, at Dapoli, in Darkhast No. 305 of 1917.

Mr. N. V. Gokhale, for the Appellant.

Mr. P. V. Kane, for the Respondent.

JUDGMENT.—The question in this appeal is, whether the present Darkhast filed by the decree-holder on the 1st October 1917 is in time. The decree under execution was passed on the 19th September 1912. The first Darkhast was presented on the 4th of March 1913. It appears that, during the pendency of a certain suit, the execution was stayed from 28th July 1913 to 27th July 1914. It also appears that the Darkhast of 1913 was adjourned from time to time from 12th October 1914 to 21st September 1915, during the pendency of certain miscellaneous proceedings relating to the investigation of claims to the attached property put forward by third parties. Both the lower Courts have held that the present Darkhast is in time, because the decree-holder is entitled, under section 15 of the Indian Limitation Act, to exclude the time from 23rd July 1913 to 27th July 1914, and from 12th October 1914 to 21st September 1915. It is clear from the dates, and it is not disputed, that if these periods were excluded, the present Darkhast would be in time. The lower Appellate Court also relied upon an application made by the decree-holder on the 5th of August 1915, for time to enable him to obtain information regarding the defendant's share in certain property which was attached. This application has been held by the lower Appellate Court to be a step in aid of execution. If it is a step-in-aid of execution, it is clear that, apart from the first ground, the present Darkhast would be in time.

Two points have been urged before me on behalf of the appellant, judgment debtor: *first*, that the period from 12th October 1914 to the 21st September 1915, cannot be excluded under section 15 of the Indian Limitation Act, because there is no order staying the execution of the decree, and, *secondly*, that the application of the 5th August is not a step-in-aid of execution and that it is really an application in retardation of the execution.



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As regards the first point I am by no means satisfied that the decree-holder is entitled to the deduction of the time from 21st October 1914 to 21st September 1915, under section 15 of the Indian Limitation Act. The section provides that, in computing the period of limitation prescribed for any application for the execution of the decree the time of the continuance of the order staying the execution of the decree shall be excluded. Admittedly, there is no written order staying the execution of the decree during this period from 12th October 1914 to the 21st of September 1915. All that I find from the *Razanama* is, that the matter was adjourned from time to time during this interval. It is not without significance that it is during that interval that the application, which is relied upon as a step-in-aid of execution by the decree holder, was made. I do not say that, under section 15 of the Indian Limitation Act, a written order staying the execution of the decree is necessary; but I think that there must be a clear order staying the execution of the decree. I do not think that the orders of adjournment from time to time could be properly construed as orders directing stay of the execution of the decree. I am, therefore, not prepared to accept the view taken by the lower Courts that this period can be excluded under section 15.

There is, however, the point relating to the application made on the 5th August 1915. Under Article 182, clause (5), of the third column of the Schedule of the Indian Limitation Act, the decree-holder would be entitled to present the application for execution within three years from the date of his applying, in accordance with law, to the proper Court to take some step-in-aid of execution of the decree. It is clear that the expression 'step-in-aid of the execution of decree' must be construed liberally. I feel satisfied that the application, Exhibit 37, was made to take a step-in-aid of the execution. On its face, it is an application for time being granted, to enable the plaintiff to inquire about, and to state the particulars as regards, the extent of the share of the judgment-debtor in the village of Singlat which was put up for sale. Such information would be necessary for the proper preparation of the proclamation of sale; and an application for adjournment to get such

information ought to be treated as an application to take a step-in-aid of execution. The fact that, subsequently, the decree-holder asked for adjournments and allowed that particular *Darbhast* to drop, has no bearing upon the question whether this application was made in order to take a step-in-aid of execution. I am unable to accept the suggestion made on behalf of the appellant that, in view of the subsequent adjournments, this application should be treated as an application in retardation of the execution.

I am satisfied that the *Darbhast* is in time. I affirm the decree of the lower Appellate Court and dismiss the appeal with costs.

*Decree confirmed.*

# CALCUTTA HIGH COURT.

SMALL CAUSE COURT SUITS NOS. 8785 AND 9532  
OF 1919.

February 17, 1920.

Present:—Mr. Justice Ghose.

RAM CHANDRA SAGOREMULL—  
PETITIONER

*versus*

AMARCHAND MURALIDHAR—  
OPPOSITE PARTY.

*Presidency Towns Small Cause Courts Act (XV of 1832), s. 9—Rules of Practice of Calcutta Small Cause Court, r. 92, object of.*

Under the powers given by section 9 of the Presidency Towns Small Cause Courts Act, the High Court added the following to rule 92 of the Rules of Practice of the Court of Small Causes at Calcutta:—

"Provided that the Court may, if in its opinion no sufficient grounds are shown for the application, dismiss it without directing service on the party against whom the application is made."

*Held*, that the object of the foregoing addition was to remove the difficulty whereby a preliminary hearing was precluded for the purpose of finding out whether there were grounds for the application such as are indicated in the rule itself; that the rule was not *obiter* but that, so far as applications under section 9 of the Act were concerned, the preliminary hearing must be before a Bench of the Small Cause Court. [p. 919, col. 1]

Mr. A. N. Chaudhuri, for the Petitioner.

Mr. Pearson (with him Mr. D. V. Bose), for the Opposite Party.

JUDGMENT.—This is an application on behalf of a firm called Ramchandra Sagore.

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mull for an order under section 115 of the Code of Civil Procedure, for the setting aside of certain orders made by the Calcutta Court of Small Causes. The application has arisen under the following circumstances:—

On the 17th April 1919 the applicant firm instituted a suit in the Small Cause Court against the firm of Amarchand Muralidhar for the recovery of a sum of Rs. 400 as damages for breach of a certain contract, by which the latter firm had agreed to sell to the applicant firm three bales of *Mullmull* on certain terms and conditions to which it is unnecessary to refer. That suit was numbered 8785 of 1919. On or about the 30th April 1919, the firm of Amarchand-Muralidhar filed a cross suit against the applicant firm for the recovery of a sum of Rs. 157 8-0 as being the damages alleged to have been sustained by them on account of the applicant firm not having taken delivery of the goods referred to above under the said contract. The last mentioned suit was numbered as 9532 of 1919. The said two suits came on for hearing before the learned Second Judge of the Small Cause Court on the 24th November 1919. The applicant firm's suit was dismissed and a decree for a sum of Rs. 58-2-0 was passed in the suit which had been instituted by Amarchand-Muralidhar against the applicant firm. On the 1st December 1919, two applications were filed before Mr. Dobbin who was the Trial Judge in the Small Cause Court, by the applicant firm in the said two suits, asking that the order of dismissal in the first suit and the decree in the second suit should be set aside, and praying for new trials in the said two suits. These applications were refused by Mr. Dobbin on the 1st December 1919. It is alleged by the applicant firm that the said applications were presented to the Trial Judge, so that he might, in accordance with what is stated to be the usual practice in the Small Cause Court, order the issue of notices on the firm of Amarchand Muralidhar returnable before the Full Bench of the Small Cause Court in order that they might show cause why the order of dismissal in the first suit and the decree in the second suit should not be set aside or such other order made as the circumstances of the two cases required. It is urged that Mr. Dobbin, in summarily dismiss-

ing the two applications referred to above acted without jurisdiction and with material irregularity. It is further urged that any power conferred on a Judge of the Small Cause Court to refuse to issue notices on applications, like the one referred to above, is *ultra vires* and bad.

In support of the applicant firm's contentions, Mr. Chandhuri has taken me through rules 92 to 95 of the Rules of Practice of the Small Cause Court as they stood before the amendment to the rules published in the *Calcutta Gazette* of the 1st July 1919, on page 1128 thereof, came into effect. He argues that the addition to rule 92 of the Rules of Practice of the Small Cause Court, under the Notification of the 9th July 1919, published as above, if it authorises a Single Judge to dispose of applications like these, is *ultra vires* inasmuch as the applicant for a new trial has been deprived of what is described as a right, hitherto enjoyed, of having applications for new trials considered by a Bench of the Judges of the Small Cause Court, usually composed of the Trying Judge and the Chief Judge, and in support of his contention he has referred me to the case reported as *Madurai Pillai v. Muthu Chetty* (1).

Now, the power given to the High Court to make rules under the Presidency Small Cause Courts Act is to be found in section 9 of the Act, and it is laid down there that the High Court may, from time to time, by rules having the force of law, prescribe the procedure to be followed and the practice to be observed by the Small Cause Court, and that rules made thereunder may provide, amongst other matters, for the exercise by one or more of the Judges of the Small Cause Court of any of the powers conferred on the Small Cause Court by the Act, or any other enactment for the time being in force. The application for a new trial is made under section 35 of the Act, and is laid down therein that the Small Cause Court may, on the application of either party, within eight days from the date of the decree or order in a suit, order a new

(1) 22 Ind. Cas. 775; 38 M. 823; 15 M. L. T. 156; 1914 M. W. N. 216; 26 M. L. J. 227; 1 L. W. 172.

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trial to be held, or alter, set aside or reverse the decree or order upon such terms as it thinks reasonable, and may, in the meantime, stay the proceedings. There is, it will be observed, nothing in the Act itself regarding the formation of a Bench of Judges for the purpose of applications under section 38, and it may be noticed, in passing, that the only provision in the Act about the formation of a Bench with more Judges than one is to be found in sections 11 and 69. The Act makes no distinction between a Judge, and more than one Judge, of the Small Cause Court, and what is spoken of is the Small Cause Court, whether it consists of one Judge or more than one Judge. I do not propose to go into the question as to whether the jurisdiction exercised by the Small Cause Court under section 38 of the Act is appellate or revisional, as to which there has been a good deal of controversy. [See *Shi Lal Padama, In re*, (2), *Budhu Lal v. Ohattu Gope* (3), *Srinivasa Charlu v. Balaji Rau* (4).]

Now, the question arises, has the High Court made a rule for the exercise by one Judge of the Small Cause Court of the powers conferred on the Small Cause Court by section 38 of the Act? To my mind, it has not. The addition to rule 92 does not, in my opinion, indicate that a Bench need not henceforth be formed on the lines laid down in rule 95 for the purpose of giving the applicant a preliminary hearing. I am strengthened in my view by the fact that rule 95 remains unaltered. Rule 92, as it stood before the amendment, precluded a preliminary hearing for the purpose of finding out whether there were grounds for applications such as were indicated in the rule itself. The object of the addition to rule 92 was to get rid of this difficulty and to provide for a preliminary hearing in two classes of applications, (i) in the applications referred to in rules 62, 64, 67 or 69, and (ii) in applications under section 33 of the Act. The addition to rule 92 is not *ultra vires*; but so far as applications under section 38 of the Act are concerned, the preliminary hearing must be before a Bench formed on the lines laid down in rule 95, with the result that no

notice would issue thereafter, except on good grounds in order that opportunities for protracting cases might be diminished.

In this view of the matter, the orders of the 1st December 1919, in the two suits referred to above, must be set aside and the application for new trials in the two suits mentioned above must be considered again by a Bench of the Small Cause Court formed on the lines laid down in rule 95. — No order as to costs of this application.

*Order set aside.*

BOMBAY HIGH COURT.  
CIVIL APPLICATIONS NOS. 302, AND 303 OF 1919.  
August 19, 1920.

*Present:*—Mr. Justice Shah and  
Mr. Justice Crump.

SONUBAI BABURAO GAIKAWAD—  
APPLICANT

*versus*

SHIVAJIRAO KRISHNARAO GAIKAWAD—OPPONENT.

*Civil Procedure Code (Act V of 1908), s. 151, O. XLI, r. 19—Limitation Act (IX of 1908), s. 6, Sch. I, Art. 168—Appeal dismissed for default—Application for restoration—Limitation—Minor appellant—Inherent power of Court, exercise of.*

A minor appellant, whose appeal has been dismissed in default, cannot take advantage of section 6 of the Limitation Act for making an application for restoration of the appeal [p. 921, cols. 1 & 2.]

Order XLI, rule 19 of the Civil Procedure Code does not exhaust the powers of an Appellate Court to re-admit an appeal dismissed for default. [p. 921, cols. 1 & 2.]

In a proper case, it is open to the Court to make an order re-admitting an appeal dismissed for default in the exercise of its inherent powers for the ends of justice. This power should, however, be sparingly used and only when a clear case is made out, but the power is exercisable without any reference to the period of limitation provided for an application to re-admit an appeal or any other proceeding. [p. 922, col. 1; p. 923, col. 1.]

Where the next friend of a minor appellant is of unsound mind, the absence of the minor at the date of the hearing of the appeal cannot be treated as default. [p. 924, col. 1.]

An order dismissing the minor's appeal for default in these circumstances would be set aside in the exercise of the inherent powers of the Courts. [p. 924, col. 1.]

Mr. D. A. Tubapurkar, for the Applicant,  
Mr. Y. V. Bhandarkar, for the Opponent.

(2) 5 Ind. Cas. 862; 34 B. 316, 12 Bom. L. R. 130; 11 Cr. L. J. 271.

(3) 89 Ind. Cas. 465; 44 C. 816; 21 C. W. N. 269; 25 C. L. J. 193; 18 Cr. L. J. 497.

(4) 21 M. 232; 7 Ind. Dec. (N.S.) 519.



SONUBAI BABURAO v. SHIVAJIRAO K. KISHNARAO.

### JUDGMENT.

SEAH, J.—These are two applications by Sonubai, widow of Baburao, to set aside the orders made by this Court on the 28th February 1916 dismissing the appeal and rejecting the application under Extraordinary Jurisdiction filed on her behalf by her next friend for default under Order XLI, rule 17. The circumstances under which the applications are made are these: Sonubai's husband, Baburao, filed Suit No. 410 of 1911 in the Court of the First Class Subordinate Judge of Poona for a partition of the joint family property and to recover his half share against Krishnarao. One Limbaji had three sons, Balwantrao, Gopalrao and Gangaram. Balwantrao died leaving a son, Baburao. Gopalrao died leaving a son Krishnarao. Thus Baburao and Krishnarao were cousins. Gangaram was not joined as a party to the suit, as it was stated that he had already separated. The joint property was stated to be very valuable. Baburao valued his half share at Rs. 18,72,005. In 1912, Gangaram filed Suit No. 359 of 1912 in the same Court in his own right and on behalf of his minor son—Yadurao *alias* Baburao—for one-third share in the joint family property. He joined Baburao Balwantrao as a party to this suit. He valued his one-third share at about Rs. 9,72,000. Baburao died in June 1913, leaving a minor widow, Sonubai. An application was made on her behalf by her father, Keshav Sambhajirao, in August 1913, to bring her on the record as the legal representative of her husband, and to allow her to continue the suit. The learned Subordinate Judge held that the right to sue did not survive and that the suit abated, and ordered accordingly, on the 10th of September 1913. It appears, however, that she was brought on the record in Gangaram's suit as the legal representative of her deceased husband in which Baburao was defendant No. 2. Sonubai's father filed Appeal No. 153 of 1914 in *forma pauperis* in this Court against the abatement, treating it as a decree, through Mr. Vidhvans, a vakil of this Court. The claim was valued at about Rs. 18,72,005. He also filed application No. 283 of 1913, under the Extraordinary Jurisdiction of this Court against the same order, through the same vakil. This was intended, apparently, to meet the possible objection that the order of abatement was not appealable as a decree or

an order. Mr. Vidhvans died in May 1915. Thereafter, a notice of his death was served upon the next friend of Sonubai. But he did not appear, and took no steps to prosecute the appeal or the application. On the 28th February 1916 my learned brother, Batchelor, and I dismissed the appeal for default under Order XLI, rule 17. Neither party appeared at the time. The application also was rejected for default. Sonubai attained majority on the 21st February 1919, when she completed her 18th year. She made the present application (No. 302 of 1919), on the 11th March 1919, to discharge the order dismissing the appeal for default, and a similar application (No. 303 of 1919) to discharge the order rejecting the application under the Extraordinary Jurisdiction for default, on the same day.

In support of these applications it is alleged by Sonubai that her father is an old man, who has been insane for nearly five years; that he was not in a position to act for her as her next friend or guardian on the record at the date of the order made by this Court or at the date when the notice of the death of Mr. Vidhvans was served upon him. Some affidavits have been filed in support of her applications. The applications are opposed by Krishnarao's minor son, Shivajirao, Krishnarao having died during the interval. The minor son of Krishnarao is represented by his mother and guardian, Banubai, on the record. It is asserted on her behalf that Sonubai's father was competent to act and did act in Gangaram's suit as the guardian of Sonubai.

I have not referred to the allegation in Sonubai's petitions as to the interest and conduct of the alienees from Baburao with reference to the estate and the litigation relating to the estate. It is not necessary to do so for the purpose of these applications.

It may be mentioned that Gangaram's suit, after certain proceedings, was finally decided only in April last. It is unnecessary in this application to go into the reasons of this delay. But the decree in the suit is now under appeal, preferred to this Court by Sonubai. The Trial Court in that suit has held that Sonubai is debarred from claiming the share of her husband in consequence of the order of abatement in Baburao's suit,

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On the facts stated above, we have to consider whether a case is made out for discharging the orders made by this Court on the 28th February 1916.

On behalf of the applicant it is urged, as a preliminary objection, that the application is barred by limitation under Article 168 of the Indian Limitation Act, and that the minority of Sonubai is not a ground for not giving effect to the provisions of this Article, as such an application is not within the scope of section 6 of the Act. It is urged that, in spite of her minority, the present application is barred, as it is made long after the date of the dismissal. It seems to me that Article 168 applies to an application for the re-admission of an appeal under Order XLI, rule 19, under which, if sufficient cause is shown for default, the Court is bound to re-admit the appeal. Such an application is outside the terms of section 6 and the minority of Sonubai is no answer to the plea of limitation. I am of opinion that the preliminary objection would be good, if the powers of the Court to re-admit the appeal were confined only to rule 19 of Order XLI and I would be bound to give effect to it. But if rule 19 does not exhaust the powers of the Court to re-admit an appeal or an application dismissed for default, and if it is open to the Court to deal with these applications under section 151 of the Code, and to make an order to that effect for the ends of justice or to prevent abuse of the process of the Court, the preliminary objection cannot succeed, as the period of limitation will have no application to the exercise of such powers. The delay would undoubtedly be an element to be considered in exercising the powers under the section which, in the very nature of things, ought to be sparingly exercised. But the inherent powers of the Court would be exercisable without any reference to the period of limitation fixed for applications to re-admit appeals or to restore any other proceeding dismissed for default.

The questions, therefore, are whether it is open to this Court to make an order re-admitting the appeal and the application in the exercise of its inherent powers, and whether the facts brought to our notice render it necessary to make such an order for the ends of justice.

As regards the first question, I am of opinion that the Court has such a power. The provisions of rule 19 are not exhaustive on the point. Under that rule, the Court is bound to re-admit the appeal if sufficient cause is shown for the default, without any reference to the merits of the appeal. The inherent powers of the Court to discharge an order made for default depend upon somewhat different considerations. The corresponding provision in the Code of 1882 has been interpreted by Bhashyam Ayyangar J., in that sense in *Somayya v. Subbamma* (1). In *Lalla Prasad v. Ram Karan* (2) the Court took the same view as to the meaning and scope of Order IX, rule 9. It is also clear that a minor, on attaining majority, can sue to have any decree against him set aside on the ground of fraud or negligence on the part of his next friend or guardian, as the observations of Farran, J., in *Cursandas Natha v. Ladkatapu* (3) show. In *Lalla Sheo Churn Lal v. Ramnandan Dobe* (4) a minor, on attaining majority, was allowed to sue on the same cause of action, in spite of an order dismissing his suit for default under section 102 during his minority on similar grounds. When it is open to the minor to resort to that remedy, I do not see why it should not be open to a Court to help the minor in an application to set aside the order made on default, if it be shown that the next friend or the guardian was unable to act or was negligent in the discharge of his duties. The reasoning in *Lalla Sheo Churn's case* (4) supports this view. It may be that, under the circumstances of a particular case, the Court may leave the minor to his remedy by way of suit in view of the necessity of testing the allegations as to negligence or fraud in the strict manner in which they could be tested in a suit. But I see no sufficient reason to hold that that is the only remedy, and that the Court has no power to help the minor otherwise with reference to an order made in consequence of the default of the next friend of the minor. The decisions in *Ranee*

(1) 16 M. 190.

(2) 14 Ind. Cas. 187; 34 A. 426; 9 A. L. J. 666.

(3) 19 B. 571 at p. 577; 10 Ind. Dec. (N. S.) 381.

(4) 22 C. 5; 11 Ind. Dec. (N. S.) 7.

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*Biriobuttee v. Pertaub Sing* (5) and *Debi Bakhsh Singh v. Habib Shah* (6) appear to me to support the view that, in a proper case, it is open to the Court to make an order re-admitting the appeal or the application in the exercise of its inherent powers for the ends of justice.

The next question is, whether the facts in this case demand that the power should be exercised in favour of the petitioner. The broad facts are, that Baburao sued for his share in a large estate and died during the pendency of the suit. His widow was a minor then, claiming to be entitled to his share on the ground that the severance of interest was effected during her husband's lifetime. Her father, as her next friend, tried to put forward her rights, but failed in the lower Court. He appealed to this Court, but his Pleader died and, after the Pleader's death, he did not or could not take any steps to prosecute the appeal. On attaining majority Sonubai has applied to this Court, without losing any time, within a month after attaining majority, to allow her to prosecute the appeal. She points out that her father could not act as her next friend at the time when he received the notice of the Pleader's death in November 1915 or thereabout, owing to his demented condition, brought on probably by old age. On the materials before the Court, the allegation as to his insanity could be neither accepted nor rejected without further inquiry. But whether on that ground or on any other ground, he failed to prosecute the appeal on behalf of his daughter, which affected her right to considerable property, worth about eighteen lacs of rupees according to the valuation in the appeal. In Gangaram's suit the one third share is valued at about Rs. 9,79,000 (nine lacs and seventy-nine thousand). The order of abatement may have the effect of negating her right to such property completely. I do not say that it has such an effect. That will have to be considered in the appeal which she has filed in this

Court from the decree in Gangaram's suit. At any rate, the Trial Court in that suit has taken that view, and the abatement may fairly be treated, for the purpose of these applications, as seriously jeopardizing her right to her husband's share in the property. In a matter of such importance, her next friend failed to act for his minor daughter. I do not think it could serve any useful purpose to delay the disposal of these applications by asking the lower Court to find on further evidence as to whether the allegation as to insanity is proved. It would largely be a matter of inference from his present condition as to whether in November 1915 he was insane, as alleged by Sonubai. His failure to act seems to me to indicate—and must be taken under the circumstances of this case to indicate—either inability due to physical incapacity or negligence on his part to safeguard the interests of his daughter.

Looking broadly at the merits of the order of abatement, which it is permissible to take into account in determining the 'ends of justice', it is fair to say that, if the appeal had been heard on the merits in February 1916, this Court would have been bound to consider the observations of their Lordships of the Privy Council in *Suraj Narain v. Iqbal Narain* (7), decided in December 1912, in connection with the question of the severance of interests; and whatever may have been the accepted view in this Presidency then, it is not unreasonable to say that this Court might have—I do not say would have—taken the view which a Full Bench of the Madras High Court took in October 1915 in *Soundararajam v. Arunachalam Ohetty* (8) as to the effect of these observations. At the same time, I do not see any need or justification for rigorously excluding from our consideration the decisions of the Privy Council after February 1916, which may make the merits of the appeal appear stronger and clearer, in determining

(5) 8 M. L. A. 160; 3 W. R. 36 (P. C.); 13 Moo. P. C. 485; 1 Suth. P. C. J. 408; 1 Sar. P. C. J. 710; 19 E. R. 440; 15 E. R. 174; 132 R. R. 149.

(6) 19 Ind. Cas. 526; 40 I. A. 151; 15 Bom. L. R. 640; 17 C. W. N. 820; 11 A. L. J. 676; 13 C. L. J. 9; 14 M. L. T. 83; (1913) M. W. N. 168; 25 M. L. J. 148; 35 A. 331; 16 O. C. 194 (P. C.).

(7) 18 Ind. Cas. 10; 35 A. 80; 13 M. L. T. 194; 17 C. W. N. 333; 11 A. L. J. 172; (1913) M. W. N. 183; 17 C. L. J. 288; 24 M. L. J. 345; 15 Bom. L. R. 456; 16 O. C. 129; 40 I. A. 40 (P. C.).

(8) 33 Ind. Cas. 858; 39 M. 159; 29 M. L. J. 793 at p. 816; 2 L. W. 12-7 at p. 1206; 18 M. L. T. 552 at p. 568; (1916) 1 M. W. N. 31.



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now what the ends of justice require. I do not desire to prejudge the merits of the appeal; but it is hardly possible, and not fair, to exclude what I may call the *prima facie* merits of the appeal from consideration in deciding whether, for the ends of justice, this Court should exercise the powers under section 151 of the Code of Civil Procedure. On the other hand, the re-admission of the appeal cannot prejudice the just rights of the opponent. I have not overlooked the fact, which has been pressed upon our attention by Mr. Bhandarkar, that the opponent is a minor.

I am conscious that the inherent powers reserved under section 151 should be sparingly exercised and only when a clear case is made out. After a careful consideration of all the circumstances, I have come to the conclusion that, for the ends of justice, it is necessary to discharge the orders dismissing the appeal and the application for default, to re-admit the appeal and the application, and to allow the present petitioner to prosecute the same against the present opponent as the legal representative of the deceased Krishnarao. I would make the Rules absolute and order accordingly.

Under the circumstances, I would order the applicant, Sonubai, to pay the opponent's costs in both the applications.

In the view I have taken, it is needless to consider the suggestion that, if necessary, the applications may be treated as applications for review and that the delay may be excused under section 5 of the Indian Limitation Act. The procedure appropriate for review would be different, and it is not essential to pursue this point further.

CRUMP, J.—In this matter Mr. Bhandarkar for the respondent has taken a preliminary objection that the application is barred by Article 168 of Schedule I of the Indian Limitation Act, 1908. The facts necessary, in order to understand the position, are as follows:—

In 1911, one Baburao sued for partition and a share in a joint family estate. On June 10th, 1913, during the pendency of that suit, Baburao died. His wife, who is now the applicant before us, was at that date a minor. On August 4th,

1913, she applied to be placed on the record as heir of the deceased plaintiff. For the purposes of that application, she was represented by her father in the capacity of next friend. Her application was dismissed on September 10th, 1913, on the ground that the right to sue did not survive, and it was ordered that the suit should abate. From that order the next friend lodged an appeal in the High Court, and Mr. Vidhwans, a Pleader of this Court, was appointed to conduct the appeal. Before the hearing, Mr. Vidhwans died, and, in accordance with the usual practice, a notice was served on the next friend on November 4th, 1915, directing him to appear, and stating that on failure the appeal would be dismissed for default. The appeal came on for hearing in due course on 28th February 1916 and neither side put in an appearance: it was accordingly dismissed under Order XLI, rule 17 of the Code of Civil Procedure, on that day. The applicant attained majority on February 21st, 1919, and, on March 11th, 1919, she moved this Court, under Order XLI, rule 19, to re-admit the appeal.

If, in such a case, a minor is properly represented by a next friend, it would ordinarily follow that an application to re-admit the appeal must be made within thirty days, the time allowed by Article 168 of Schedule I of the Indian Limitation Act. In this case, however, it is alleged, at the outset, that the next friend became insane about the year 1914. The allegation is supported by substantial affidavits and it is necessary to consider the case on that basis.

Assuming the allegation of insanity to be well founded, the position is, that a minor litigant has been prevented from appealing to this Court by reason of the fact that her next friend was of unsound mind, and her claim to a large estate has been allowed to go by default. The result would be deplorable were there no remedy, but the hardship is no ground for interfering, unless interference is warranted by the powers of the Court.

In my opinion, a person who is of unsound mind cannot act as next friend. This is, indeed, clearly laid down by Order XXXII,

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rule 4 of the Code of Civil Procedure. But it is urged that, where a next friend becomes insane after appointment, the remedy is to move the Court for his removal under rule 9 of that Order and that, unless and until this is done, the minor is bound by the acts of the next friend as though he were of sound mind. I am unable to accede to this contention. In my opinion, a next friend who is of unsound mind is no next friend at all for he is not qualified to act. The case, therefore, falls within the scope of Order XXXII, rule 5, and the order dismissing the appeal may be discharged on the ground that the minor was not represented by a next friend.

But even if this rule is not applicable, the case would be one in which the Court ought, I think, to interfere *ex debito justitiæ*, and the inherent powers of the Court under section 151 of the Code of Civil Procedure can very properly be applied to this case. The principles on which the Privy Council acted in *Debi Bakhsh Singh v. Habib Shah* (6) are applicable. To rank the absence of a minor, whose next friend is of unsound mind, in the category of default is not very stateable. An order passed in these circumstances is a nullity.

But apart from the question of the insanity of the next friend, which might in itself call for further enquiry beyond the affidavit on the record, the circumstances disclose negligence so gross, whether arising from insanity or not, as to be in itself a sufficient ground for avoiding the order. The facts speak for themselves. There is a very large estate at stake. The refusal to place the minor on the record as heir of her husband has deprived her, or may deprive her, of that estate. I say "may deprive her," for the exact effect of the order of abatement is not certain. That order was challenged by an appeal, and certainly there is at least an arguable case. That case would indubitably have been argued but for the unfortunate death of the Pleader engaged. At this point the next friend became blind to his plain duty and took no steps to appoint another Pleader. A clearer case of the grossest negligence could hardly be found. It can hardly be doubted that, where a minor is concerned, the gross negligence of a next friend is a ground on which the avoidance of proceedings may be sought even where

there is a statutory bar: cf. *Lalla Sheo Ohurn v. Ramnandan Dobey* (4). It is impossible to permit the estate of an infant to be lost in this way, and, in my opinion, the inherent powers of the Court are wide enough to enable us to make such orders as the interests of justice require. The orders proposed by my learned brother are, in my opinion, appropriate *ex debito justitiæ*.

*Rule made absolute.*

BOMBAY HIGH COURT.  
SECOND CIVIL APPEAL No. 864 OF 1919.  
August 26, 1920.  
*Present* :—Mr. Justice Shah and  
Mr. Justice Crump.  
SAKHARAM DAJI GANPULE—  
APPELLANT  
*versus*  
GANU RAGHU GURAO—  
RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 92—Suit by pujari of temple to establish right to share in offerings, nature of—Scheme framed—Suit, whether maintainable—Procedure, proper.*

A suit by a hereditary *pujari* of a temple to establish his right to a certain share in the offerings made to the deity, which are *prima facie* temple property, falls under clause (c) of sub-section (1) of section 92 of the Civil Procedure Code. Where a scheme has already been framed in respect of the temple properties, such a suit is not maintainable, and the proper procedure is, to apply to the Court, which framed the scheme, to give directions as to the application of this particular fund. [p. 926, col. 1; 927, col. 1.]

Appeal from the decision of the Assistant Judge, Ratnagiri, in Appeal No. 39 of 1919, confirming the decree passed by the Subordinate Judge, at Chiplun, in Civil Suit No. 208 of 1917.

Mr. G. S. Rao, for the Appellants.  
Mr. P. B. Shingne, for Respondents Nos 1, 7 and 10.

Mr. J. R. Gharpure, for Respondents Nos. 11 to 15.

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## JUDGMENT.

SHAH, J.—The plaintiff in this case is one of the *pujaris* of the well-known temple of Sbri Bhargavram, near Chiplun. He filed the present suit to recover Rs. 91-8 0 as damages from defendants Nos. 1 to 10, the Guravs connected with this temple. He also prayed for an injunction restraining them from collecting the offerings made to the deity during the period of his turn to serve as a *pujari*. His allegation was that, as one of the hereditary *pujaris* of this temple, he had the right to officiate in the months of Magh and Phalgun of the Shaka year 1838 and that, during that time, the defendants Nos. 1 to 10 forcibly prevented him from entering the temple and from receiving the offerings laid before the deity. The plaintiff's claim was, that he was entitled to receive these offerings in accordance with the long-established usage of the institution, according to which the offerings were to be appropriated by the *pujaris*. The Guravs defended the suit on the ground that they were entitled to the offerings. They also contended that the suit was not maintainable. At a later stage the defendants Nos. 11 to 15, who are members of the Devasthan Committee appointed by the District Court, were joined as parties to the suit. They contended that the Guravs had no right to take the offerings, and that the Ganpules were entitled to take the offerings in accordance with the arrangement arrived at in 1841 between the then *pujaris* and the members of the Devasthan Committee, which was at that time appointed by the Collector of the District.

The Trial Court found that the plaintiff was entitled to act as *pujari* at the time mentioned in the plaint; that the Guravs had taken away offerings to the extent of Rs. 66, and that, according to the evidence, if the suit was maintainable, the sum awardable to the plaintiff would be Rs. 35. The Trial Court was of opinion that the suit was not maintainable in the form in which it was brought, on the ground that the offerings to the deity were voluntary and uncertain and that these offerings would not be property within the meaning of section 9 of the Code of Civil Procedure. In the result, the plaintiff's suit was dismissed.

The plaintiff appealed to the District Court

and, subject to a slight variation as to the amount, which might be payable to the plaintiff if the claim were maintainable, the Appellate Court affirmed the view of the Trial Court. It may be mentioned that, in the course of the trial, the plaintiff admitted through his Pleader that the offerings to the deity belonged, in the first instance, to the temple and formed part of the property of the temple; but he maintained that, in virtue of his right as an hereditary *pujari* and in accordance with the long established usage of the institution, he was entitled to appropriate that sum. The decree of the Trial Court was affirmed by the Assistant Judge who heard the appeal.

The plaintiff has appealed from this decree. It has been urged on his behalf that the lower Courts are wrong in their view that, the offerings being temple property, the suit is not maintainable. In support of this contention, reliance is placed upon section 9 of the Code of Civil Procedure. It is contended that it is a suit in which the right to property is contested and that a Civil Court has jurisdiction to try it. It is also urged that, on the merits, the lower Courts have taken an erroneous view as to the arrangement between the *pujaris* and the members of the Devasthan Committee in 1841. It is urged that this arrangement really affirmed what was then an established usage of the institution.

On the other hand, on behalf of the Gurave, it has been contended that the suit is not maintainable, as there is no right to property in contest within the meaning of section 9. On the merits it is urged that the finding of the lower Appellate Court, that the Guravs and the Ganpules are entitled to divide the offerings equally, should be accepted.

On behalf of the trustees it has been urged that the suit is not maintainable. It has been pointed out that, though they took up a position in the Trial Court which is not consistent with the position now taken up on their behalf, it was due to a misapprehension on their part of their legal position, and that, properly speaking, the suit is not maintainable. Though the point was not raised by any of the parties in the



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course of the argument, we felt a doubt as to whether the suit would not be barred in view of the provisions of section 92 of the Code of Civil Procedure. We accordingly invited arguments on the point, and we have heard the parties fully. It is a point not taken in either of the Courts below and it was not taken before us, though Mr. Gharpure's contention on behalf of the trustees came fairly near the point based on the provisions of section 92.

The amount of the claim in suit is very small; but the plaintiff seeks in this suit to establish his right not only to recover certain amount as damages in consequence of the alleged wrongful act of the Gurave, but also to restrain them from obstructing him in the enjoyment of the offerings placed before the deity. No relief is claimed against the trustees. But they are parties to the suit, and if the plaintiff's claim were decided on the merits it is clear that the decision would be binding upon them.

Before proceeding to deal with the point as to the effect of section 92, Civil Procedure Code, I desire to make it clear that I am by no means satisfied that the lower Courts are right in their view that the present suit is not maintainable, apart from the provisions of section 92. It seems to me that, though the offerings may be uncertain and voluntary still, when the offerings are made, they are the property of the temple. Undoubtedly, this suit relates to that property, and I do not see how it can be said that the Civil Courts cannot try it, unless it can be shown that the cognizance of such a suit is expressly or impliedly barred.

The only bar suggested is that created by the provisions of section 92. In connection with the point relating to section 92, it is necessary to state that in 1889 a suit was brought under section 539 of the Code of Civil Procedure, then in force, by some of the *pujaris* against the then members of the Devasthan Committee. The suit was decided in 1897, and a decree was passed appointing certain persons as trustees, and framing a scheme. It is not necessary to set forth this scheme in detail. Clause 2 provides that: The "members (i. e., members of the Devasthan Committee) shall conduct the affairs of the Devasthan according to the long

established usages thereof. They shall keep clear and accurate accounts of all the transactions... No suit shall be filed and no other new or important step taken without the consent in writing of the majority of the Committee. In all disputed matters, the decision shall be according to the opinion of the majority to be recorded in writing." The scheme further mentions that, "the rules embody all the matters on which it appears at present necessary to give directions." There is no specific reservation in the scheme for any application to add to or alter the scheme.

The question is, whether sub-section (2) of section 92 creates any bar to this suit. Under that sub-section it is provided that no suit, claiming any of the reliefs specified in sub-section (1), shall be instituted in respect of any such trust as is therein referred to, except in conformity with the provisions of that section. The question is, whether the nature of the suit, including the relief claimed by the plaintiff, brings the case within the scope of section 92, sub-section (1). In determining the nature of the suit, we must look not merely to the form but to the substance. As I read the plaint and the prayer clause, it appears that the plaintiff claims to be one of the hereditary *pujaris* and to have certain rights, in virtue of his position as such hereditary *pujari*, in accordance with the usage of the institution, to a certain part of the temple funds. It is common ground that the funds, (i. e., in this case the offerings) laid before the deity belong to the temple and are to be managed and administered by the members of the Devasthan Committee under the scheme. It is in relation to this fund that a relief is asked by the plaintiff, which in effect amounts to asking for an appropriation of these funds for the benefit of the officiating *pujaris*. On the other hand, the Guravs maintain that they have a right to this part of the temple property. Undoubtedly, a dispute has arisen, between the *pujaris* and the Guravs, who are both connected with the temple and whose services in connection with the temple are necessary, as to whether the offerings made to the deity should be given to the *pujaris* exclusively, or should be divided between them and the Guravs, and, if so, in what proportion. Such a claim clearly invites the direction of the Court for the administration of this trust property. There is no dispute, and

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there can be none, that this property is part of a trust created for public purposes of a religious nature. In fact, that position had been accepted in the suit filed under section 539 of the Code of Civil Procedure, corresponding to the present section 92. It also appears to me that, in substance, in this suit the Court is invited to determine and declare what proportion of this part of the trust property shall be allocated to the *pujaris* and the Guravs. Looked at in that light, the suit seems to me to relate to a relief which would be covered by clause (e) of section 92. It is clear that, if a suit had been brought in accordance with the provisions of section 92 by the Advocate-General or by any two or more persons interested in the trust with the leave of the Advocate-General, and if the directions of the Court had been sought as to the appropriation of the offerings made to the deity, the District Court would have been bound to entertain the suit under section 92, as such a suit would clearly be covered by sub-section (1) of that section. In the course of the argument before us, it is conceded that if such a suit were brought by the Advocate-General, and if the relief, as I have stated above, were claimed by him, the suit would be well within the scope of section 92. But it is urged that in the present case the plaintiff seeks relief in his private capacity in respect of a right which he asserts against the Gurave to this particular part of the trust property, and that such a suit cannot be said to be within the scope of section 92. This argument proceeds merely upon the form and not the substance of the suit. The nature of the relief claimed and the allegations in the plaint, upon which the claim is based, must be looked at. It seems to me to be clearly a suit in which the direction of the Court is sought as to the administration of this part of the trust fund. It is true that, under the scheme, the trustees themselves, if they had been alive to their duty, might have been able to deal with this matter. If necessary, they might have and could have sought further directions of the Court which framed the scheme. But that has not been done by the members of the Devasthan Committee and they have allowed the dispute to go on between the Ganpules and the Guravs, though the trust funds belong to the temple and are liable to be managed and administered by them under the scheme.

When once the scheme has been framed, it is clear that the funds must be administered in accordance with the provisions of that scheme. No separate suit relating to the apportionment or administration of any part of the funds between any persons connected with the temple, who are not themselves trustees but who are under the trustees, can be allowed in view of the provisions of section 92.

In connection with this point, I may refer to the case of *Rama Das v. Hanumuntha Row* (1). The facts and the circumstances of that case were undoubtedly different; but the *ratio decidendi* seems to me to be applicable to the present case. As pointed out at page 369\* of the report, the principle adopted is apparently that the scheme once settled by a Court cannot be altered except by the Court. This would seem to preclude suits between parties to establish a private right, which, if established, would interfere with a charitable scheme settled by the Court. In the present case we have a scheme settled by the District Court. True it is, that the scheme is not detailed and makes no specific provision for the allocation of this fund. But the duty of managing the temple funds, which would include the offerings placed before the deity, is laid on the members of the Devasthan Committee, who are required to administer the same in accordance with the long established usage of the institution. I do not see how, if a suit of the present character between the Ganpules and the Guravs were allowed in respect of what is called the private right of the Ganpules against the Gurave, the scheme settled by the Court could remain uninterfered with.

It has been urged on behalf of the plaintiff that his position is really that of a stranger with reference to the trust, so far as the present claim is concerned. Indeed, if that fact were established his suit would be outside the scope of section 92. But I am unable to accept the contention that the plaintiff is in the position of a stranger. The cases cited to us at the Bar are mostly

(1) 12 Ind. Cas. 449; 36 M. 364; 21 M. L. J. 952; 10 M. L. T. 356; (1911) 2 M. W. N. 387.

\*Page of 36 M.—[Ed.]

SAKHARAM DAJI GANPULE v. GANU RAGHU GURAO.

cases, in which the dispute was between the trustees in charge of the trust and the strangers who had trespassed upon the trust property. I do not see how, either the Ganpules or the Garavs can be treated as strangers to the temple and how, any suit, to which they and the trustees are parties, could be said to be a suit between the trustees and the strangers as contemplated in these cases. Some of the cases cited before us bear upon the question as to whether any dispute between the trustees would be within the scope of section 92. We are not concerned in the present case with the decisions which bear on the question as to whether one trustee could maintain a suit against his co-trustee in respect of the alleged wrongful act of the co-trustee. It is sufficient, for the purpose of this case, to observe that these decisions have no bearing upon the present case in which the dispute is between two classes of servants or hereditary officers of the temple. Such a dispute relates, in my opinion, to the administration of the trust, and any clear and definite direction on the point in the scheme would be decisive and binding upon the parties. In the argument before us it is conceded that it was open to any of the parties to move the District Court to supplement the scheme by specific provisions as to the division of this fund. But it is urged that it was only an additional remedy and did not bar the present suit. I am of opinion that section 92, sub section (2), bars the cognizance of this suit by the Court, in which the suit was filed.

The further question as to what is the proper course for the plaintiff to adopt under the circumstances, is one upon which, it is not strictly necessary for us to express any opinion. It has been accepted before us at the Bar that it is open to any one interested in this fund to apply to the District Court, which framed the scheme, to supplement or modify the same. It is not suggested that a separate suit under section 92 is necessary. Though no liberty to apply is reserved under the scheme, such a reservation can be always implied. An application to the District Court seems to be the obvious, and, as I hold, the only remedy open to the parties, under the circumstances, to have a direction from that Court as to the offerings laid before the deity.

I may add that, though we have not been able to deal with the plaintiff's claim in this suit on the merits, it is clear that the money, which the Garavs are said to have wrongfully taken, must ultimately be liable to be distributed in accordance with the direction which the District Court may give as to the disposal of the offerings made before the deity generally and as to the particular amount in question. I also desire to make it clear that, merely because the funds belong, in the first instance, to the temple, it does not follow that the hereditary *pujaris* may not have a right as such to the whole or any part of this fund. That is a matter which must be decided on evidence by the District Court on a proper application. The view taken by the lower Courts on this point must not be taken to have been accepted by this Court.

In the result, I would affirm the decree of the lower Appellate Court except as to costs. Having regard to the view which we have taken of this case and to the positions taken up by the parties to this litigation, we think that each party should bear his own costs throughout.

CRUMP, J.—I agree.

*Decree confirmed.*



DOWLATRAM V. NARAINDAS.

## SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 35 OF 1916.

March 24, 1920.

Present:—Mr. Fawcett, J. C., and  
Mr Kemp, A. J. C.DOWLATRAM *alias* DOLUMAL

—APPELLANT

*versus*

NARAINDAS—RESPONDENT.

*Hindu Law—Succession—Stridhan—Son and grand-son—Stridhan, non-technical, succession to—Succession, rule of, obtaining in Bombay applicable to Sind.*

Where a Hindu female succeeds by inheritance to the estate of her father, she takes an absolute estate, and on her death, the estate devolves on her son in preference to a grandson of a pre-deceased son [p. 921, col. 1.]

The non-technical *stridhan* of a Hindu female governed by the Vyavahara Mayukha descends to her son in preference to her son's son [p. 9-2, col. 2.]

Where a rule of succession among Hindus has been declared to be of general authority in the Bombay Presidency, it should be held to be the rule also in Sind except where an invariable and ancient special usage is alleged and proved by him who avers it. [p. 922, col. 2.]

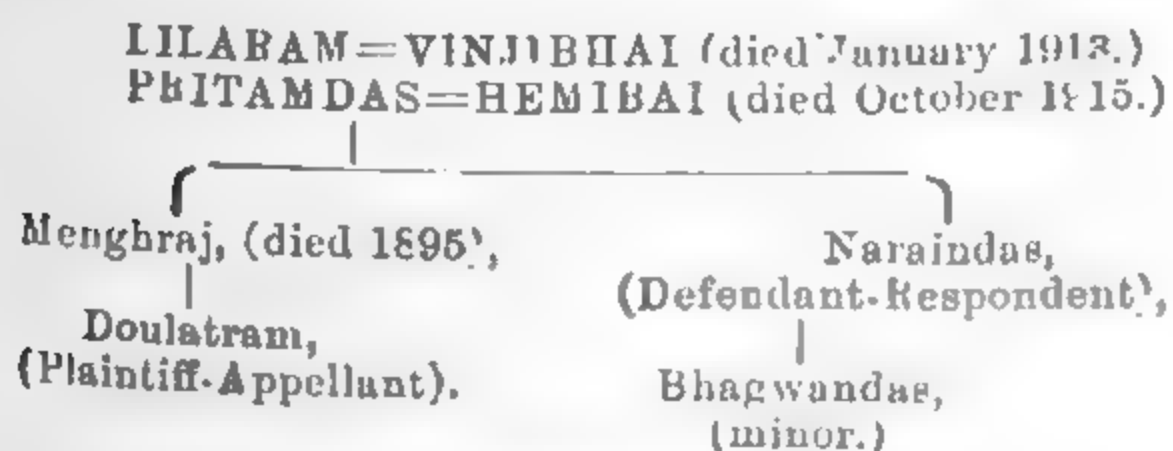
Appeal from the decree of the First Class Sub-Judge, Sukkur.

Mr. Rupchand Eilaram, for the Appellant.

Mr. Isardas Oodharam, for the Respondent.

## JUDGMENT.

Fawcett, J. C.—The following genealogical tree shows the relationship of the parties to the suit out of which this appeal arises:—



The plaintiff, Dowlatram, sued for partition of his share of property formerly possessed by his grand-mother, Hemibai, and great-grand mother, Vinjibai. His suit has been dismissed except in regard to one property, of which the defendant, Naraindas, admitted his right to partition. He appeals in regard to the other properties.

The property alleged to have been left by Hemibai consists of a shop and certain

ornaments. The shop came to her on a partition made between Pritamdas and his two sons, Menghraj and Naraindas, which was effected by a decree passed upon an award. Hemibai has admittedly executed a Will, by which she left this property to the defendant's son, Bhagwandas, and the main question arising is, whether Hemibai had power to dispose of the shop by Will in this way. It is quite clear that, as ruled by the Privy Council in *Debi Mangal Prasad Singh v. Mahadeo Prasad Singh* (1), immoveable property obtained by a widow on partition reverts on her death to the next heirs of her husband, in the absence of any agreement to the contrary, at the time of the partition. In the present case Hemibai was not a widow, but the property was awarded to her for maintenance charges and the same principle would apply. It is contended by the appellant's Pleader that the award debars Hemibai from willing away the property, while respondent's Counsel urges that it confers upon her an absolute estate. The award, paragraph 6, runs as follows:—

"The following property is awarded to defendant No. 3 Musammot Hemibai, wife of Massand Pritamdas, for the expenses of her maintenance and *Dins* payable to the daughters and sisters of the parties' father and other expenses for keeping up family status. By reason of her getting it she will continue to defray her maintenance charges herself and she will continue to pay *Dins* to the daughters and sisters of the parties' fathers and other expenses for maintaining status of the family. Other parties will have no concern with that nor will the other parties have any right, interest or claim or interference in the property awarded to her.

"(1) Ornaments which Musammot Hemibai wears on her person and the ornaments which Musammot Pissandbai, wife of Massand Malram, had given her at the time of death—all these ornaments awarded to Musammot Hemibai now belong to her. Other parties have no right or interest therein.

"(2) One residential shop situated in the Town of Shikarpur, Sub Registration District

(1) 14 Ind. Cas. 100; 84 A. 234; 9 A. L. J. 263; 11 M. L. T. 217; 16 C. W. N. 403; (1912) M. W. N. 324; 14 Bom. L. R. 220; 15 C. L. J. 344; 22 M. L. J. 462; 30 I. A. 121 (P. C.).

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Shikarpur, in this side of the office of Town Inspector, which shop is occupied by Kodumal walad Pamandas, physician, as a tenant. This shop is wholly awarded to *Musammatt Hemibai* with all rights and interests and it belongs to her and will remain in her possession and enjoyment.

"(3) This property is awarded to *Musammatt Hemibai* on this condition that whatever property is left out of the said property at the time of her death will be appropriated in equal halves by Mengbraj and Naraindas between themselves.

"(4) If *Musammatt Hemibai* gives her property to one son the other son will get divided half (of the property) from his brother."

And it is also to be noted that, with regard to the property awarded to Pritamdas, it was provided as follows:—

"As regards the property awarded to defendant No. 1, Massand Pritamdas, he has full powers as, for an instance, if he chooses to transfer the property in any way during his lifetime or to gift it in charity or to spend it, he is competent to do so, except that if he gives away his property to one son his other son will recover from him half (the property)."

Reading these provisions in their ordinary grammatical meaning, it is, I think, quite clear that the arbitrators were anxious that neither the father nor the mother should show any preference to either of the two sons and provision was accordingly made that, if either the father or the mother gave property to one of the sons, the other son had a right to recover half of it from his brother. Sub paragraph (3) of paragraph 6 also contains a clear provision that whatever property was left to Hemibai out of that awarded should go to the two sons in equal halves. And this is made a condition on which the property was awarded to her. Mr. Isardas for the respondents contends that the first part of paragraph 6 confers an absolute estate upon Hemibai and that the subsequent clause, so far as it purports to restrict that estate, should be treated as repugnant to the grant and, therefore, invalid, in accordance with the well-known rule of construction referred to in *Goverdhandas v. Venattai* (2). In support of the contention he refers to the use of

(2) 1 S. L. R. 211.

the words '*milkiat*' and '*kabzo*', and argues that this virtually is equivalent to saying that Hemibai was the *malik* of the property, which expression usually confers a heritable alienable estate. As a matter of fact, Hemibai is not described as a *malik* and I do not think that the mere use of the words '*malikiat*' or '*kabzo*' can be said to amount to the same thing, and even had she been described as *malik*, yet the rule that this confers an heritable and alienable estate is one which applies only in the absence of indication of a different intention, as is pointed out in *Goverdhandas*' case (2), at page 216. The leading case is that of *Surajmani v. Rabi Nath Ojha* (3), in which it was held that the use of the word *malik* implies "absolute ownership" unless there is anything in the context or surrounding circumstances to qualify such a meaning, and that it was not so qualified by the fact that the donee was a widow. But in this case there is a good deal more. The express provision in sub-paragraph (3) of paragraph 6 of the award is a clear qualification of the otherwise absolute estate conferred upon Hemibai. And it is, in my opinion, a valid and reasonable condition attached to the estate conferred upon her by the award. The estate conferred is, in fact, an absolute estate only during her lifetime. Hemibai could not, therefore, will any of this property to Mengbraj or Naraindas so as to confer it on either of them, except to confer it on them in equal halves.

The question, therefore, now arises whether the bequest to Naraindas' son, Bhagwandas comes within this qualification of her estate. No doubt it does not do so, if the words are read only as they literally stand. But in construing the award, just as in construing the Will of a Hindu, it is not improper to take into consideration what are known to the ordinary notions and wishes of Hindus with respect to the devolution of property. See *Moulvie Mahamed Shumsool Hooda v. Shewukram* (4) cited in *Motilal v. Advocate-General of Bombay* (5). The

(3) 30 A. 84; 5 A. L. J. 67; 12 C. W. N. 231 (P. C.); 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 181; 8 M. L. T. 144; 35 I. A. 17.

(4) 2 I. A. 7; 22 W. R. 409; 14 B. L. R. 226 (P. C.); 3 Sar. P. C. J. 405.

(5) 11 Ind. Cas. 547; 35 B. 279 at p 285; 13 Bom. L. R. 471.

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ordinary rule of Hindu Law is, that a grandson whose father is dead, is on the same footing as a son in regard to the inheritance to the separate property of his grandfather by virtue of the doctrine of representation: cf. Mulla's Principles of Hindu Law, Second Edition, page 18, and Gour's Indian Hindu Code, page 938. There can, in my opinion, be no reasonable doubt that the arbitrators intended that the names Menghraj and Naraindas should include any descendants of theirs. They are on the same footing under this rule of representation. And it would be virtually assenting to a fraud to allow the contention that the Will of Hemibai does not offend this condition because it leaves the property to Bhagwandas instead of to his father Naraindas. Bhagwandas, it may be noted, is a minor, and the virtual possession and ownership will be with Naraindas, at any rate, for many years. He thereby obtains a benefit at the expense of his brother's son which is opposed to the award. Accordingly, I differ from the finding of the lower Court that, in consequence of Hemibai's Will, the plaintiff was not entitled to a share in the shop. Under the conditions contained in the award the plaintiff, Doulatram, stands in the shoes of Menghraj and is entitled to a half share in this property.

The plaintiff also claims a share in certain ornaments alleged to have been left by Hemibai and to have been taken possession of by the defendant, Naraindas. The Subordinate Judge has held that there is no satisfactory evidence that such ornaments were in existence when Hemibai died, and that they are in defendant's possession. I can see no reason to differ from this finding of fact. No doubt, it is clear from the award that Hemibai had ornaments. But the plaintiff has not proved that they were still with her at her death. The witness Hemandas speaks only to seeing ornaments on her person two or four years before her death. Mohandas, similarly, to one year before her death and Shewaram to four and four-and-a-half years ago, which would be about three years before her death. There is also evidence that, at any rate, some of the ornaments had been sold. The only evidence of defendant's possession is that of the plaintiff, Doulatram, which is uncorroborated, although he mentions that

certain witnesses were present when he was beaten by the defendant. It may be difficult for the plaintiff to adduce evidence, but at the same time this in itself will not justify us in holding his allegation proved. Accordingly, I see no reason to differ from the view taken by the lower Court on this part of the case.

The remaining property is a house, which plaintiff alleged had been willed to him by his great-grand-mother Vinjibai. The original Will was not produced and was alleged to be in possession of the defendant. The lower Court held that the Will was not proved and that the copy of it that was produced was inadmissible in evidence. Mr. Rupchand for the appellant has not been able to show us any evidence that the original Will was in the defendant's possession or that other circumstances existed which would enable the Court to admit secondary evidence of it. Nor has the plaintiff adduced all the evidence that seems available in regard to the actual execution of the Will. Thus, neither the writer nor any of the alleged attesting witnesses have been called. It is, no doubt, probable that such a Will was executed, as it is referred to in a receipt (Exhibit 59) purporting to have been signed by the defendant. The defendant also is very vague both in his written statement and in his evidence in disputing its existence. But this will not suffice to excuse the plaintiff from proving the essentials for admitting secondary evidence of the Will. I can see no sufficient reason for differing from the lower Court's decision on this point.

Mr. Rupchand for the appellant contended, however, that the plaintiff is, under general Hindu Law, entitled to a half share of this house independently of any bequest by Vinjibai. No issue was raised on this point in the lower Court; but the claim is made in paragraph 3 of the plaint, and as it is a point which does not necessitate further enquiry as to the facts, it can, I think, be taken in appeal; cf. *Begam v. Topanmal* (6) and *Bherumal Teckchand v. Duklanomal* (7). The point is also referred in the memorandum of appeal. It appears that Vinjibai obtained this property as the widow of Lilaram, and upon her death it

(6) 4 Ind. Cas. 598; 3 S. L. R. 106.

(7) 27 Ind. Cas. 933; 8 S. L. R. 272.



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vested in the daughter Hemibai, as her absolute property and became, therefore, her *Stridhan*; *Chinku v. Utamchand* (8); Gaur's Hindu Code, sections 25 and 2, page 1086. Mr. Rupchand contends that, even so, it descends to her sons, etc., as if she were a male, and that, accordingly, the plaintiff, as a great grand son of Lilaram, is entitled to succeed to it simultaneously with his uncle under the ordinary doctrine of representation which has already been alluded to. In support of this contention, he cites Mayne's Hindu Law, 8th Edition, sections 618-9 at pages 863 and 864, and *Budha Singh v. Lattu Singh* (9) and *Ranchandra Martand v. Vinayak Venkatesh* (10). The passage in Mayne is based on Mr. Justice West's judgment in *Vijayaragam v. Lakshuman* (11). The view there taken that, under the Vyavahara Mayukha, *stridhan* acquired by inheritance descends, on the woman's death, to her sons and the rest, as if she were a male, is based on Chapter IV, section X B1 26 of that work (see at page 260). This text has been held by the Bombay High Court only to give precedence to sons and rest "over daughters and the rest" in the case of inheritance to non technical *stridhan*, and not to authorize a devolution to the heirs of their last male owner: *Manilal Rewadat v. Bai Rewa* (12). The view propounded by Mr. Mayne has there been expressly dissented from. The Bombay High Court has also refused to reconsider its former decisions, even though some Privy Council rulings weaken them, on this principle of *stare decisis*: cf. *Bhau v. Raghunath Krishna* (13), *Gulappa v. Tayawa* (14) and *Dhondi v. Radhabai* (15). Finally, it has held, on the exact point now arising,

and on a consideration of the text of the Mayukha, which was the basis of Mr. West's judgment, that the non-technical *stridhan* of a Hindu female governed by the Vyavahara Mayukha descends to her son in priority to her son's son: *Rai Raman v. Jigjivandas Kashidas* (16). That case, it may be noted, like this one was concerning the property inherited by a daughter from her father and the two Privy Council rulings relied on by Mr. Rupchand had been cited in argument (see at pages 620 and 622\*). As stated in the arguments in that case (page 622\*), the modern text-writers treat succession to a *stridhan* as going not collectively but consecutively to sons, grandsons and great grandsons. The judgment also gives reasons which, seem weighty, for not applying the doctrine of representation in such a case. This view assimilates the Mayukha Law to the Mitakshara Law in the case of both technical and non technical *stridhan* (see at page 623\*). It has been held in *Chinku v. Utamchand* (8) that, where a rule of succession among Hindus has been declared to be of general authority in the Bombay Presidency, it should be held to be the rule also in Sind, except where an invariable and ancient special usage is alleged and proved by him who avers it. Whether, therefore, the Mitakshara or the Mayukha is to be followed, it seems to me clear that the property on Hemibai's death devolved on the son, Narainda, in preference to the grandson, Dowlatram, and that the latter is not entitled to succeed to it simultaneously with his uncle, Narainda. I hold, therefore, that the plaintiff is not entitled to a partition of a half share in this property.

I would, therefore, allow the appeal only in regard to the shop, which is Item No. 2 of Schedule A to the plaint, and vary the lower Court's decree by including this property in the properties of which the plaintiff is entitled to get a half share on partition from the defendant. As the appellant has been partly successful, I would also allow him half his costs of appeal.

KEMP, A. J. C.—I agree.

P. WERTT, J. C.—On this judgment being delivered Mr. Rupchand also claims a variation (16) 41 Ind. Cas. 277; 41 B. 815; 19 Bom. L. R. 629.

\*Pages of 41 B.—[E.L.]

(8) 2 S. L. R. 59.

(9) 20 Ind. Cas. 529; 37 A. 604; 29 M. L. J. 424; 2 L. W. 897; 18 A. L. J. 1007; 18 M. L. T. 403; 17 Bom. L. R. 1022; 20 C. W. N. 122 C. L. J. 481; (1915) M. W. N. 772; 42 I. A. 208 (P. C.).

(10) 25 Ind. Cas. 280; 42 C. 384; 18 C. W. N. 1154; 27 M. L. J. 833; 1 L. W. 831; 10 N. L. R. 112; 16 M. L. T. 437; (1914) M. W. N. 835; 14 Bom. L. R. 863; 12 A. L. J. 1281; 20 C. L. J. 573; 41 I. A. 290 (P. C.).

(11) 8 B. H. C. R. (O. C. J.) 244.

(12) 17 B. 758; 9 Ind. Dec. (N. S.) 498.

(13) 80 B. 229; at p. 283; 7 Bom. L. R. 936.

(14) 31 B. 458; 9 Bom. L. R. 834.

(15) 16 Ind. Cas. 343; 36 B. 546; 14 Bom. L. R.

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ation of the lower Court's decree by allowing mesne profits in respect of the shop, of which partition is now allowed. We think that enquiry may be directed under Order XX, rule 12, Civil Procedure Code, in regard to these mesne profits from the institution of the suit up to delivery of possession to plaintiff, and vary the lower Court's decree also in this respect.

*Decree varied.*

### ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 35 OF 1920.

November 19, 1920.

*Present* :—Mr. Justice Walsh and

Mr. Justice Ryves.

RAMA NAND BHARTI—DEFENDANT—

FIRST PARTY—APPELLANT

*versus*

SHEO DASS AND OTHERS—PLAINTIFF AND

DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1942), s 55—Sale—Portion of sale-consideration left with vendee to pay vendor's mortgagee—Mortgagee not paid—Charge, creation of—Vendor's lien, enforceability of.*

A. sold certain property to B, leaving with him a portion of the sale consideration for payment to C, who held a mortgage of the property from A. Subsequently, D. brought a suit for pre-emption and acquired the property from B, but neither he nor B, made any payment to C, who brought a suit to enforce his mortgage by sale of the property and obtained a decree. A. satisfied this decree and brought the present suit to recover the money paid by him by sale of the property:

*Held*, that B and D. having acquired the property with notice of the mortgage to C, the amount due on that mortgage formed a charge on the property under section 55 of the Transfer of Property Act, and as the amount due was paid by A he was entitled to enforce his lien against the property in the hands of D.

First appeal from the order of the Second Additional Subordinate Judge, Basti, dated the 17th of December 1919.

FACTS appear from the following judgment of the lower Appellate Court :—

"On 6th June 1912 plaintiff appellant executed a sale-deed for Rs. 999 in favour of the ancestors of defendants, second party. Rs. 201 out of the sale consideration was left

in the hands of the purchasers for payment to defendant, third party, on account of a mortgage, dated 28th July 1909. Defendants, first party, acquired the property in suit by right of pre-emption through Court by filing a suit against defendants, second party. Neither the original purchasers nor the pre-emptors paid the money due to defendant, third party, on account of his mortgage referred to above. Defendants, third party, therefore, sued the plaintiff and obtained a decree for sale of the mortgaged property on foot of his mortgage. Thereupon plaintiff executed a mortgage, dated 20th December 1918, for Rs. 403.15-0 in favour of defendant, third party, and satisfied the decree. He then brought this suit for recovery of the said amount by sale of the property which had been sold to the ancestors of defendants, second party, and which was now in the hands of defendant, first party.

"Plaintiff claimed to be entitled to a charge on the property sold under section 55, clause (4) (b) for the amount in question. The learned Munsif, relying on *Gur Dayal Singh v. Karam Singh* (1) and *Abhulla Beary v. Mammali Beary* (2), held that there was an agreement between the vendor and the vendees for payment of a portion of the consideration to a creditor of the vendor that the defendants (vendees and the pre-emptors) having failed to pay the said money. There was a breach of contract on the part of defendants for which plaintiff could sue them for damages, and that the amount in question not being payable to the plaintiff there could be no charge in his favour. He, therefore, dismissed the suit, hence this appeal.

"The question for determination is, whether there can be a charge in favour of the plaintiff, under the circumstances given above or not, and whether it can be enforced against defendant. The leading case on the point is *Webb v. Macpherson* (3). It is an authority for the proposition that the seller can enforce the charge mentioned in section 55, clause (4) (b), against the property in the hands of a subsequent purchaser who has notice of the fact that the

(1) 20 Ind. Cas. 289, 14 A. L. J. 304; 33 A. 206.

(2) 5 Ind. Cas. 87; 33 M. 416; 7 M. L. T. 376.

(3) 31 C. 57; 50 I. A. 248; 5 Bom. L. R. 833; 8 C. W. N. 41; 13 M. L. J. 369 (P. C.); 8 Sar. P. C. J. 554.

RAMA NAND BHARTI v. SHEO DAS.

purchase-money in the first transfer or some part of it has not been paid.

"It cannot be denied in this case that defendants, first party, (who acquired the property in question through Court by pre-emption) had notice of the fact that the mortgage, money due to defendant, third party, which was left in deposit with the vendees) had not been paid. If there is a charge it can, therefore, be enforced against defendants, first party. It is contended on behalf of defendants that the agreement in this case was to pay not to the vendor but to the creditor of the vendor; that the charge created by the Statute in favour of the vendor in only securing for purchase-money payable to him, and that a contract to the contrary arises by implication to negative the statutory charge. This view was taken by the Madras High Court in *Abdulla Beary v. Mammali Beary* (2), but in that case there was a distinct stipulation that, upon the failure of the vendee to discharge the liabilities of the seller, he shall be liable for any damages resulting from such default. There is no such stipulation in the sale-deed in suit in this case. The Hon'ble Sir Sunder Lal, J., expressed some doubt about the correctness of the interpretation put upon the sale-deed by the Madras High Court. Assuming the interpretation to be correct, there is no such stipulation in the sale-deed in suit as there was in the case reported as *Abdulla Beary v. Mammali Beary* (2). That case is, therefore, not in point. The Hon'ble Sir Sunder Lal, on page 1038, XII A. L. J. [*Megh Raj Vaish v. Abdullah Khan* (4)] in a case similar to the present case observed: 'Under the terms of the sale-deed in suit, it is not possible to say that the money was not payable to the plaintiffs. It was at the plaintiffs' request left in the hands of the vendee to pay for and on behalf of the vendors and in that sense the money was payable to the vendors and they had a lien for the money so long as it was not paid.'

"In a similar case, reported as *Har Ohand v. Kishori Singh* (5), it was held that the fact that the money was left with the vendee for payment to a creditor of the vendor was in no way inconsistent with the continuance of the lien.

(4) 25 Ind. Cas. 203; 12 A. L. J. 1034 at p. 1038.

(5) 7 Ind. Cas. 639.

"Following the above rulings, I am of opinion that there was a charge in favour of the plaintiff for the money remaining unpaid by the defendants. The ruling reported as *Gur Dayal Singh v. Karam Singh* (1) is distinguishable, in that the subsequent transferees in that case were held to have had no notice of the unpaid purchase money. As the lower Court has dismissed the suit on a preliminary point the decree of the lower Court is reversed. I remand the suit with direction to re-admit the suit on its original number and to proceed to determine it according to law. The appellant will have his costs of this appeal from respondents, first party."

Mr. Inwar Saran, for the Appellant.

Mr. P. L. Banerji, for the Respondents.

JUDGMENT.—This order was clearly right. We cannot improve upon the admirable judgment of the lower Appellate Court. There is obviously a serious question as to whether the plaintiff can establish a charge for more than Rs. 201. The only ground upon which he suggests it in his plaint, being an allegation of negligence on the part of the defendants, in paragraph 6. But in this case notice is clearly found, and in the authorities relied upon there was no notice. Great reliance has been placed upon the decision in the case of *Gur Dayal Singh v. Karam Singh* (1) in which case there was no notice, and particularly upon the dictum contained on page 260\* of the judgment, where it was said that in a case where by an agreement part of the consideration is left in the hands of the vendee to pay a creditor, such agreement and the money payable thereunder is not "unpaid purchase-money." That dictum was not necessary for the decision of that case, and we think that probably, at some future date, it will require further consideration. The appeal must be dismissed with costs.

*Appeal dismissed.*

\*Page of 88 A.—[Ed.]



PAHLUMAL SEWANMAL V. SIDIK.

## SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 37 OF 1917.

March 11, 1920.

*Present*:—Mr. Fawcett, J. C., and  
Mr. Kemp, A. J. C.

PAHLUMAL SEWANMAL—

APPELLANT

versus

SIDIK AND ANOTHER—RESPONDENTS.

*Limitation Act (IX of 1908), s. 20—Interest, payment of, as such—Civil Procedure Code (Act V of 1908), O. XXI, r. 2 (1)—Decree payable by instalments—Application for execution—Decree-holder, whether can certify payment of interest as such.*

Where the holder of a decree payable by instalments applies for execution thereof, it is open to him to extend the period of limitation under section 20 of the Limitation Act, by entering in his execution application, a payment on account of interest as such towards all overdue instalments. [p. 936, col. 1]

Appeal from the decree of the District Judge, Larkana.

Mr. Nihalchand Tikamdas, for the Appellant.

## JUDGMENT.

KEMP, A. J. C.—Plaintiff-respondent obtained an instalment-decree against defendant-appellant for Rs. 400, payable thus:—

Rs. 50 on 1st January 1911, with interest at Rs. 1 per cent. per mensem.

Rs. 50 on 1st June 1911.

Rs. 50 on 1st January 1912.

Rs. 50 on 1st June 1912.

Rs. 50 on 1st January 1913, and the balance of Rs. 150 on 1st June 1913.

For interest on the last Rs. 350 the plaintiff was to receive the *Batai* of the defendant's land up to the *Rabi* crop of 1912-13. If default was made in the payment of any instalment, interest on the overdue amount was to be paid at Rs. 1 per cent. per mensem.

The first instalment of 1st January 1911, with interest at Rs. 1 per cent. per mensem, was duly paid. It is unnecessary to consider whether the provision for interest at Rs. 1 per cent. per mensem on default of payment in any instalment over and above the receipt of *Batai* as interest was a penalty under section 74 of the Contract Act because no such point appears to have been taken in either of the lower Courts.

None of the instalments after 1st January 1911 were paid, but the plaintiff received the *Batai* up to the *Rabi* crop of 1914-15.

On 1st January 1915 plaintiff applied for execution. On that date the instalments of 1st June 1911 and 1st January 1912 were barred, unless limitation could be saved by payment of interest under section 20, Limitation Act. But the receipt of *Batai*, after default in payment of the instalment of 1st June 1911, cannot be regarded as payment of interest as such towards that instalment, because the intention of the parties seems to have been that the *Batai* was to represent the interest due on the balance of the debt after each instalment had been paid until the discharge of the whole judgment-debt, and interest on any instalment in arrears was provided for by the stipulation for interest at Rs. 1 per cent. per mensem on any such overdue instalment. As nothing but *Batai* was received, it appears that no interest in money was paid on the barred instalments before they became barred. This is also the view of the lower Appellate Court.

But the plaintiff received extra *Batai* for 1913-14 and 1914-15 admittedly against the interest due on the two overdue instalments of 1st June 1911 and 1st January 1912. This extra *Batai* was interest paid as such under section 20, Limitation Act. The plaintiff sought to have it taken into account to extend the period of limitation by mentioning the receipt of this extra *Batai* in his execution application.

Now the question as to whether a decree-holder can certify a payment mentioned in his execution application generally arises in one of two cases,—

(1) When he seeks to certify the payment as one made against an instalment payable under a decree made payable by instalments with a clause that this whole amount is to become due on failure to pay one or more instalments.

(2) When he seeks to certify the payment in order to extend the period of limitation under section 20, Limitation Act, in respect of an instalment that would otherwise be barred.

*Shafi Mahomed v. Choithram* (1) was an instance of the former case, and being a

(1) 52 Ind. Ca. 504; 13 S. L. R. 37.

PAHLUMAL SEWANMAL v. SIDIK,

decision of a Full Bench of this Court settles the law so far as this Province is concerned. It is unnecessary to cite authorities from other Courts on this point.

The present case comes under the second head. Here the decree-holder does not, by seeking to certify, ask the Court to say from what date limitation runs but essays to bring time barred instalments within time by invoking the assistance of section 20, Limitation Act. As to whether he can do this we have the decision in *Narsoomal v. Tirathmal* (2) against him. Nevertheless, the binding force of that decision is weakened by the subsequent remarks of the same Judges in the later case in *Shafi Mahomed v. Choithram* (1).

It is settled by the decision in *Shafi Mahomed v. Choithram* (1) that the application to certify may be admitted from the mention of the fact of the payments in the decree-holder's execution application. Can the decree-holder take advantage of payments uncertified before his application for execution to prolong the period of limitation? According to the decisions in *Kutubullah Sarkar v. Durga Oharan Rudra* (3) and *Bhajan Lall v. Oheda Lall* (4) he cannot. But the Calcutta High Court, in another case of *Eusuffeman Sarkar v. Sanchia Lal* (5), allowed the decree holder to extend the period of limitation under section 20, Limitation Act, by entering a payment on account of interest as such in his execution application. See also the Madras High Court's decision in *Rijam Aiyar v. Anantharatnam Aiyar* (6). Apparently the cases of *Kutubullah Sarkar v. Durga Oharan Rudra* (3) and *Bhajan Lall v. Oheda Lall* (4) were not cited before the learned Judges who decided *Eusuffeman Sarkar v. Sanchia Lal* (5). Nevertheless, the last mentioned case is reported in an unauthorized report and has, therefore, the weight to be attached to such reports.

There thus seems to be considerable conflict of opinion as to whether the execution creditor may, by entering payments in his execution application, extend the

period of limitation under section 20, Limitation Act. From one point of view it seems desirable that he should not be allowed to do so, because of the opportunity it would open for fraud on his part. He might be tempted to make no mention of such payments in the hope that, if the judgment-debtor paid the decretal amount before the period of limitation for an execution application ended, he could conceal such payments from the Court. On the other hand, there is an obligation on him to enter such payments in his execution application under Order XXI, rule 2 (1), and it seems unjust to assume he has fraudulent intention if he does not certify them as soon as they are made. If he does mention the payments in his execution application, the wording of Order XXI, rule 2 (1) makes it obligatory on the Court to record them. Nor is it alleged in the present case that the decree-holder has been guilty of any intended fraud in not certifying the extra *Batai* when it was received against interest on the overdue instalments.

There is no period of limitation within which the decree-holder must certify the payment, and I am, therefore, of opinion, this appeal must be allowed.

Fawcett, J. C.—I agree that the appeal should be allowed.

The circumstances are such that it can be reasonably inferred that the extra *Batai* for 1913-14 and 1914-15 was intended by the parties to cover interest due on the two instalments of 1st June 1911 and 1st January 1912; nor does any contention to the contrary appear to have been raised in either of the lower Courts.

The only point for determination is, whether non-certification of the payments within the prescribed period of limitation (3 years) prevents section 20 of the Limitation Act operating in favour of the decree-holder. In view of the judgments in *Shafi Mahomed v. Choithram* (1) the decision in *Narsoomal v. Tirathmal* (2) can no longer be treated as good and binding. It was distinctly dissented from by Pratt, J. C., and Crouch, A. J. C., and I resiled from the main reasoning on which it was based. No doubt, I also put forward the view in *Shafi Mahomed v. Choithram* (1) at pages 49-51\* that a payment

(2) 30 Ind. Cas. 51; 9 S. L. R. 27.

(3) 13 Ind. Cas. 424; 16 O. W. N. 886.

(4) 24 Ind. Cas. 215; 12 A. L. J. 825.

(5) 34 Ind. Cas. 606; 43 O. 207; 20 O. W. N. 272; 23 C. L. J. 380.

(6) 31 Ind. Cas. 318; 29 M. L. J. 669; 18 M. L. T. 475; (1916) 1 M. W. N. 127.

\*Pages of 13 S. L. R.—[Ed.]

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or adjustment on which a decree-holder relies for showing that his application for execution is within time must be certified by him before the question whether such payment or adjustment should be recognised first comes before the Court executing the decree. But in this case the certifying was made before the question came before the Court and not after the application for execution on which the question of recognition arose. Therefore, this view does not come in the way of recognising the payments which are in question in this

The Calcutta and Madras High Courts have in *Eusuffzaman Sarkar v. Sanchia Lal* (5) and *Masilamani Mudaliar v. Sethuswami Aiyar* (7), and in other cases there followed, ruled that a payment that is first mentioned in an execution application presented within 3 years from the date of such payment, is sufficiently certified under Order XXI, rule 2, Civil Procedure Code, and will operate to save limitation under section 20 of the Limitation Act. In view of the adoption by this Court of the general principle that a decree-holder can certify a payment at any time, I think these decisions must be followed by us, in preference to that of the Allahabad High Court in *Bhaan Lal v. Okeda Lal* (4).

We, therefore, reverse the lower Appellate Court's decree and restore the order of the Sub-Judge, holding that the two instalments of 1st June 1911 and 1st January 1912 are not time-barred. The respondents must bear appellant's costs in this and the District Court.

*Appeal allowed.*

(7) 41 Ind. Cas. 701; 41 M. 251; (1917) M. W. N. 502; 33 M. L. J. 219; 22 M. L. T. 115.

## PRIVY COUNCIL.

APPEALS FROM THE OUDH JUDICIAL COMMISSIONER'S COURT,

March 1, 1921.

*Present:*—Lord Buckmaster, Lord Shaw and Sir John Edge.

GHULAM ABBAS KHAN AND ANOTHER  
—APPELLANTS

*versus*

Musammam AMATUL FATIMA AND OTHERS  
—RESPONDENTS.

MOHAMMAD JAFAR AND ANOTHER  
—APPELLANTS

*versus*

Bibi AMATUL FATIMA AND OTHERS  
—RESPONDENTS.

*Oudh Taluqdars—Primogeniture sanad, construction of—"Successors", whether includes alienees.*

The ordinary form of *sanad* granted to the Oudh Taluqdars provides that, in the event of the grantee or any of his "successors" dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture:

*Held*, that "successors" in this connection is equivalent to heirs, i. e., is confined to those who succeed to the estate by virtue of the grant and does not include those who take the whole or part thereof through alienation. [p. 94, cols. 1 & 2.]

Consolidated appeals from a decree of the Court of the Judicial Commissioner of Oudh, (Stuart, A. J. O. and Kanhaiya Lal, A. J. O.), dated July 5, 1915, reported as 31 Ind. Cas., 748, affirming a decree of the Subordinate Judge, Mohanlalganj.

**FACTS.**—The main question raised by this appeal, and the only one decided by the Board, was whether or not, on the true construction of the Sanad in the case, which was in the ordinary form of primogeniture Sanad, the rule of primogeniture therein provided, applied to all persons who came into possession of the estate.

The facts are sufficiently stated in their Lordships' judgment. The two rival claimants were the first born son of a daughter and the son of the eldest daughter respectively. Their suits were both dismissed by the lower Courts.

Mr. De Gruyther, K. O. and Mr. E. B. Rastres, for the Appellants in first appeal.

Sir Eile Richards, K. O. and Mr. Parikh, for the Appellants in second appeal.

Mr. Clouston, K. O., and Mr. Kenworthy Brown, for Respondents Nos. 3 to 6.

Mr. De Gruyther, K. O., for Appellants in first appeal, submitted that the succession was,



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governed by the *sanad*. This is not settled by *Thakur Sheo Singh v. Raghubans Kunwar* (1). That case shows that the *sanad* establishes a permanent rule of succession and not merely intestate succession. The word "successors" includes successors by devise: it is not limited to intestacy. When these *sanads* were granted, the intention, as set out at length in Sykes' Compendium of Oadh Taluqdari Law, was to prevent the splitting up of estates. They lay down a rule which is to apply not merely to the original holder, but to his successors.

[SIR JOHN EDGE.—A Muhammadan gentleman might devise to a Hindu money-lender. Would he be a successor?]

I think so.

[SIR JOHN EDGE.—It may be, but I do not think Government could have intended it.]

Here you have the whole estate bequeathed to a member of the family who would at least have got part under the ordinary Muhammadan Law.

[LORD BUCKMASTER.—The question was not, it seems, considered in *Thakur Sheo Singh v. Raghubans Kunwar* (1) (*supra*), so as a decision to guide us it is of little use.]

"Successor" must at least include the succession to the whole family estate by a member of the family.

Mr. Parikh (who was allowed to follow on the same side).—The Will by which Sughra Bibi bequeathed to Akbar Ali Khan was admittedly made at the instance of the Chief Commissioner. This shows that it was not considered that a devise would defeat the policy of the Government.

Mr. Clauson, K. O., for Respondents Nos. 3 to 6.—There are two points fatal to appellants: (a) "succession" in the *sanad* means successor *ab intestate* (b) they cannot show they are male heirs, i. e., males establishing their title through males.

[LORD BUCKMASTER.—That second contention might be dangerous for you, as you do not make out your title through males.]

We are in possession and it is for them to prove their own title. As to (a) I say successor means one who comes in by force of the existence of the estate with no interruption. Successor might mean (1) *ab intestate*, (2) any holder of the estate, (3) something intermediate. Admittedly (2) is impossible, I submit successor cannot include transferees.

(1) 82 I. A. 203; 27 A. 634; 15 M. L. J. 352; 8 O. O. 317; 9 O. W. N. 1009; 2 C. L. J. 194 (P. C.).

One would not expect that the old limitation would apply to quite new people. It is not necessary to bar transfers altogether, but I would suggest that, at all events, a transfer outside the line marked out by the *sanad* breaks the successory limitation provided therein. Elahi Khanam was outside the circle: on no hypothesis could "heir" include the widow.

Mr. De Gruyther, replied.—Alienate includes adoption, and if any alienation is to break the line of succession, the adopted son would be free from all restrictions and would not be a successor, even though he took on an intestacy. Next, if "successor" had that limited meaning, each grantee could get rid of all limitations by devising to this next heir. The intention was that, till the estate was alienated, it should devolve in the particular way laid down. The *sanad* should be construed liberally so as to give effect to its true intent.

(The question as to the priority in right *inter se* of the two appellants was afterwards argued but the arguments are not reported as no decision was given.)

#### JUDGMENT.

LORD BUCKMASTER.—These are two consolidated appeals (Nos. 200 and 201 of 1919), arising out of two suits, brought by different plaintiffs for the purpose of determining the rights of succession to a property known as the Maniapur Taluka.

Several subordinate questions arise upon these appeals, but they are dependent upon the success of the appellants in their contention that, according to the true construction of a *sanad* granted in 1861 to a lady called Sughra Bibi, the rules relating to primogeniture, which that *sanad* established, apply to all persons who come into possession of the estate, whether by gift, devise, purchase or descent.

The facts which give rise to this dispute can be shortly stated. Sughra Bibi died on the 11th November 1865 having by Will given the whole Talukdari estate to one Akbar Ali Khan, who was the youngest of her four half-brothers. Akbar Ali Khan had no male issue, and, partly by a deed of gift and partly by bequest, he disposed of the whole of the property in favour of his wife Elahi Khanam. She died on the 20th April 1899 leaving six daughters, who are six respondents, and a number of grand-sons by such daughters, of whom Agha Mohammad

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Jafar, the appellant in Appeal No. 201 of 1919, is the son of the eldest daughter; Babu Ghulam Abbas Khan, the appellant in the other appeal, being the eldest of the grandsons by a younger daughter. If, according to the true construction of the document, the successors on whom the right of primogeniture is imposed do not include those who being outside the line of descent succeeded by the operation of a devise, the appellants fail; this has been the decision of one of the Judicial Commissioners and of the Subordinate Judge, the other Judicial Commissioner deciding, for other reasons, that the appellants were not entitled.

The relevant terms of the document are as follows:—

"Know all men that whereas by the Proclamation of March, 1858, by His Excellency the Right Hon'ble the Viceroy and Governor-General of India, all proprietary rights in the soil of Oudh, with a few special exceptions, were confiscated and passed to the British Government, which became free to dispose of them as it pleased, I, George Udney Yule, Officiating Chief Commissioner of Oudh, under the authority of His Excellency the Governor-General of India in Council, do hereby confer on you the full proprietary right, title and possession of the estate of Maniarpur. . . . Therefore, this *sanad* is given you in order that it may be known to all whom it may concern that the above estate has been conferred upon you and your heirs for ever, subject to the payment of such annual revenue as may from time to time be imposed, and to the conditions . . . . It is another condition of this grant that in the event of your dying intestate or of any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate, either in whole or in part, by sale, mortgage, gift, bequest, or adoption to whomsoever you please. It is also a condition of this grant that you will, so far as is in your power, promote the agricultural prosperity of your estate, and that all holding under you shall be secured in the possession of all the subordinate rights they formerly enjoyed. As long as the above obligations are observed by you and your heirs in good faith, so long will the British Government maintain you and your

heirs as proprietors of the above-mentioned estate, in confirmation of which I herewith attach my seal and signature."

From this it will be seen that the estate was granted in a form intended to secure the succession of the nearest male heir according to the rule of primogeniture, but that, at the same time, free power of disposition was reserved to all who became possessed of the estate. The construction of the document is rendered difficult by the use of words that have, according to English Law, a well-known meaning and implication which, in the circumstances of the grant, it would not be right to apply without qualification to the document in question. The circumstances in which the grant was made are relevant considerations, and they are fully set out in Sykes' Compendium of Oudh Taluqdari Law, referred to in the judgments of the Subordinate Judge. From this it is apparent, that it was the object of the Government to associate possession of the Taluqdari estate in its entirety in the hands of the Taluqdars, with the honour and dignity of the family whose title should be transmitted to the nearest male heir. It was something remotely akin to an estate in tail male according to English Law but the kinship was not close, because a power of alienation, unknown to an English estate tail, unless the entail is destroyed, was an essential part of the document. The conditions imposed as to loyalty and obedience to the British Government were obviously intended to have reference to those who took under the grant, and this is a relevant consideration in determining what the true meaning of the word "successors" may be, for if it bore the meaning which it is obviously capable of supporting, of any form of succession, it would follow that, whoever bought the estate under any circumstances, would be subject to the same restrictions. If, however, the estate were at any time alienated into the hands of people living in a totally different district and under totally different conditions, the reason for these provisions would at once disappear. Again, "successors," without some limitation, would include all those who succeeded to any part of the estate, and as the power of disposition clearly and in express language contemplates the power of breaking the estate up by the act of any holder for the time

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governed by the *sanad*. This is not settled by *Thakur Sheo Singh v. Raghubans Kunwar* (1). That case shows that the *sanad* establishes a permanent rule of succession and not merely intestate succession. The word "successors" includes successors by devise: it is not limited to intestacy. When these *sanads* were granted, the intention, as set out at length in Sykes' Compendium of Oadh Talukdari Law, was to prevent the splitting up of estates. They lay down a rule which is to apply not merely to the original holder, but to his successors.

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The relevant terms of the document are as follows:—

"Know all men that whereas by the Proclamation of March, 1858, by His Excellency the Right Hon'ble the Viceroy and Governor-General of India, all proprietary rights in the soil of Oudh, with a few special exceptions, were confiscated and passed to the British Government, which became free to dispose of them as it pleased, I, George Udney Yule, Officiating Chief Commissioner of Oudh, under the authority of His Excellency the Governor-General of India in Council, do hereby confer on you the full proprietary right, title and possession of the estate of Maniarpur. . . . Therefore, this *sanad* is given you in order that it may be known to all whom it may concern that the above estate has been conferred upon you and your heirs for ever, subject to the payment of such annual revenue as may from time to time be imposed, and to the conditions . . . It is another condition of this grant that in the event of your dying intestate or of any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate, either in whole or in part, by sale, mortgage, gift, bequest, or adoption to whomsoever you please. It is also a condition of this grant that you will, so far as is in your power, promote the agricultural prosperity of your estate, and that all holding under you shall be secured in the possession of all the subordinate rights they formerly enjoyed. As long as the above obligations are observed by you and your heirs in good faith, so long will the British Government maintain you and your

heirs as proprietors of the above-mentioned estate, in confirmation of which I herewith attach my seal and signature."

From this it will be seen that the estate was granted in a form intended to secure the succession of the nearest male heir according to the rule of primogeniture, but that, at the same time, free power of disposition was reserved to all who became possessed of the estate. The construction of the document is rendered difficult by the use of words that have, according to English Law, a well-known meaning and implication which, in the circumstances of the grant, it would not be right to apply without qualification to the document in question. The circumstances in which the grant was made are relevant considerations, and they are fully set out in Sykes' Compendium of Oudh Taluqdari Law, referred to in the judgments of the Subordinate Judge. From this it is apparent, that it was the object of the Government to associate possession of the Taluqdari estate in its entirety in the hands of the Taluqdars, with the honour and dignity of the family whose title should be transmitted to the nearest male heir. It was something remotely akin to an estate in tail male according to English Law but the kinship was not close, because a power of alienation, unknown to an English estate tail, unless the entail is destroyed, was an essential part of the document. The conditions imposed as to loyalty and obedience to the British Government were obviously intended to have reference to those who took under the grant, and this is a relevant consideration in determining what the true meaning of the word "successors" may be, for if it bore the meaning which it is obviously capable of supporting, of any form of succession, it would follow that, whoever bought the estate under any circumstances, would be subject to the same restrictions. If, however, the estate were at any time alienated into the hands of people living in a totally different district and under totally different conditions, the reason for these provisions would at once disappear. Again, "successors," without some limitation, would include all those who succeeded to any part of the estate, and as the power of disposition clearly and in express language contemplates the power of breaking the estate up by the act of any holder for the time

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being, such an event might easily arise and the object of securing an undivided holding in a family whose loyalty was rewarded by security of possession would be defeated. It would, therefore, be unreasonable to assume that the estate, if sold, should be subject in the hands of any purchaser to the conditions which as to descent and loyalty had their origin in circumstances which would no longer apply.

Their Lordships, therefore, reject the view that the word "successors" can in this *sanad* be subject to the liberal construction for which the appellants contend. But if this view be rejected, the document does not permit any other interpretation of the word except that of succession according to the terms of the *sanad* itself. The estate is, in the first instance, given to Sughra Bibi and her heirs for ever. The heirs there cannot mean any person outside the line of defined succession, for to such people no such grant was made nor, so far as the grant is concerned, were they contemplated in any way as succeeding. That phrase, therefore, must be taken to mean that the estate was an absolute estate conferred upon the grantee, and it is upon her and her nearest male heir and his nearest male heir and so on in unending succession that the conditions are imposed. The last words of the *sanad* make this clear:—"As long as the obligations are observed by you and your heirs in good faith, so long will the British Government maintain you and your heirs as proprietors of the above-mentioned estate." That must mean "maintain" the heirs who succeed according to the terms of the grant, because no other heirs as heirs can take the estate. "Successors," therefore, is, in their Lordships' opinion, an inartistic phrase used for the purpose of expressing that, in the event of there being no alienation, those who succeed to the estate by virtue of the grant will succeed subject to the conditions and with the same provision as to succession as the person to whom the grant was originally made.

It is argued that this might enable the whole purpose of the grant to be defeated by any owner for the time being by gift, sale or devise to the person who on his death would be the nearest male heir. This argument is open to the objection

that, until the moment of death occurs, it is impossible to say who the nearest male heir will be, so that the selection of the person might be almost impossible. But apart from that, their Lordships think that due effect can be given to the words of the *sanad* by construing it as meaning that "successors" includes the designated parties who would succeed in the event of intestacy, and that those designated parties escape the obligations of the grant by having acquired the property through other means than succession.

Their Lordships are, therefore, unable to agree with the appellants' contention on the first point which this appeal raises, and, in these circumstances, the other questions do not arise for determination. They will, therefore, humbly advise His Majesty that these appeals should be dismissed. The 3rd, 4th, 5th and 6th respondents will have one set of costs only. There will be no other order as to costs.

*Appeal dismissed.*

Solicitors for the Appellants in First Appeal.—Messrs. T. L. Wilson & Co.

Solicitor for the Appellant in Second Appeal.—Mr. E. Dalgado.

Solicitors for Respondents Nos. 3 to 6.—Messrs. Watkiss and Hunter.

### CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL NO. 48 OF 1919,  
IN SUIT NO. 1003 OF 1915.

March 16, 1920.

Present:—Justice Sir Asutosh Mookerjee, Kt.,  
Justice Sir Asutosh Chaudhuri, Kt.

D. N. SHAHA & Co.—DEFENDANTS

—APPELLANTS

*versus*

THE BENGAL NATIONAL BANK, LTD.—  
RESPONDENTS.

*Promissory note payable on demand, when overdue.*

Where a note payable on demand is negotiated, it is not deemed to be overdue for the purpose of affecting the holder with defects of title, of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue. [p. 941, col. 2.]

Appeal from the judgment of Fletcher, J.  
Mr. A. A. Avelon (with him Mr. B. L. Mitter), for the Appellants.

Messrs. H. D. Bose and A. K. Roy,  
for the Respondent.

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## JUDGMENT.

MOOKERJEE, J.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Fletcher in a suit for recovery of money due on a promissory note.

On the 28th August 1912, the defendant firm executed a promissory-note in favour of B. N. Das and Co. in the following terms:

"On demand I promise to pay to B. N. Das and Company or order the sum of Rs. 2,500 only, with interest thereon at the rate of 12 per cent per annum till the date of realisation, for value received in cash."

On or about the 10th January 1914 B. N. Das & Co., for valuable consideration, endorsed the promissory-note in favour of the plaintiff Bank. Notice was duly given by the plaintiff Bank to the defendant firm, but as no payment was made in response to repeated demands, the Bank instituted this suit on the 27th August 1915. The defendant firm urged that the Bank were not *bona fide* holders in due course and for value, and that the note had been discharged by the firm before the endorsement to the Bank. Mr. Justice Fletcher has overruled these contentions and has decreed the suit.

The evidence leaves no room for doubt that, at the date of the endorsement, B. N. Das & Co. were heavily indebted to the Bank and that the Bank were endorsees for value. This, indeed, would be the presumption under section 118, clause (a) of the Negotiable Instruments Act (1881). Section 9 shows that the Bank became holders in due course if they obtained the note before the amount became payable and without having sufficient cause to believe that any defect existed in the title of the person from whom they derived title. There can be no question, we think, that the Bank acted in good faith and the controversy has centred round the question, when did the amount mentioned in the promissory note become payable? Mr. Aveloom has contended that the promissory-note became payable from the moment of execution and has relied upon the decision in *Brojendro Kishore v. Hindustan Co operative Insurance Society* (1). In our opinion, that case is clearly distinguishable. There it

was ruled that, for purposes of the law of limitation, a note payable on demand is a present debt and is due and payable at once without demand. As explained in *Norton v. Ellam* (2), *Kowe v. Young* (3), *Maltby v. Murrells* (4), no demand is necessary before bringing an action upon a note payable on demand, because its payment is a duty which attaches the moment the loan is given and the note is made. To put the matter differently, the creditor cannot extend the period of limitation by omission to make a demand, and time runs against him from the date of the note, on the principle that the cause of action arises instantly on the loan and the contract on the note is in a state of being broken perpetually. Clearly, these principles have no application to a case under section 9 of the Negotiable Instruments Act. The true rule applicable is that, where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title, of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue. In *Brooks v. Mitchell* (5) Baron Parke observed: "if a promissory-note payable on demand is after a certain time to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory-note payable on demand is intended to be a continuing security; it is quite unlike the case of a cheque which is intended to be presented speedily." The Court accordingly overruled the contention based on the analogy of the rule applicable to the decision of the question of limitation. Similarly, in *Barough v. White* (6), Bayley, J., observed that the fact that the note was made payable with interest implied that it would be in negotiation for sometime. The same view was adopted by the Court of Appeal in *Glascock*

(2) (1837) 2 M. & W. 461; 1 M. & H. 69; 1 Jur. 433; 6 L. J. (N. S.) Ex. 121; 46 R. R. 646; 150 E. R. 839.

(3) (1820) 2 Brod. & B. 165; 2 Bligh 391; 129 E. R. 921; 21 R. R. 91.

(4) (1860) 5 H. & N. 813; 29 L. J. Ex. 377; 2 L. T. (N. S.) 362; 120 R. R. 839; 157 E. R. 1405.

(5) (1841) 9 M. & W. 15; 11 L. J. Ex. 51; 152 E. R. 7.

(6) (1825) 4 B. & C. 325; 2 Car. & P. 8; 6 D. & R. 379; 3 L. J. (O. S.) K. B. 227; 104 E. R. 1060.

(1) 39 Ind. Cas 705; 44 C. 978; 25 C. L. J. 288; 21 C. W. N. 482.



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v. *Balls* (7). Consequently, this promissory-note was not overdue when it was transferred to the Bank who became holders in due course. The suit has been rightly decreed by Mr. Justice Fletcher and the appeal must be dismissed with costs.

CHANDHURI, J.—I agree.

*Appeal dismissed.*

(7) (1890) 24 Q. B. D. 13; 59 L. J. Q. B. 51; 62 L. T. 163; 38 W. R. 155.

### SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 57 OF 1919.  
March 16, 1920.

*Present:*—Mr. Fawcett, J. C., and  
Mr. Kennedy, A. J. C.

UDHAVDAS AND ANOTHER—APPELLANTS  
*versus*

UKAMAL PHATAMAL AND OTHERS—  
RESPONDENTS.

*Arbitration Act (IX of 1899), s. 15—Award, enforceability of—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 22—Application to execute award, whether application to enforce order.*

Inasmuch as section 15 of the Arbitration Act, subject to certain requirements, makes an award itself directly enforceable, as if it were a decree of the Court, an application to execute the award, is not an application in execution of an order within the meaning of section 22 of the Dekkhan Agriculturists' Relief Act. [p. 943, col. 1.]

Appeal from the order of Mr. E. Raymond, Additional Judicial Commissioner, Sind.

Mr. Tahilram Maniram, for the Appellants.

Mr. Kimatrai Bhojraj, for the Respondents.

#### JUDGMENT.

FAWCETT, J. C.—In this case, on the 14th of November 1918, an award was passed in favour of the respondents Udhavdas and others against the appellants or their predecessors-in-title. The respondents are seeking to have the immoveable property belonging to the appellants sold in execution of the award. And the appellants have raised the objection that, as they are agriculturists, this immoveable property is exempted from attachment and also under section 22 of the Dekkhan Agriculturists' Relief Act. This contention has been rejected by the lower Court on the ground that section 22 is inapplicable, and we

are now asked to decide in appeal whether this conclusion is correct.

It is admitted by Mr. Tahilram for the appellants that the immoveable property is not being sought to be attached and sold in execution of any decree, but he contends that it is in execution of an order within the meaning of section 22. This contention is based on the fact that before an award under the Indian Arbitration Act becomes enforceable, as if it were a decree of the Court, there must be an order of the Court allowing it to remain filed. He urges that it is the act of the Court in recognising and accepting its filing which gives the award its enforceability. Mr. Kimatrai for the respondents, on the other hand, relies on the fact that section 15 of the Indian Arbitration Act plainly says that an award on being filed in accordance with the provisions of the Act, becomes enforceable as if it were a decree, unless it is remitted or set aside. In deciding between these two contentions, I think that, as section 22 is in restriction of the ordinary right of a decree-holder to recover his decretal debt by attachment and sale, it must be strictly construed. We must also have regard to the fact that, under section 74, the Civil Procedure Code applies to the proceedings under the Dekkhan Agriculturists' Relief Act except so far as it is inconsistent with it. Now, no doubt, an order by the Court that an award shall stand filed is an "order" within the wide definition of that word contained in section 2 (14) of the Civil Procedure Code, for it is the formal expression of a decision of Civil Court which is not a decree, *vis.*, the decision that any objections which may have been taken to the award are unsubstantial or insufficient, and that, therefore, the Court will not interfere with the filing of the award that has already been done. But it does not follow that, when section 22 speaks of an "order" it uses the word in this wide sense. The word must, in my opinion, be read with the preceding words "in execution of", and so read, I think it must be limited to an order capable of execution in the ordinary way. Section 36 of the Civil Procedure Code applies the provisions of the Code relating to the execution of decrees to the

HAILES, *In re A. A.*

execution of orders, and any person who wants to execute an order, has, therefore, to make an application under Order XXI, rule 11, asking the Court's assistance to execute the order which he seeks to get executed. But, as already mentioned, section 15 of the Indian Arbitration Act, subject to certain requirements, makes the award itself directly enforceable, as if it were a decree of the Court, and in view of that provision the application would be to execute the award and not the Court's order letting it remain filed. Nor do I agree with Mr. Tabilram's contention that the enforceability of the award is derived not from filing of the award but from a subsequent order of the Court accepting its filing. Accordingly, I think, an application to execute the award in such a case cannot be deemed to be an application as in execution of an order within the meaning of section 22, Dekkhan Agriculturists' Relief Act. No doubt, if the Court in passing its order also directs the costs of filing the award to be paid by a certain party, then a person seeking to recover those costs by attachment and sale of immoveable property would be seeking execution of an order, within the meaning of section 22. There are also, of course, many other cases of orders under the Civil Procedure Code which would come within the scope of that section; and my decision is strictly limited to an award under the Arbitration Act. I am, therefore, of opinion that the appeal fails and should be dismissed with costs.

KENNEDY, A. J. C.—I agree.

*Appeal dismissed.*

## CALCUTTA HIGH COURT.

INSOLVENCY JURISDICTION.

April 6, 1920.

Present :—Mr. Justice Rankin.

*In re A. A. HAILES—INSOLVENT.*

Presidency Towns Insolvency Act (III of 1909),  
s. 21—Adjudication, application to annul—Debt, payment of, what amounts to.

Where an insolvent applies under section 21 of the Presidency Towns Insolvency Act, to have his adjudication annulled, he must satisfy the Court that he has paid his creditors such sum as would have been a complete discharge in respect of those debts had there been no bankruptcy at all; that is to say, he must show that he has not only paid up all his debts but that he has paid interest up to the date of payment on such of them as carried interest.

Babu Subodh Chandra Mitter, (Attorney),  
for the Insolvent.

Mr. S. N. Bannerjee, for the Creditor.

JUDGMENT.—In this case I think that, as it is admitted that the creditor who appears as respondent to dispute the right of the insolvent to have an annulment of adjudication under section 21, is a creditor upon a judgment which carries interest at 6 per cent., the insolvent has not brought himself within the language of section 21 unless he satisfies me that he has paid to the creditor, being a creditor in respect of a debt which was proved, such sum as would have been a complete discharge to him in respect of that debt, had there been no bankruptcy at all. Under section 21 the position is, that an insolvent is entitled to claim a right which the section gives him, if it is proved to the satisfaction of the Court that the debts of the insolvent are paid in full. It is true that the right is not an absolute right because the insolvent may have mis-conducted himself to such an extent that even then the Court may have discretion to refuse it. Apart from any such consideration as that, a person who can say that his debts are paid in full ought no longer to be subject to the control and his estate ought no longer to be subject to the administration of the Court. But such a person coming to the Court in the middle of a pending bankruptcy and asking the Court to determine his bankruptcy must show, independently of any rights given to him by the Bankruptcy Act, that he has paid off his creditors as one man pays another, apart from the Bankruptcy Court altogether. He is asking the Court to bring the bankruptcy to a sudden stop because it is no longer necessary. In my opinion, the only person who is in that position is the person who has made such a payment as could be pleaded between two ordinary parties as amounting to a complete discharge of the debt. In this case

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there is a judgment-creditor who has an interest carrying judgment. If there had been no insolvency, it is perfectly clear that the payments made would only have been payments on account, and would not have discharged the liability under the judgment. That being so, it does not seem to me that this insolvent has brought himself within the terms of section 21. The matter may be illustrated in this way. For this purpose I know nothing and require to know nothing about the state of the assets in the bankruptcy. There may be a surplus—there might be a very large surplus—capable of being handed over to the insolvent. If there were, that would not be a good reason for refusing to him an annulment of the bankruptcy if, in other circumstances, he would have been entitled to it, yet in such case it is quite clear that if the bankruptcy goes on, the creditor would get not only interest upto the date of receiving order but interest upto the date of payment and he might even get interest at one of the higher postponed rates right up to the date of payment. That right could be defeated if, by merely paying interest up to adjudication, an insolvent were entitled to have the bankruptcy set aside. That seems to me to be contrary to the principle and intention of the Insolvency Act. I think that, for the present purpose, the man who is claiming to set aside the adjudication altogether, must be taken just as if the onus was on him to show that, independently of the insolvency, he had cleared off this debt and satisfied the creditor in question in full. I do not think I need consider whether "debts" includes debts other than those which have been proved or whether interest due upon them comes within this section. I am dealing here solely with debts in respect of which proofs have been lodged and admitted. With respect to such debts I think section 21 involves that complete payment discharging the debt has been made. For these reasons, I do not think that this applicant has brought himself under the section.

*Application refused.*

## SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 13 of 1917.

March 19, 1920.

*Present:—*Mr. Fawcett, J. G., and

Mr. Kennedy, A. J. O.

DWARKOMAL AND OTHERS—APPELLANTS  
*versus*

HARCHUMAL AND ANOTHER—RESPONDENTS.

*Contract Act (IX of 1872), s. 30—Contract—Wager—Common intention—Burden of proof—Transaction with broker—Presumption.*

Where a person enters into a transaction with a broker, who is entitled to commission and any losses incurred which he has paid, there is a presumption against the transaction being a wagering one. To constitute a contract by way of wager within section 30 of the Contract Act, a common intention between the party contracting and the broker to wager is essential, and the burden lies upon the party contracting to show that the transaction was a wager. [p. 945, cols. 1 & 2.]

Appeal against the decision of the Assistant Judge, Sukkur.

Mr. Tolasing Khushalsing, for the Appellants.

Mr. E. Castillino, for Respondent No. 1.

## JUDGMENT.

Fawcett, J. O.—The plaintiffs in the suit, out of which this second appeal arises, sued for the recovery of Rs. 1,000, alleged to be due on the foot of a commission agency account, comprising 15 transactions of purchase and sale of 4,200 bags of wheat. The defendant-respondent, Harchumal, whose liability is in issue, is a resident of Sukkur and, according to the finding of the lower Appellate Court, is a petty shop-keeper doing a little money-lending and selling a little grain in retail at his shop. The plaintiffs also reside at Sukkur and do business there as grain dealers and commission agents on a small scale. It has also been held by the lower Court that, under the defendants' instructions, the plaintiffs purchased these 4,200 bags of wheat for the defendants between August and October and re-sold them by November. These purchases and sales were made through other agents employed by the plaintiffs at Multan. And it appears from the evidence that, what was actually the subject of transactions were the Railway Receipts under which consignments of wheat were made at Multan to dealers in wheat at Karachi. In the case of forward contracts such as those in this case,



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the firm to which the consignments are made, pay the final holder of the Railway Receipt the amount due under the contract, less 10 per cent., which is withheld for adjustment after the goods have been weighed and tested at Karachi. It appears that these Railway Receipts generally pass from hand to hand, and that the intermediate dealers only pay or recover the differences of prices that occur in their transactions. On these main facts, the Assistant Judge, Sukkur, had held that there was no intention to give and take delivery in any event, and that the transactions in question were wagers and accordingly void under section 30 of the Indian Contract Act. The plaintiffs' suit, which had been decreed by the Trial Court, was therefore, dismissed with costs throughout.

The appellants urge that the Judge of the Court below has erred in law in arriving at this finding. The main principle which governs the case is that as laid down in *Bhagwandas Parashram v. Burjorji Ruttonji Bomanji* (1): Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential. In a case like this, where the defendant entered into transactions with a broker who merely sues in respect of his commission and any losses incurred which he has paid, there is a presumption against the transaction being a wagering one. This is clearly pointed out in *Sassoon v. Tokersey* (2). Sir Lawrence Jenkins in his judgment, at page 624, points out: "that the plaintiffs in that case were merely commission agents, entitled as such to their proper remuneration and to re-imbursement of expenses but they took no risks; the only risk that was suggested was that which might be the sequel of supervening insolvency, but obviously that is not a risk which converts an otherwise legitimate contract into a wager." As remarked in Pollock and Mulla's Contract Act, 3rd Edition, page 188, the presumption in favour of the broker is considerably strengthened where the broker is authorised by the principal to contract with the third person in his (the broker's) own

name, for the third person may in such case remain undisclosed even after the contract is made. This applies in the present case, for the evidence shows the plaintiffs made their contracts at Multan in their own names. The learned Judge below says that it has been settled that there may be a wagering contract between a commission agent and his constituent and cites as authority for this the case of *Burjorji Ruttonji Bomanji v. Bhagwandas Parashram* (3), which is the same case as that already referred. That case affords very little support to the proposition of the learned Judge because it was one of a *Pakia Adatia*, who [as is pointed out in the judgment in the same case by the Bombay High Court, *Burjorji Ruttonji Bomanji v. Bhagwandas Parashram* (3)], is on the same footing as an ordinary principle, and is not, therefore, in the position of a disinterested broker. No doubt, the presumption to which I have referred may be rebutted by evidence of a common intention to wager though the contract has been brought about by a broker. The case of *Eshwar Doss v. Venkatasubba Rau* (4) supplies an instance of such a case. But the burden, of course, lies upon the defendant to show that the broker had the common intention which is necessary to bring the case under section 30 of the Indian Contract Act or Bombay Act III of 1865. In the present case, even though the plaintiffs may have known that the defendants entered into the contracts as wagering transactions with the intention of paying the differences only, and that he would be unable to complete the contracts by payment and delivery having regard to his position and means, still that is no answer to a suit by the broker (see Pollock and Mulla's Contract Act, 3rd Edition, page 193). This had been laid down in many cases such as *Perosha Oursetji Parakh v. Manekji Dossabhoj Watcha* (5) and *Sassoon v. Tokersey* (2). And the underlying principle has been approved by the Privy Council in the case of *Bhagwandas Parashram v. Burjorji Ruttonji Bomanji* (1). Nor is it shown that the contracts which the plaintiffs entered into with the third person on behalf of the defendants were wagering contracts as

(1) 44 Ind. Cas. 284; 42 B. 373 at p. 378; 23 M. L. T. 203; 34 M. L. J. 305; 4 P. L. W. 229; 16 A. L. J. 241; 27 C. L. J. 358; (1918) M. W. N. 315; 22 C. W. N. 625; 20 Bom. L. R. 581; 7 L. W. 577; 11 Bar. L. T. 211; 45 L. A. 29 (P. C.).

(2) 23 B. 616 at pp. 624, 625; 6 Bom. L. R. 521.

(3) 20 Ind. Cas. 84, 15 Bom. L. R. 716 at p. 723; 35 B. 204.

(4) 18 M. 303 (F. B.); 6 Ind. Dec. (N. S.) 532.

(5) 22 B. 501, 11 Ind. Dec. (N. S.) 1124.

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between the plaintiffs and those third persons. There is no finding to that effect, nor does the evidence on the record support any such conclusion. No doubt, it is true that no delivery of the actual grain can be made by one intermediate dealer to another, who has purchased the Railway Receipt from the former. The grain has to be delivered to the firm to which it is consigned. But that does not suffice to make the transaction a wagering one. Any purchaser who obtains the Railway Receipt can, as I understand the case, go to Karachi and, on the strength of his possession of the receipt and assignment in his favour, claim to deliver the grain to the consignee and recover 90 per cent. of the amount due under the contract to the consignor and the further amount that is settled after delivery. That is a transaction which is void of any wagering element, and there is no room, therefore, for the contention that such transactions cannot be treated as *bona fide* business. The burden of showing that any of the transactions is void as being a contract by way of wager rests upon the defendant who sets up that plea. In this case, that burden has not, in my opinion, been discharged, and the case is the ordinary one of a commission agent, who has a presumption in his favour. This presumption having not been rebutted, I do not think, that the lower Court was justified in its finding. That finding is based on a misconception of the real law applicable to the case.

I would, therefore, reverse the lower Court's decree and restore that of the Court of first instance. I would also, in suppression of the lower Court's order as to costs, order the defendant-respondent, Harchumal, to pay the plaintiffs' costs throughout.

KENNEDY, A. J. C.—I agree.

*Lower Court's decree reversed.*

CALCUTTA HIGH COURT.  
APPEAL FROM ORIGINAL CIVIL NO. 21  
OF 1919.

March 17, 1920.

Present:—Justice Sir Asutosh Mookerjee, Kt.,  
and Justice Sir Ernest Fletcher, Kt.

RAMESH CHANDRA MITTER—  
APPELLANT

versus

JOGINI MOHAN CHATTERJI—  
RESPONDENT.

*Companies Act (VII of 1913), s. 38—Jurisdiction under section, scope of—Company, application to remove name from Register of Members of—Mortgagee of Company, whether can intervene in opposition.*

Although persons are not entitled to an order *ex debito justicie*, the jurisdiction under section 38 of the Companies Act is unlimited with a discretion in the Court in the circumstances of each case. [p. 97, col. 1.]

Where a holder of shares in a Company applies to have his name removed from the Register of Members of the Company, a mortgagee of the uncalled share capital of the Company is a person vitally interested in the proceedings, and is entitled to intervene to oppose the application. [p. 947, col. 2.]

Appeal from an order of Mr. Justice Chaudhuri.

Mr. B. L. Mitter (with him Mr. S. C. Bose), for the Appellant.

Mr. B. C. Ghose (with him Mr. Langford James), for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This is an appeal from an order made by Mr. Justice Chaudhuri on an application under section 38 of the Indian Companies Act for the removal of the name of the respondent from the Register of Members of a Company known as the Bengal Co., Ltd.

On the 19th June 1915 the respondent agreed to purchase six ordinary shares of the Company on the understanding that he would be elected as one of its Special Directors. On the same date he paid Rs. 1,500 for the six shares, which were issued to him two days later. On the 27th June 1915 the appellant entered into an agreement with the Company for a first charge, to the extent of Rs. 10,000, on all uncalled share capital; he advanced Rs. 5,000, on the same day and the balance was paid on the 11th January, 1916. The mortgage instrument, which was executed by the Company in favour of the appellant on the 21st March 1916, referred specifically to thirty ordinary shares of Rs. 1,000 each,

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six ordinary shares, class 'A', of Rs. 500 each, and twenty-seven preference shares of Rs. 100. It is not disputed that the six ordinary shares specified in the schedule to the document are those that belonged to the respondent; consequently, there can be no doubt that the appellant had a specific charge on the six shares in question.

It appears that the respondent was not elected as a Special Director. He thereupon instituted a suit in the Court of Small Causes, on the 7th May 1918, for damages for breach of agreement and obtained a decree against the Company on the 7th August 1918. On the 20th December 1918 the respondent made an application under section 38 of the Indian Companies Act, with a view to have his name removed from the Register of Members of the Company. The Company did not oppose the application, which was, however, contested by the present appellant. Mr. Justice Chaudhuri expressed a doubt, whether the appellant, a mortgagee of the Company, had *locus standi* in these proceedings, but held that, even if he was allowed to intervene, it would be inexpedient to decide summarily the objection raised by him. In this view, Mr. Justice Chaudhuri, on the 4th March 1919, made an order in favour of the respondent, without opportunity afforded to the appellant to place his objections before the Court for adjudication. The mortgagee accordingly lodged this appeal on the 11th April 1919. Thereafter, on the 16th June 1919, the respondent made an application for liquidation of the Company and three days later obtained an order in that behalf. The appellant has now argued, *first*, that section 38 is comprehensive enough to entitle a person in his position to oppose the application of the respondent for removal of his name from the Register of Members of the Company; and, *secondly*, that on the indisputable facts of the case, the application should have been refused on the merits. In our opinion, these contentions are well founded.

It is now well settled that, although persons are not entitled to an order *ex debito iustitie*, the jurisdiction under section 38 is unlimited, with a discretion in the Court in the circumstances of each case. In support of this proposition, reference may be made to the decisions in *Kimberley North Block Diamond*

*Company, In re, Wernher, Ex parte* (1), *Ruby Consolidated Mining Company, In re, Askew's case* (2), *Sussex Brick Co. Ltd., In re* (3) and *Gresham Life Assurance Society, In re, Penney, Ex parte* (4). In a simple case where an immediate rectification is essential, it may be desirable to apply under the section; but if the case is at all complicated, an action should be brought. The respondent has, however, argued that section 38 does not authorise the Court to consider a dispute between a member and a stranger. In support of this proposition, reliance has been placed upon the language of sub-section (1) of section 38, which is in these terms: "On any application under this section, the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the Register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the Company on the other hand: and, generally, may decide any question necessary or expedient to be decided for rectification of the register." Mr. Ghose has contended that the generality of the concluding words of the sub-section is materially restricted by what precedes, and that, notwithstanding their comprehensive phraseology, we are bound to hold that "a question necessary or expedient to be decided for rectification of the Register" must be a question between members or alleged members, or between members on the one hand and the Company on the other hand. We are of opinion that we should not adopt this narrow interpretation of the section. The Legislature obviously intended that the Court should have the widest possible power to determine, in its discretion, questions which may appear to it to be necessary or expedient for decision before an order for rectification is made or refused. In the case before us, the appellant was manifestly entitled to intervene to oppose the application made by the respondent. He is vitally interested in these proceedings and his position might be

(1) (1839) 53 L. T. 579.

(2) (1874) 14 L. J. Ch. 633; 9 Ch. 634; 3 L. T. 572; 21 W. R. 3.

(3) (1901) 1 Ch. 598; 73 L. J. Ch. 303; 90 L. T. 355; 52 W. R. 37; 11 Min. 63.

(4) (1879) 42 L. J. Ch. 183; 8 Ch. 416; 23 L. T. 153; 21 W. R. 186.



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seriously prejudiced by an order for rectification made behind his back. There is no conceivable reason why the respondent should be allowed to obtain an *ex parte* order, and the appellant should be driven to fight him in a suit brought for the purpose.

We may point out that the respondent has hitherto proceeded on the assumption that there was a valid contract between him and the Company. There was admittedly an agreement between him and the Company for the transfer of six shares. He obtained the shares, and, on the basis of his position as a share-holder, got his name entered in the Register of the Company. Subsequently, he sued the Company successfully in the Court of Small Causes for damages for breach of contract. That suit could be maintained only on the assumption that there was a valid contract between him and the Company, which had been unlawfully broken by them. In these circumstances, there can be no room for controversy that he was a share holder and that the appellant had a valid charge on the uncalled capital covered by those shares. The appellant must consequently be heard, on the elementary principle that no man should be prejudiced unheard. The view we take follows as a corollary from the principle that the Register of Members is the creditors' guarantee, showing them to whom and to what they have to trust, and must consequently be properly kept, so that the names appearing therein are all the names and nothing but the names of the persons really for the time being liable to the creditors.

The result is, that this appeal is allowed and the application made by the respondent dismissed with costs in both Courts.

FLETCHER, J.—I agree.

*Appeal allowed.* 4

## SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL No. 4 OF 1918.

March 24, 1920.

*Present:*—Mr. Fawcett, J. C., and  
Mr. Kemp, A. J. C.

*Musammatt JANAT AND OTHERS—*  
*APPELLANTS*

*versus*

*Sayed KAMILSHAH AND OTHERS—*  
*RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), s. 114, O. IX, r. 9, O. XLI, r. 19, O. XLVII—Appeal, dismissal of, in default—Order restoring appeal, propriety of, whether can be questioned—Procedure—Sufficient cause, what is.*

The propriety of an *ex parte* order setting aside an order dismissing an appeal for default, may be questioned at the hearing of the appeal, and is open to re-consideration at the instance of the party aggrieved. [p. 949, cols. 1 & 2.]

Where an appeal is dismissed owing to the default of the appellant in depositing the sum required to defray the cost of serving notices, the order of dismissal should not be set aside except for just and reasonable cause sufficient to meet the provisions of Order IX, rule 9 or Order XLI, rule 19 of the Civil Procedure Code. The fact that the default was due to the misconduct, or neglect of duty on the part of the agent of the appellant, even though a *pardah-nashin* lady, would not be sufficient cause. [p. 950, col. 2.]

Appeal against the decree of the Joint Judge, Hyderabad.

Mr. Dipchand Chinnimal, for the Appellants.

Mr. Rupchand Bilaram, for Respondents Nos. 1—3.

## JUDGMENT.

FAWCETT, J. C.—The present appeal was filed on the 21st of January 1918 and was admitted on or about the 21st of February. The record of the lower Court was then called for and on the 5th of March, the draft notice to the respondents was sent to the *Nazir* for recovery of the expenses due in respect of the appeal. At that time, rule 2 of Chapter XV of the Court Rules required that no notice of hearing of the appeal should issue to the opposite party unless a sum sufficient to cover the estimated cost of preparing the copies and translations required for the paper-book had been deposited in Court. The requisite applications for copies and translations were appended to the appeal, and the estimated cost of preparing these copies and translations had been

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fixed at Rs. 100 and 200 respectively on the 5th of March. The costs of the notices came to another Rs. 30. On the 13th of March the draft notice and the applications for copies and translations were returned by the Nazir with an endorsement "costs not paid in time." Thereafter no further steps appear to have been taken until the 16th of July, when Mr. Shahani, who had presented the appeal on behalf of the appellants, sent a letter stating that, owing to certain reasons, he had returned his brief and that he did not any more represent the appellants in the matter. The case then appears to have been set down and was brought up in Court on the 2nd of August, when it was dismissed under Order XLI, rule 18, Civil Procedure Code. In the order so dismissing it, it was noted that no appearance was put in for the appellants. On the 20th of August the appellants Nos. 2—4 presented an application, under Order XLI, rule 19, praying the Court to readmit the appeal on the grounds stated in the application. Affidavits were appended to this application in support of it. On the 27th of September the Pleader for the applicants was heard and the Court passed an order readmitting the appeal without prejudice to any objection the respondents might raise at the hearing. Mr. Rupchand for the respondents has accordingly taken a preliminary objection at the hearing of the appeal that the applicants have not proved that they were prevented by any sufficient cause from depositing the sum required to defray the cost of serving the notices on the respondents, and that, therefore, the *ex parte* order readmitting the appeal under Order XLI, rule 19, should be set aside.

Mr. Dipchand for the appellants has raised certain points, which I will deal with before discussing the case on the merits.

In the first place, he contended that Order XLV, rule 19, only requires the Court to be satisfied on the point mentioned in it and that the Court in readmitting the appeal must have been so satisfied; consequently, it is not now open to the Court to cancel that order. This contention, in my opinion, is clearly unsustainable. The case is on all fours with

the admission of an appeal after the period of limitation has expired without notice to the respondents. The Privy Council in *Krishnasami Panikondar v. Ramasami Chettiar* (1) has held that, where such an order has been made, it would amount to a denial of justice to preclude the respondents from questioning its propriety, and that such an order should be treated as open to re-consideration at the instance of the respondents. This case is, in fact, a stronger one, because the Court in its order expressly made it subject to the consideration of any objection at the hearing.

Mr. Dipchand has next contended that the Court's order dismissing the appeal for default under Order XLI, rule 18, was illegal and should be set aside, or at any rate reviewed. No such contention is contained in the application under consideration, and the order in question cannot be reviewed by another Bench of this Court, except in accordance with the provisions of Order XLVII of the Civil Procedure Code. This follows from the general rule that, no Court has the power of setting aside an order that is properly made unless it is given by Statute. Order XLI, rule 19 provides one method in which an order dismissing an appeal for default can be set aside, but that does not cover the case of its being set aside for illegality. The only provisions under which this Court can set it aside on that ground are those contained in section 114 and Order XLVII, viz., by review, cf. *Fatimunnissa v. Denki Pershad* (2). These provisions require, in the first place, an application by a person considering himself aggrieved by the decree or order complained of and no such application has been made. Also under Order XLVII, rule 4, a review cannot be granted without previous notice of the application for review to the opposite party. No such notice has been given. Thirdly, under Order XLVII, rule 5, the application for review can be heard only by my learned brother, who was one

(1) 43 Ind. Cas 493; 41 M. 412; 34 M. L. J. 61; 4 P. L. W. 54; 16 A. L. J. 57; 7 L. W. 156; 28 M. L. T. 101; 27 C. L. J. 253; 2 P. L. R. 1918; 22 C. W. N. 181; 21 Ben. L. R. 541; 11 Bar. L. T. 121; (1918) M. W. N. 906; 45 I. A. 25 (P. C.).

(2) 24 C. 350; 1 C. W. N. 21; 12 Ind. Dec. N. 8) 901.

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of the two Judges who passed the order in question, the other Judge being no longer attached to this Court. Therefore, in my opinion, it is not open to us, on the present application, to consider the objection of illegality.

A third point taken is that, as the appellant No. 1, *Musammal Janat*, had died on the 31st of March 1918, her heirs had six months within which to be joined as her legal representatives, so that no order could be passed to their prejudice on the 2nd of August 1918. This point appears from the record to have been urged by appellant's Pleader at the time the order re admitting the appeal was passed. But is not one of the grounds on which the Court has been asked to interfere under Order XLI, rule 19, and in regard to that rule it is on the same footing as the ground of illegality just considered. In any case, it seems to me that section 146, Civil Procedure Code, suffices to meet any objection of this kind, as has been held in the case of *Venkatasubbier v. S. Krishnamurthi* (3). The applicants themselves support this view by heading their application as one made under section 146 and stating that appellants Nos. 2 and 3 applied not only in their own right but also as representatives of deceased appellant No. 1. It is, therefore, unnecessary, in my opinion, to consider the questions which have been argued in regard to Order XXII, rules 2 and 3 and Order XLI, rule 4, Civil Procedure Code.

Coming to the merits I can see no adequate ground for holding it proved that the applicants were prevented by a sufficient cause from depositing the sum required to defray the costs of serving the notices. Those costs, strictly speaking, were limited to the sum of Rs. 30, but rule 2 of Chapter XV of the Court Rules, which has already been mentioned, required the simultaneous deposit of Rs. 300. Even leaving out of account this latter sum, the affidavits attached to the application show that the Rs. 30 required for notices were not paid to the appellant's Counsel, Mr. Shabani, until the 26th of June 1918. And no tender of any amount was made to the Court until some

time in July. The grounds put forward for the delay are, that the appellants are *parda nashin* ladies, who had to entrust their affairs to an Attorney who lived in a village, which is out of the way of quick postal communication; that the Attorney was ill and so could not personally attend to the matter; that a friend of his at Hyderabad was also ill; that there was a difficulty in raising the sum required, and that the Pleaders engaged in the matter neglected to take proper steps to pay in the amounts required after they had received them. The allegation that the Attorney was so ill that he could not make personal arrangements to pay the sum required, rests merely on his own statement, and such a statement cannot safely be accepted without corroboration. If he was so ill that he could not personally attend to the matter, arrangements should have been made for some creeper to do the needful. The appellants have no doubt been unfortunate in the conduct of their agents. But it would be setting up a bad precedent to relieve them on the ground of misconduct or neglect of duty on the part of their agents; cf. *Raji Lal v. Nawal Singh* (4). Nor do I think that the fact that the applicants are *parda nashin* ladies should be allowed to make any difference, as has already been held by this Court in *Usto Sohebdino v. Ghulam Kadir* (5). The contrary view would defeat the clear intention of the Legislature that a party should exercise due diligence in prosecuting a suit or appeal. I have considered whether the case might possibly be held to fall under section 151, Civil Procedure Code, or otherwise justify a departure from the strict terms of Order XLI, rule 19. On this point I see no reason to alter the opinion I expressed in the case of *Usto Sohebdino v. Ghulam Kadir* (5), that the Court cannot restore a suit or appeal for a just and reasonable cause which has not been sufficient to meet the provisions of Order IX, rule 9, or Order XLI, rule 19, Civil Procedure Code, and the contrary view once taken in the Madras High Court has now been overruled in *Gadi Neelaveni v.*

(3) 21 Ind. Cas. 568; 88 M. 412; 14 M. L. T. 396; (1913) M. W. N. 899.

(4) 39 Ind. Cas. 686; 19 A. 388; 15 A. L. J. 413.

(5) 27 Ind. Cas. 924; 8 S. L. R. 241 at p. 245.



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*Marappareldi Gari Narayana Reldi* (6). There it is held that section 151, Civil Procedure Code, cannot be applied to a case like this, and even if it could, I do not think it can be said that it is necessary for the ends of justice to allow the appeal to be re-admitted. In *Lalbur v. Choithran Kalandas* (7) the maxim *actus curiæ neminem gravabit*—the act of the Court should not prejudice any one—was applied to rectify a mistake which had been inadvertently made by the Court. But here I can find no such mistake. Under Chapter XV, rule 2 of the Court Rules, the office rightly required a deposit of the whole amount due, and even if this were wrong the delay from March to July is not properly accounted for. I would, therefore, set aside the provisional order re-admitting the appeal and order the appellants to bear the respondents' costs of the appeal.

I would add that, in my opinion, the objection to passing a provisional order under section 5 of the Limitation Act, which is pointed out in *Krishnasami Panikondar's case* (1), applies equally to a provisional order of the kind now in question and I think it is desirable that rule 1 (1), Chapter XV, should be amended so as to cover such an order.

KEMP, A. J. C.—I agree.

*Order re admitting the appeal set aside.*

(6) 53 Ind. Cas. 847; 43 M. 94; 37 M. L. J. 599; 28 M. L. T. 377; 10 L. W. 609; (1920) M. W. N. 19 (F. B.).

(7) 29 Ind. Cas. 592; 5 S. L. R. 327.

### CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL NO. 94 OF 1919,  
IN SUIT NO. 1868 OF 1919.

February 17, 1920.

Present:—Justice Sir Asutosh Mookerjee, Kt.,  
and Justice Sir Ernest Fletcher, Kt.

KEDARNATH BABULAL—

APPELLANTS

versus

SUMPATRAM DOOGUR—

RESPONDENTS.

Arbitration Act (IX of 1899), s. 19—Stay of proceedings, order for—Jurisdiction—Discretion—Appeal, interference in.

Before the jurisdiction of the Court to make an order for stay of proceedings under section 19 of the Arbitration Act, can be invoked, it must be established beyond doubt that there is a valid submission: and before an order staying proceedings can be made the Court must be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration [p. 952, col. 2.]

The making of an order staying proceedings is a matter largely in the discretion of the Court, and when the discretion has been exercised, a strong case must be made out to justify the interference of a Court of Appeal [p. 952, col. 2; p. 953, col. 1.]

Appeal from the judgment of Mr. Justice Greaves.

Mr. B. L. Mitter, for the Appellants.

Mr. M. N. Bose, for the Respondents.

### JUDGMENT.

MOOKERJEE, J.—We are invited in this appeal to consider the propriety of an order made by Mr. Justice Greaves whereby he has refused an application for stay of a suit under section 19 of the Indian Arbitration Act, 1899.

On the 8th August 1918, the appellants agreed to purchase from the respondents 50 bales of Japanese grey shirting and sheeting. The material portion of the contract provided as follows: "All conditions according to *bahar* (that is, importing firm), interest, cool charges, according to the custom of Bazar, the goods being of Japan Cotton Company's Office." It has been argued that this implies the incorporation of an arbitration clause contained in the form of contract used by the Japan Cotton Trading Company. That arbitration clause is in these terms:—"Any dispute as to damage, difference, inferiority, short quantity or measure or defect or amount of allowance to be referred, at seller's option, to the Bengal Chamber of Commerce or two European or Japanese merchants or European or Japanese Assistants in mercantile firms, one to be named by each party; if either party shall fail to nominate an arbitrator within three days after being required to do so, the other party shall be at liberty to appoint both arbitrators or to refer to the Bengal Chamber of Commerce at his discretion."

It is alleged by the appellants that the goods delivered were not in accordance with the contract and were in fact different and

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defective goods. They accordingly refused to accept delivery, and, on the 13th January 1919, cancelled the contract. The respondents thereupon proceeded "to re-sell the goods," although exception was taken to that course by the appellants on the 2nd May 1919. On the 19th May 1919 the appellants referred the matter to the arbitration of the Bengal Chamber of Commerce on the assumption that the arbitration clause contained in the contract form used by the Japanese Cotton Trading Company had become incorporated in the contract between the parties. On the 28th May 1919 the respondents sellers objected to the arbitration as without jurisdiction, and on the 18th July 1919 they instituted a suit on the Original Side of this Court for the enforcement of their claim. On the 30th July 1919 summonses in the suit were served upon the buyers (now appellants), with the result that, on the 7th August 1919 they made an application under section 19 of the Indian Arbitration Act for stay of the suit. This application recited the correspondence between the parties and concluded with the following prayer:—"That all proceedings in the aforesaid Suit No. 1858 of 1919 may be stayed until the said Tribunal of Arbitration of the Bengal Chamber of Commerce makes and publishes the award after proceeding with and completing the said arbitration now pending and that the costs of and incidental to this application may be reserved." This application was heard by Mr. Justice Greaves. He apparently held that, in view of the construction placed by him upon the contract form used by the Japanese Cotton Trading Company in the case of *Ochandmull Ganeshmull v. Nippon Mankaru Kabusheki Kaisha* (Appeal from Order No. 42 of 1919), the application could not be entertained.

On the present appeal, the buyers have argued that the construction placed upon the contract cannot be supported. On behalf of the sellers no attempt has been made to support the order on the ground assigned by the learned Judge, and, in our opinion, it cannot be supported, because the facts disclosed in the correspondence make it abundantly clear that the events had not taken such a turn that the arbitration clause (assumed to have been incorporated in the contract between the parties), could be utilised by one of them and a reference made

thereunder. But the respondents have contended that the order of the learned Judge may be supported on other grounds, which we now proceed to examine.

Section 19 of the Indian Arbitration Act provides as follows:

"Where any party to a submission to which this Act applies, or any person claiming under him, commences any legal proceedings against any other party to the submission, or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

The term "submission" is defined in clause (b) of section 4 to mean a written agreement to submit present or future differences to arbitration, whether the arbitrator is named therein or not. It is plain that, before the jurisdiction of the Court to make an order for stay under section 19 can be invoked, it must be established beyond doubt that there is a valid submission. This is by no means clear in the case before us, for, it is at least doubtful whether the arbitration clause in the Japanese contract form was or was not incorporated, by reference, as a condition in the contract between the parties. But, let us assume that there was a submission: before an order can be made, the Court must be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration. This is manifestly a matter largely in the discretion of the Court, which, no doubt, must be judicially exercised. But when the discretion has been exercised by the primary Court, a

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## PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

March 16, 1921.

*Present:*—Lord Buckmaster, Lord Dunedin,  
Lord Shaw, Sir John Edge and  
Mr. Ameer Ali.

MALAYANDI APPAYASAMI NAICKER—

APPELLANT

versus

THE MIDNAPORE ZEMINDARI  
COMPANY LIMITED—RESPONDENTS.

*Palayams in Southern Districts of Madras, whether alienable—Military service tenures, abolition of, by Proclamation—Police service tenures—Madras Regulation XXV of 1802.*

Where lands in British India are held on military service tenure, there is good reason for holding that no one of the successive tenants could deal with the land so as to deprive the next holder of the source from which his duties might be discharged. [p. 956, cols. 1 & 2.]

In the Southern Districts of Madras, sundry *palayams* were originally held on military service tenure and subject to the payment of a tribute to the paramount power. But these military service tenures were abolished and determined by a Proclamation of the Governor in Council, dated 1st December 1801, and thereafter any character of inalienability attaching to the *palayams* by virtue of such tenure ceased. [p. 956, cols. 1 & 2.]

Police service tenures were abolished in 1816 by the Government of Madras: but it was held in the present case that it was not proved that the *Palayam* had in fact been held on such a tenure. [p. 965, col. 2; p. 956, col. 1.]

Madras Regulation XXV of 1802 neither gives to, nor takes away from, the former owners of lands not permanently settled any rights which they then had. [p. 958, col. 1.]

Appeal from a decree of the Madras High Court, (Sir John Wallis, Kt., Chief Justice and Mr. Justice Spencer), dated 18th February 1918, reported as 47 Ind. Cas. 733, reversing a decree of the District Judge, Madura.

FACTS are very fully stated in their Lordships' judgment. The Madura District Judge decreed the suit, holding that the *Palayam* was inalienable but his decree was reversed and the suit dismissed by the Madras High Court (Wallis, C. J., and Spencer, J.). Hence this appeal.

Mr. Dunne, K. O., (with him Mr. Narasimham), for the Appellant, submitted that the High Court were wrong in treating this *Palayam* as an ordinary Zemindari. It was an unsettled *Palayam*. The case of *Collector of Trichinopoly v. Leekamani* (1) was not one of general application: it merely showed that that

(1) 1 I. A. 282 at p. 306; 21 W. R. 358; 14 B. L. R. 115; 7 Mad. Jur. 190; 8 Sar. P. C. J. 318.

strong case must be made out to justify the interference of a Court of Appeal. In this connection, reference may usefully be made to the observations of Buckley, L. J., in *Freeman & Sons v. Chester Rural District Council* (1): "Section 4 of the Arbitration Act, 1889," (which corresponds to section 19 of the Indian Arbitration Act), "gives a discretion, and that in two ways, namely, (i) the words are permissive, not imperative, for the verb is 'may make', not 'shall make', and (ii) the jurisdiction to stay the proceedings arises if the Court is 'satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission.'" The fact that one member of a Court is of opinion that the matter should not be referred to arbitration is sufficient to enable another member to concur, though the latter is satisfied that there is no sufficient reason why the matter should not be referred and if it had rested with himself alone, would have directed a stay. [See also *Vawdrey v. Simpton* (2), *Barnes v. Youngs* (3)]. In the case before us, there is not only a substantial dispute as to whether the contract between the parties includes an arbitration clause, there are abundant indications that the appellants initiated the arbitration proceedings in contravention of the term of the alleged arbitration clause. The first choice rested with the respondents sellers, who were not afforded an opportunity to exercise the option. This clearly does not show a readiness and willingness on the part of the appellants to do all things necessary to the proper conduct of the arbitration.

In this view the order of Mr. Justice Greaves must be confirmed and this appeal dismissed with costs.

FLETCHER, J.—I agree.

*Appeal dismissed.*

(1) (1911) 1 K. B. 783 at p. 791; 80 L. J. K. B. 695; 104 L. T. 368; 75 J. P. 132.

(2) (1896) 1 Ch. 166 at p. 169; 65 L. J. Ch. 366; 44 W. R. 123.

(3) (1898) 1 Ch. 414 at p. 417; 67 L. J. Ch. 263; 46 W. R. 332.



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particular estate was in the nature of an ordinary Zemindari and followed the ordinary law, not that all unsettled Palayams were. Here the Palayam was not joint family property. The family merely had a limited right to an estate as the appanage of an office. The position resembled that of the Ghatwali tenures in Bengal. To the end Government took the view that the holder of the estate for the time being was a mere farmer for his life. The early *Sanads* contained no power to transfer. In early days Government had absolute power as to the succession, and we submit that is still the case. The holder only had a life-interest, and it was for Government to recognise any new incumbent. The hereditage applied, if at all, to the office and not to the estate. The land was service land attached to the office, and as such inalienable: Mayne, Hindu Law, sections 337, 338.

[LORD DUNEDIN.—According to you there is no succession.]

There was no succession to the estate. Each new incumbent came in by virtue of succeeding to the office and was entitled to repudiate anything which his predecessor had done.

[LORD DUNEDIN.—You are almost asking us to establish a new tenure.]

I admit I cannot give decisions or dicta as to Palayams, but there are other estates in India, e. g., the Ghatwali tenures of this kind: and the absence of judicial recognition in Madras may be due to the fact that before *Sartui Kuari v. Deora Kuari* (2) it was not necessary, in the view of the law taken there, to raise points of this kind.

[LORD DUNEDIN.—For the same reason it matters little what Government said before 1888].

For a long series of years this was treated by every one as a military tenure. Both the family and the Government took that view. Prior to Regulation XXV of 1802 the holders family had no title to the succession. If advantage had been taken of that Regulation they would have acquired a title, but this was not done. The original tenure did not involve a proprietary right in the estate and it is not shown to have ever been changed.

Mr. De Gruyther, K. O. and Mr. Kenworthy Brown, for the Respondents, were not called on.

#### JUDGMENT.

SIR JOHN ECCLES.—This is an appeal from a (2) 15 I. A. 51; 10 A. 272 (P. C.); 5 Sar. P. O. J. 189; 12 Ind. Jur. 213; 6 Ind. Dec. (N. S.) 182.

decree, dated the 18th February 1918, of the High Court at Madras, which reversed a decree, dated the 11th September 1916, of the District Judge of Madura.

The suit in which this appeal has arisen was brought to obtain, so far as is now material, against the Midnapore Zemindari Company, Limited, hereinafter referred to as the respondent Company, a decree for possession of the properties specified in Schedules A and C of the plaint, and for mesne profits. The properties claimed were villages of the Palayam of Kannivadi. The suit was brought by two brothers, sons by different wives of the late Malayandi Appaya Naicker, a Hindu, one of whom only could have obtained a decree if their case had been proved. The first plaintiff on the record was Malayandi Appayasami Naicker, who was the son of Malayandi Appaya Naicker by his first or senior wife; he is the appellant here, and will be hereafter referred to as the appellant. The second plaintiff on the record was the son of Malayandi Appaya Naicker by his second or junior wife, and is by date of birth the elder of the two brothers. They were obviously joined as plaintiffs, owing to some doubt as to which of them was entitled, on the death of their father in 1911, to succeed to the Palayam by the custom of primogeniture applicable in the family. The second plaintiff did not appear and was not represented in the High Court, and he is not a party to this appeal, so need not again be referred to.

In the plaint it was alleged that the Palayam of Kannivadi is an ancient impartible Palayam, descendible to a single heir according to the custom of primogeniture; that the Palayam was conferred as a military fief by a Nayak Ruler of Madura about A. D. 1500 upon an ancestor of the appellant who was placed in charge of one of the principal bastions of Madura Fort; that the Palayagar was by virtue of the tenure liable to be called upon to render military service by furnishing men and other aid, and for Police duties and to pay annual tribute to the State; that the Palayam continued to be held by the appellant's family under the same conditions of tenure and service after the assumption of the Dindigul country by the British; and "That the said Kannivadi Palayam is inalienable beyond the life of the Palayagar for the time being,

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both by reason of the tenure and according to the custom of the family, which custom came into existence in consequence of the character of the tenure."

Briefly stated, the connection of the respondent Company with the Palayam of Kannivadi, according to the allegations in plaint, is as follows:—The grand father and father of the appellant in 1895 mortgaged the Palayam to the Commercial Bank, Limited, of Madras, in respect of debts of theirs which were not binding upon the appellant or upon the Palayam; on that mortgage the Bank obtained a decree, and in execution of that decree, brought the Palayam to sale at auction, and at the sale purchased the estate in 1900, and on the 8th January 1901 conveyed all their rights under the decree and under the auction sales to the respondent Company, who have since then been in possession.

Various other matters were alleged in the plaint as to which no arguments were addressed to their Lordships by either side.

The respondent Company in their written statement admitted that the Zemindari of Kannivadi was, at the time of the sale to the Bank, impartible and was descendible to a single heir according to the custom of primogeniture, but they denied that it had been conferred upon an ancestor of the appellant "for being in charge of a bastion of the Madras Fort;" denied that the estate had been granted or was ever held subject to any obligation of rendering military or Police service, or was inalienable, or that the Zamindar had ever held any office by virtue of which he was under any obligation to perform military or Police duties; denied that there is any family custom or anything in the tenure of the Kannivadi Zemindari which rendered it inalienable beyond the life of the Palayagar, and alleged that in law the Zamindar for the time being of the Kannivadi Zemindari always possessed an absolute interest in it with full powers of alienation. The respondent Company in their written statement pleaded several other matters, which, in the view that their Lordships take of the case, are not now necessary to be considered.

There were 27 issues fixed for the trial of the suit, but in their Lordships' opinion, the tenth issue was, in the circumstances, that upon which the decision of this appeal depends. It was:—

"X. Whether the plaint mentioned Zemindari is inalienable either by custom or by virtue of its tenure?" If it was not inalienable either by custom or by reason of its tenure, the Palayagar for the time was entitled to mortgage or to transfer absolutely every village in the Palayam according to his pleasure. That is the result of the decisions of the Board in cases of impartible estates in India which descend according to a custom of primogeniture. Until the law on this subject was placed by decisions of the Board beyond a doubt, there was a current of judicial decisions in the Presidency of Madras to the effect that a holder of an impartible estate which descended by a rule of primogeniture could not transfer except for his own lifetime any part of the estate unless, possibly, for necessity.

The suit was tried by the District Judge of Madras. The District Judge states in his judgment that:—

"The plaintiffs base their case not on custom but on the military and Police nature of the tenure and rely on the decision in I. L. R. 10, Allahabad 285, [*Sri Rao Kuari v. Deora*, *Kuari* (2)] to establish that if such is its tenure it (the estate) is inalienable..... A distinction is also sought to be drawn between the present case and others in that, in them, there was a Permanent Settlement whereas in the present case the estate was an unsettled Palayam till the Bank obtained a Permanent Sanad in 1905 from the Government."

The District Judge, after an elaborate consideration of all the historical references to the family to which the appellant here belonged, and of reports and proceedings of Officers of the Government, came to the conclusion that the Palayam of Kannivadi was held, down to 1816, for Police as well as military service and that, although by 1816 the Government had removed from the Palayagar the duty of Police services, the Government had not by the grant of a Zemindari Sanad altered the tenure by which the Palayam was held. His final conclusion on the tenth issue is thus expressed:—"It seems to me, therefore, that as I have held the Palayam to have been held on a military and Karal (Police) tenure that, as it had never been settled and as

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there was no express putting an end to the military liabilities, the estate must be held to have been held on the old tenure up to the grant of the Sanad in 1905 to the Bank, and that, therefore, up to that date, the estate was inalienable. This is my finding on Issue No. 10." The District Judge made a decree in favour of the appellant here, against the respondent Company. From that decree the respondent Company appealed to the High Court at Madras.

The High Court in dealing with the appeal considered separately the question as to whether the Palayam of Kannivadi was held on military service tenure, and the question as to whether it was held on a tenure of performing, for the State, Police duties. Their Lordships will adopt the same course in dealing with this appeal. The learned Judges in their judgment referred to the fact that the Board in *Naragunty Lutchmeedavamah v. Vengama Naidoo* (3), which related to the Naragunty Palayam in the District of Chittore in the Presidency of Madras, had accepted as correct the explanation in Wilson's Glossary that Palayagars were originally petty Chieftains occupying usually tracts of hills or forest country subject to pay tribute and service to the paramount State, but seldom paying either, and more or less independent; but as having at present, since the subjugation of the country by the East India Company, subsided into peaceable land-holders. With reference to that description the learned Judges found that: "There can be no doubt that Kannivadi was a Palayam of this nature." It has not been suggested at the hearing of this appeal that that conclusion of the High Court was not correct. The High Court do not state when the Palayam of Kannivadi was first granted to an ancestor of the appellant; there was not on the record any reliable evidence on that point, but they obviously and rightly considered that the grant had been made before Dindigul, in which District Kannivadi is situated, was ceded to the East India Company by the Treaty of Seringapatam, 1792.

"It may be accepted as a fact that the Palayam of Kannivadi was originally held on military service tenure and subject to the payment of a tribute to the paramount power. Where lands in British India are

(3) 9 M. L. A. 66; 1 W. R. P. C. 30; 1 Suth. P. C. J. 460; 1 Sar. P. C. J. 226; 19 E. R. 666.

held on military service tenure, there is good reason for holding that "no one of the successive tenants could deal with the land so as to deprive the next holder of the source from which his duties might be discharged." (See Mayne's Hindu Law, paragraph 337): "A Palayam is in the nature of a Raj, it may belong to an undivided family, but it is not the subject of partition; it can be held by only one member of the family at a time." [See the *Naragunty's case* (3) cited above.] The question, so far as it depends on military service tenure is concerned, is—Did the Palayam continue to be held on military service tenure when the mortgage to the Bank was made in 1895? The High Court held that the military service of Palayagars of the Madura and Tinnevely Districts was abolished in 1801, by the Proclamation of the 1st December 1801, of Lord Olive, Governor in Council.

On the 2nd October 1799, in consequence of a rebellion which had been fomented and supported by Palayagars of the Tinnevely District, Major Bannerman, as Military Commandant of the Southern Detachment, had been obliged to issue a Proclamation to the Palayagars, land-holders and inhabitants of the Tinnevely District, ordering the Palayagars to destroy all forts in their Palayams and to deliver all guns, gingal pieces, firelocks, matchlocks and pikes in their possession, or in the possession of any of the inhabitants, to the Military Detachments sent to receive them. The Court of Directors, in their letter of 11th February 1801 to Fort St. George (the Government of Madras), sanctioned the gradual introduction of a permanent land settlement in the Presidency, but laid down that it was of first importance that "all subordinate military establishments should be annihilated within the limits subject to the Dominions of the Company." That must have meant that military service tenures should be abolished in the Districts subordinate to Fort St. George.

In consequence of those orders of the 11th February 1801, Lord Olive, Governor in Council, issued the Proclamation of the 1st December 1801 which was addressed to the Palayagars of the Madura and Tinnevely Districts. That Proclamation referred to a Proclamation of 9th December 1799 of the Governor in Council of Fort St. George



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addressed to the Palayagars of Tinnevely and to a rebellion excited and maintained in arms by Palayagars of Panobalam Kurishi and of Virupakshi and by the Sherogars of Sivaganga. The following paragraphs of the Proclamation of the 1st December 1801 show clearly what the Government of Fort St. George intended :—

"Wherefore the Right Honourable Edward, Lord Olive, Governor in Council, aforesaid, with the view of preventing the recurrence of the fatal evils which have attended the possession of arms by the Palayagars and Sherogars of the southern provinces and with the view also of enforcing the conditions of the Proclamation published by Major Bannerman on the 2nd October 1799, formally announces to the Palayagars, Sherogars and inhabitants of the southern provinces the positive determination of His Lordship in Council to suppress the use and exercise of all weapons of offence with the exception of such as shall be authorized by the British Government.

"The military service heretofore rendered by the Palayagars and Sherogars having been suppressed and the Company having in consequence charged itself with the protection and defence of the Palayagar countries, the possession of fire arms and weapons of offence is manifestly become unnecessary to the safety of people. The Right Honourable the Governor in Council, therefore, orders and directs all persons possessed of arms in the provinces of Dindigul, Tinnevely, Ramnadpuram, Sivaganga, and Madura to deliver the said arms consisting of muskets, matchlocks, pikes (to ?) Lieutenant-Colonel Agnew, the Officer now commanding the forces in those provinces.

"It is unnecessary to assure the people of the southern province that the Right Honourable the Governor in Council in the determination of carrying this resolution into effect can be governed by no other motives than those connected with the sacred duty of providing for the permanent tranquility of those countries. His Lordship disclaims every wish of subjecting the Chiefs and hereditary landlords to any humiliation, but the discontinuance of the general use of arms according to the prevailing habits of those countries being indispensably necessary to the preservation of peace and to the restoration of prosperity, the Governor in Council

hopes that the Chieftains will with cheerfulness sacrifice a custom now become useless to the attainment of those important objects.

"With a view, therefore, of tempering the execution of their general resolution with as great a degree of attention as may be practicable to the hereditary customs and to the personal feelings of the Chieftains, the Right Honourable Lord Olive, Governor in Council aforesaid, hereby authorizes each Palayagar or Zemindar to retain a certain number of peons carrying pikes for the purpose of maintaining the pomp and state heretofore attached to the persons of the said Palayagars. But the said number of authorized pikemen shall be fixed and shall continue to be limited for the better execution of this intention, the said number of pikemen shall be determined by the Governor in Council of Fort St. George upon the representation of the several Palayagars, transmitted through the regular channel of the Company's Collector, after Proclamation of the number so fixed, the names of the said pikemen shall be registered in the public *cutcherry* of the Collector, and the pikes shall in like manner be publicly stamped by the Collector with a mark bearing the sanction of the British Government.

"In the confident expectation of reclaiming the people of the southern provinces from the habit of predatory warfare and in the hope of inducing them to resume the arts of peace and agriculture, the Right Honourable Edward, Lord Olive, Governor in Council of Fort Saint George aforesaid, announces to the Palayagars and to all the inhabitants of their Palayams that it is the intention of British Government to establish a permanent assessment of revenue on the lands of the Palayams upon the principles of Zemindari tenure, which assessment being once fixed shall be liable to no change in any time to come, that the Palayagars becoming by these means Zemindars of their hereditary estates will be exempted from all military service and that the possession of their ancestors will be secured to them under the operation of limited and defined laws to be printed and published as well for the purpose of restraining its own officers to the regulations and ordinances of the Government as of securing to the people their property, their lives and their religious usages of their respective castes."

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It appears to their Lordships that by that Proclamation military service tenures in the districts to which the Proclamation applied were abolished whether the Palayagars obtained a permanent assessment *Sanad* or not.

Following upon the Proclamation of the 1st December 1801, some Regulation XXV of 1802, under which a Permanent Settlement so far, if at all, as it has any bearing on this case was made with the Bank, and an *Istimrari Sanad* was granted to the Bank on the 29th September 1905. The Palayam estate had not been previously settled. The Palayagars generally, including the Palayagar of Kannivadi, refused to accept *Istimrari Sanads*, and when the Palayagar of Kannivadi for the time being was willing to accept a *Sanad* the Government refused in 1883 to grant him one. There can be little doubt that that refusal to grant him a *Sanad* was "out of consideration for the family, as it was generally believed that it was more difficult for a creditor to bring to sale unsettled Palayams than Palayam estates which were held under an *Istimrari Settlement Sanad*. It appears to their Lordships that Regulation XXV of 1802 does not affect the question as to whether in 1895 the Palayam of Kannivadi was alienable or not. The Board decided in the *Marungapuri* case [*Collector of Trichinopoly v. Lekkamani* (1)], that the affirmative words of the 2nd section of Regulation XXV of 1802, "That in consequence of the assessment the proprietary right of the soil shall become vested in Zamindars, &c." did not either give to or take away from the former owners of lands not permanently settled, any rights which they then had. It (a settlement under that Regulation) merely vested in all Zamindars an hereditary right at a fixed revenue upon the conclusion of the Permanent Settlement with them [*Collector of Trichinopoly v. Lekkamani* (1)]. In that case the Board approved of the opinion expressed by the High Court of Madras: "That the existence of a proprietary estate in Polliams or other lands not permanently assessed, and the tenure by which it has been held, are, in our opinion, matters judicially determinable on legal evidence, just as the right to any other property" (page 312). In the same case the Board held that: "The only difference between a Polliam or Zamindari which is permanently settled and one that is not, is that, in the

former, the Government is precluded for ever from raising the revenue; and, in the latter, the Government may or may not have that power" (page 313). In the present case the learned Judges of the High Court held that the tenure of military service under which the Palayam of Kannivadi had been held had been abolished and determined by the Proclamation of the 1st December 1801, and with that decision their Lordships have agreed.

It remains to be considered whether the Palayam of Kannivadi was held under a tenure of the Palayagar rendering Police service to the State. The best and most reliable evidence that the Palayam was held on Police service tenure would be a *Sanad* showing that it was so held. Only two *Sanads* which were granted to any Palayagar of Kannivadi have been brought to the attention of this Board. They are *Sanads* which were granted respectively on the 13th July 1797, for the Fasli year 1207, and the 13th July 1800, for the Fasli year 1210, to Appaya Naicker, the then Palayagar. There is nothing in either of those *Sanads* from which their Lordships can infer that the Palayam of Kannivadi was held on a tenure of rendering Police duties to the State. The conditions in those *Sanads* by which the Palayagar was bound to protect the inhabitants by preventing, as far as might be in the power of the Palayagar, robberies, depredations, etc., in their properties, to deliver up persons guilty of murder; and not to give shelter to deserters, and to apprehend and deliver them to the Collector are similar to the duties which all landholders and Zamindars in British India have to perform. Even if it were possible to infer from those *Sanads* that the Palayam of Kannivadi was then held on a tenure of rendering Police duties to the State, the Police duties of Zamindars in that part of the country were abolished in 1816 by the Government of Madras.

Their Lordships hold that in 1895 the Palayam of Kannivadi was not inalienable, and that the then Palayagar had power to alienate it to suit his own purposes, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors for the Appellant.—Mr H. S. L. Polak.

Solicitors for the Respondents.—Messrs. Wontner & Sons.

MANINDRA CHANDRA NANDI v. UPENDRA CHANDRA HAZRA.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1724  
of 1918.

April 23, 1920.

Present:—Justice Sir Asutosh Chaudhuri, Kt.,  
and Mr. Justice Ghose.

MANINDRA CHANDRA NANDI

—APPELLANT

versus

UPENDRA CHANDRA HAZRA—

—RESPONDENT.

*Bengal Tenancy Act (VIII of 1885), ss. 106, 113—  
Record of Rights, rectification of, as regards rent—Suit  
for settlement of rent, whether barred.*

Where, under section 106 of the Bengal Tenancy Act, a Record of Rights is rectified in respect of existing rent, such rectification does not amount to a settlement of rent, so as to bar a suit under section 113 of the Act. [p. 954, col. 2; p. 960, col. 1]

Appeal against the decree of the District Judge, Murshidabad, dated July 31, 1918, reversing the decree of the Mansif, Berhampore, dated September 22, 1917.

Babu Hemendranath Sen (with him Babu Saratkumar Mitra and Dwarkanath Chakravarti), for the Appellant.

Babu Mohinimohan Chakrabarti (with him Babu Bansarilal Sarkar), for the Respondent.

**JUDGMENT.**—This appeal, which arises out of a suit for enhancement of rent under clauses (a) and (b) of section 30 of the Bengal Tenancy Act, illustrates the shortcomings and difficulties of the enactment. The plaintiff is the appellant. The lands in suit belong to his *Mahal* Beldanga. In the time of his predecessor-in-interest there were disputes between her and the tenants as to the rent and area of the holdings. The Magistrate of the district then intervened and the disputes were settled, the principal tenants executing *niriknamas* at certain rates. Among them the defendant executed *furdas* in respect of 68 *bighas*, 17 *kattas* and odd in his possession, agreeing to pay rent at Rs. 63 6 9 on the basis of the *niriknama*. He also executed a *kabuliyat* in favour of Maharani Swarnamoyi, the predecessor, on the basis of which he paid rent up to 1908. On default made, the plaintiff instituted rent-suits on the strength of the *kabuliyat*, which was held invalid by this Hon'ble Court as being in contravention of section 29 of the Tenancy Act. During the pendency of the appeals in the High Court, Record of Rights was prepared in respect of that *mal* which

was finally published on the 24th January 1908. In such record the defendant was entered as a settled *raiyat* and the rent at Rs. 32-10-3 and the area was found to be 69 *bighas*, 4 *kattas* and odd. Thereupon, the tenants made an application under section 105 of the Bengal Tenancy Act on the 28th March 1908 anticipating the plaintiff's objections. The plaintiff made an application on the 24th April 1908 under section 106 of the Bengal Tenancy Act to rectify the record. His application was rejected. He claimed rectification on the ground that he was entitled to the *kabuliyat* rent, and if not so, to an enhancement of the original rental to the extent of two-annas in the rupee. The High Court decision in the rent-suits was given on the 1st June 1908 whereupon the tenant withdrew his application under section 105, on the 23rd June 1908. In August of that year the Revenue Officers disallowed the plaintiff's application, whereupon this suit was instituted. It was urged by the defendant before the learned Mansif that sections 37 and 113 of the Bengal Tenancy Act barred the present suit. He held against such contention.

The learned District Judge, on appeal, agreed that section 37 was not a bar, but held that section 113 clearly barred the present suit. Hence this appeal.

It has been contended before us, as it was contended before the first Appellate Court, that the Record of Rights merely dealt with the existing rent of the land and that the Settlement Officer was not competent to settle a fair and equitable rent until an application under section 105 was made to him. Section 106 deals with the rectification of records and that is what was sought by the plaintiff: he did not in that application, as he could not, apply to have a fair and equitable rent settled. He did not make any application under section 105 for settlement of rent. During the proceedings under section 106, the tenants who had applied under section 105 withdrew their applications, as the High Court had decided in their favour. It was urged on behalf of the tenant that the present suit was barred under section 113. He contends that the rent of his holding was "settled" under Chapter X, when the plaintiff's application under section 106 was rejected and the entry in the record was maintained: that it settled the dispute about



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Rent and must be considered as a settlement of the rent. The wording of section 113 is capable of that interpretation, but it involves an absurdity. Section 102 lays down what particulars are to be put down in the record. One of such particulars to be put down is "the rent payable at the time the Record of Rights is being prepared." Section 102, clause (e). It cannot be contended that the Settlement Officer can at that time settle what ought to be assessed as fair and equitable rent. The section undoubtedly empowers the Settlement Officer to settle the existing rent cutting down illegal exactions, if any, and disallowing any amount imposed in contravention of the Act. The expression used in clause (e) is "rent payable" which is certainly loose. The Tenancy Act was amended, and section 105A was added by Bengal Act I of 1907. Section 106, which was a substitution for the original as contained in Bengal Act of 1903, was again amended in 1907 by an additional provision—namely, the last clause. Section 105A was added to include decisions on certain questions arising during the course of settlement of rent under Chapter X; but we think, having regard to the scheme of the preparation and publication of the record, it cannot be contended that a rectification of the record of the nature sought by the plaintiff can be considered as settlement of rent precluding a suit. No claim for settlement of rent under section 30, clauses (a) and (b), was made in the application before the Settlement Officer under section 106 and could not have been made. Section 105 is a special provision. It cannot be said that a person who does not make an application under that section is debarred from bringing a suit. It is unnecessary to refer to the cases cited which do not deal directly with the point, but deal with the distinction between sections 105 and 106. We do not think that the learned Judge was right in holding that the present suit was barred. We hold it is maintainable. As the learned Judge has not dealt with the other points in the appeal before him, we think the appeal should be remanded for further hearing. The defendant will pay the plaintiff his costs of this appeal.

*Appeal allowed; Case remanded.*

## BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 1110  
OF 1920.

September 30, 1920.

Present:—Mr. Justice Setalvad.

CHAPSI UMERSI—PLAINTIFF

versus

KESHAVJI DAMJI—DEFENDANT.

*Bombay Rent (War Restrictions) Act (II of 1918),  
s. 2—Landlord and tenant, whether includes tenant  
and sub-tenant—Standard rent, what is.*

The only object of including in the definition 'landlord,' a tenant who sub-lets, and in the definition of 'tenant,' a sub-tenant, in the Bombay Rent (War Restrictions) Act, is to extend the benefits of the Act to sub-tenants, and it was not intended that the standard rent should be determined by different standards between the original landlord and the tenant and between the tenant and the sub-tenant. [p 962, col. 2]

'Standard' means a rule or a mode and can only be one. The whole object of the Rent Act is to prevent tenants being made to pay rent which the Legislature considers excessive or unreasonable. In regard to the same premises, rent which the law regards as unreasonable or excessive between the original landlord and tenant ought not to be regarded as reasonable between the tenant and the sub-tenant. Similarly, rent which the law regards as reasonable between the original landlord and tenant ought not to be regarded as unreasonable between the tenant and the sub-tenant. Standard rent must mean the rent at which the premises were originally let. The standard rent is to be fixed in relation to premises and not in relation to persons, and can, therefore, be only one and not varying as between different individuals. [p. 932, col. 2.]

Mr. Campbell, for the Plaintiffs.

Mr. Kanga, for the Defendants.

**JUDGMENT.**—This suit relates to a godown situated on the ground floor of a house at Mandvi belonging to one Keshavji Damji. On the 28th of September 1916 an agreement was entered into between Keshavji Damji and the plaintiffs for a lease of this godown for twenty-three months, to commence from 25th December 1916. At this time the building was being re-constructed and the ground floor was expected to be ready in December and so the lease was made to commence from 25th December. The godown, however, became ready in February 1917, and the plaintiffs commenced paying rent from 22nd February 1917. The plaintiffs sub-let the godown to the defendants for Rs. 275 per month as from the 22nd of February 1917 and the defendants entered into possession on that date. The plaintiffs never themselves entered into possession except

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through their sub-tenant, the defendants. The defendants commenced paying rent to the plaintiffs from the 22nd February 1917. The defendants paid the said rent of Rs. 275 up to 12th March 1918, but thereafter they refused to pay the stipulated rent and contended that Rs. 110 was the standard rent which, under the Rent Act, they were liable to pay. The defendants paid Rs. 1,474 as rent at the rate of Rs. 110 up to the 27th July 1919 which the plaintiffs took under protest. The plaintiffs claim in this suit Rs. 5,401, being the rent at the rate of Rs. 275 per month from 13th March 1917 to 20th March 1920, after giving credit for Rs. 1,474 paid as aforesaid by the defendants, and claim further rent at Rs. 305 per month, contending that that is standard rent of the premises. By their letter of 14th February 1920, the plaintiffs had given notice to the defendants that they would claim, from March 1920, Rs. 305 from the defendants as the standard rent. The only issue in the case is, "What is the standard rent the defendants are liable to pay?"

It appears that Keshavji Damji, the owner of the premises, filed a suit against the present plaintiffs, in the Small Cause Court, to recover rent at the rate of Rs. 305 per month, for four months, from 13th March 1918 to 8th July 1918. The present plaintiffs contended in the said suit that Rs. 305 was not the standard rent, but the Small Cause Court held against the present plaintiffs that Rs. 305 per month was the standard rent and awarded the same. The said decree was confirmed by the Full Court of the said Court. The said Keshavji Damji instituted another suit against the present plaintiffs in the High Court, being Suit No. 2974 of 1919, to recover rent for thirteen months, subsequent to the 8th of July 1918, at the rate of Rs. 305 per month. The present plaintiffs had in that suit to submit to a decree for rent at that rate. In the present suit the defendants in their written statement alleged that the proceedings in the Small Cause Court and the High Court were collusive and that, in any event, they were not bound by the results of those suits. These charges of collusion were, in the course of the trial, abandoned.

One Narandas Mathuradas was, in January 1916, in occupation of the space comprised within the godown in suit as a tenant, and he

was then paying Rs. 100 as rent as shown by the rent bill, dated 17th January 1916, produced by him (Exhibit 4), but it is contended that the godown in suit is not the premises that were in the occupation of the said Narandas on the 1st of January 1916, but, to all intents and purposes, it is new premises, and, therefore, the statutory standard rent must be taken to be the rent at which it was first let. The godown in suit is on the south, and there is another godown on the north which is now occupied by the said Narandas. It appears that Keshavji purchased the building on the ground floor of which the godown in suit is situated, in July 1915, in partnership with one Bhimji. Bhimji's interest was bought by Keshavji who, thereupon, became full owner in September 1915. When Keshavji bought the building, it was in a very dilapidated condition, and there were no tenants on the four upper floors and, except the godowns on the ground floor, the building was unoccupied. Keshavji paid for this building Rs. 73,000. He was advised by his architect, Karani, to reconstruct the building, and he appears to have expended on such reconstruction Rs. 95,000. The rateable value of the old building, when Keshavji bought it, was Rs. 3,785, and the rateable value, now assessed by the Municipality, of the reconstructed building, is Rs. 18,381. The original building stood on 544 square yards of land, and in the reconstructed building further 36 square yards of adjoining land which was vacant and which belonged to Keshavji, were added. Three different applications were submitted to the Municipality at different times for reconstructing different portions of the building. These applications were submitted, under section 342 of the City of Bombay Municipal Act, apparently in order to avoid the set-back and other requisitions which would have been made by the Municipality if the application had been in form for the construction of a new building under section 337 of the City of Bombay Municipal Act. The work was begun in March or April 1916, the work on the ground floor was finished in February 1917, and the work on the whole of the building was finished in the beginning of 1918. The evidence of Karani, the architect, which I accept, makes it clear that the net result of the operations that he carried out has been to put up, for all practical purposes, a new building in place

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of the old building, and, if so, the portion let to the defendants, namely, the godown in suit, is a part of the new building. The whole building was practically re-walled, re-floored and re-roofed and a new Chowk to bring in more light and air was made. Free ventilation has been provided, and access to the D'Souza Street has been given. Most of the old beams and joists were removed and new ones put in, and one can fairly say that there was now a new building. Taking the godown itself, the west and north walls are new. A large proportion of the posts, beams and joists in the godown is new, and the ceiling is also practically new. The floor of the godown has been re-laid. The present godown has more light and air than the old one and has now access into the D'Souza Street over the Ota constructed on the 36 square yards of the land added to the building. If, then, the premises in suit were not the premises that were let to Narandas on 1st of January 1916, the rent then paid by him cannot be regarded as the standard rent for the godown in suit. The standard rent is the rent at which these new premises were first let after the 1st of January 1916. They were so let by Keshavji Damji to the present plaintiffs at the rent of Rs. 305 per month. But it is contended that, assuming that these are new premises and they were not let on the 1st of January 1916, the letting by the plaintiffs to the defendants at Rs. 275 per month should be taken, as between them, as the rent at which the premises were first let, after the 1st of January 1916, within the meaning of section 2 (a) (ii) of the Bombay Rent (War Restrictions) Act. This involves the contention that there can be different standard rents for the same premises as between different individuals, and that, while the standard rent between Keshavji and the plaintiffs for these premises may be Rs. 305 per month, the standard rent as between the plaintiffs and the defendants is Rs. 275. This contention is based on the definition of the expressions 'landlord' and 'tenant' in the Rent Act. 'Landlord,' according to the definition, includes a tenant who sub-lets any premises, and the expression 'tenant' includes a sub-tenant. The argument is that, as between a tenant who is a landlord according to this definition and his sub-tenant who is regarded as tenant for this purpose, the letting to be

looked to is the letting by the tenant to the sub-tenant. The only object, to my mind, of including in the definition of 'landlord' a tenant, and in the definition of 'tenant' a sub-tenant, is to extend the benefits of the Rent Act to sub-tenants, but I do not think that it was intended that the standard rent was to be determined by different standards between the original landlord and the tenant and between the tenant and the sub-tenant. Otherwise, the tenant, while himself getting the advantage of the Rent Act, would be able to profiteer as between himself and the sub-tenant. Supposing a tenant took certain premises in 1917 for a monthly rent of Rs. 200, and then sub let them for Rs. 300 to another person, after the coming into operation of the Rent Act, he would be entitled to claim that he was liable to pay only the rent at which the premises were let on the 1st of January 1916 which, let us suppose, was Rs. 100 a month, while the sub-tenant would be obliged to pay to him Rs. 300, that being the rent at which the premises were first let after the 1st of January 1916, as between them. In section 2 (a) (i) "standard rent" in relation to any premises is defined as the rent at which the premises were let (not sub let) on the 1st of January 1916. With reference to premises that were or shall be first let after the 1st of January 1916, standard rent is the rent at which they were or shall be first let (not sub-let). 'Standard' means a rule or a model and can only be one. The whole object of the Rent Act is to prevent tenants being made to pay rent which the Legislature considers excessive or unreasonable. In regard to the same premises, rent which the law regards as unreasonable or excessive between the original landlord and tenant ought not to be regarded as reasonable between the tenant and the sub-tenant. Similarly, rent which the law regards as reasonable between the original landlord and tenant ought not to be regarded as unreasonable between the tenant and the sub-tenant. Standard rent must, I think, mean the rent at which the premises were originally let. The standard rent is to be fixed in relation to premises and not in relation to persons, and can, therefore, be only one and not varying as between different individuals. In the case of *King v. York* (1)

(1) (1919) W. N. 59; 88 L. J. K. B. 839; 35 T. L. R. 256.



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the Court of Appeal in dealing with the provisions of the Increase of Rent and Mortgage Interest Act, 1915, said: "The Act applied to houses, not to persons. The Act operated *in rem*, not *in personam*. It stereotyped the rent of a house." The present case is no doubt somewhat peculiar, because the original tenants (the plaintiffs) took the premises at a rent of Rs. 305 per month and sublet them to the defendants at a reduced rent of Rs. 275. Such cases will always be rare; ordinarily, there will be cases of sub-tenants taking premises at an enhanced rent or the same rent as the tenant is paying. If the standard rent in relation to these premises is Rs. 205, being the rent at which they were first let after 1st of January 1916, then the defendants are liable to pay that rent. There will be a decree for the plaintiffs as prayed with costs and interest on judgment at 6 per cent.

*Suit decreed.*

## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL NO. 40 OF  
1920 IN SCIT NO. 34 OF 1920.

April 23, 1920.

*Present:*—Sir Asutosh Mookerjee, Kt.,  
Acting Chief Justice, and Justice Sir Ernest  
Fletcher, Kt.

KHATIZAN—APPELLANT

*versus*

SONAIRAM DAULATRAM

—RESPONDENT.

*Letters Patent (Cal.), cls. 13, 15—Appeal—Order  
of Single Judge of High Court transferring suit, nature  
of—Order, whether appealable.*

An order made by a Single Judge of the High Court under clause 13 of the Letters Patent, transferring a suit from the Calcutta Small Cause Court to the High Court for trial, is not a judgment within the meaning of clause 15 of the Letters Patent, and is consequently not appealable. [p 964, col. 1.]

Appeal against the order of Mr. Justice Greaves.

Mr. S. R. Banerjee, for the Appellant.

Mr. B. L. Mitter (with him Mr. K. P. Khaitan), for the Respondents.

## JUDGMENT.

MOOKERJEE, ACCT. C. J.—This is an appeal against an order made by Mr. Justice Greaves, under clause 13 of the Letters

Patent, for the transfer of a claim, suit—from the Calcutta Small Cause Court to this Court.

A preliminary objection has been taken on behalf of the respondent that the appeal is incompetent, inasmuch as the order is not a "judgment" within the meaning of clause 15 of the Letters Patent.

There can be no question, in our opinion, that the proceeding which has been transferred is a suit within the meaning of clause 13 of the Letters Patent. It was pointed out by Mr. Justice Wilson in the case of *Ismail Solomon Bhamji v. Mahomed Khan* (1), that, under the Rules of Small Cause Court, claims are not tried summarily; they are dealt with just as suits are; and we find that the proceeding is described and is numbered as a suit pending in the Calcutta Court of Small Causes. The only question consequently is, whether the order of transfer is a "judgment." We are of opinion that the answer must be in the negative.

In the case of the *Justices of the Peace for Calcutta v. The Oriental Gas Company* (2), Sir Richard Couch, C. J., said: "We think that 'judgment' in clause 15 means a decision which affects the merits of the question between the parties determining some right or liability. It may be either final, or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined." In the case before us, the order for transfer does not involve a decision which affects the merits of the question between the parties, nor does it determine some right or liability. We do not overlook the later decision in the case of *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* (3), where it was ruled that an order granting leave to sue, to the plaintiff, under clause 12 of the Letters Patent, is a "judgment" and is appealable under clause 15. It was explained that an order granting leave to sue was not a mere formal order or an order merely regulating the procedure in the suit, but one that had the effect of

(1) 18 C. 296; 9 Ind. Dec. (N. S.) 157.

(2) 8 B. L. R. 433; 17 W. R. 364.

(3) 13 B. L. R. 91; 21 W. R. 303.

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ving a jurisdiction to the Court which it otherwise would not have and, from this point of view, it might fairly be said to determine some right between the parties, namely, the right to sue in a particular Court, and to compel the defendants who were not within its jurisdiction to come in and defend the suit, or, if they did not, to make them liable to have a decree passed against them in their absence. These reasons, obviously, are not applicable to a case of the description now before us.

It has been contended, however, that the order under appeal not only directs the transfer of the suit, but also declares that the defendant firm will be at liberty to proceed with the sale in execution of the decree of the Small Cause Court, made in a previous suit. This declaration is merely ancillary to the order for transfer, and cannot be deemed appealable irrespective of the character of the primary order. We are accordingly of opinion, upon a construction of clauses 13 and 15, that the order is not appealable.

It is worthy of mention that our attention has not been drawn to any case in which an appeal has been entertained from an order of this description. Orders for transfer have frequently been made for years past and many of them are to be found in the reports: but there is no trace that an appeal has ever been successfully maintained against an order for transfer under clause 13 of the Letters Patent.

The result is, that the appeal is dismissed with costs.

The Rule is discharged with costs.

FITCHER, J.—I agree.

*Appeal dismissed.*

## BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION.

October 21, 1920.

*Present:—* Sir Norman Macleod, Kt.,  
Chief Justice, and Mr. Justice Fawcett.

*In the matter of THE EXCESS PROFITS  
DUTY ACT, 1919*

AND

*In the matter of THE BOMBAY AND  
PERSIA STEAM NAVIGATION  
COMPANY, LIMITED.*

*Laws: Excess Profits Duty Act (X of 1919), Sch. II, cl. (1),*

*proviso—Accumulated profits when can be treated as capital—Specific Relief Act (I of 1877), s. 45—Income Tax Act VII of 1914, s. 51—Chief Revenue Authority, whether bound to make reference.*

Accumulated profits cannot be treated as capital under the proviso to clause (1) of Schedule II. to the Excess Profits Duty Act, unless they are actually employed in the business. Profits intended to be employed in the business cannot be treated as capital. [p. 965, col. 2.]

Whether or not they are employed in the business, is a question of fact which the Chief Revenue Authority is entitled to decide on the materials before it [p. 966, col. 2.]

It is not clearly incumbent on the Chief Revenue Authority, within the meaning of section 45 of the Specific Relief Act, to make a reference to the High Court under section 51 of the Income Tax Act. [p. 967, col. 2.]

Mr. Collman, for the Petitioners.

Sir Thomas Strangman, Advocate General,  
for the Respondent, to show cause.

## JUDGMENT.

MACLEOD, C. J.—The petitioners were assessed on the 30th October 1919 under the Excess Profits Duty Act (X of 1919) in the amount of Rs. 6,48,379.4-0 and received due notice thereof from the Collector of Income Tax (Exhibit B). Thereupon the petitioners presented an appeal against the said assessment to the Chief Revenue Authority claiming that they were entitled to be held exempt from assessment. The appeal was heard on the 3rd August 1920, when the assessment of the Collector of Income Tax was confirmed. The petitioners requested the Chief Revenue Authority to state a case for the opinion of the High Court but on the 11th August the Chief Revenue Authority wrote that a reference to the High Court had been deemed unnecessary.

On the 20th August the petitioners obtained a Rule calling upon the Chief Revenue Authority to show cause why he should not be ordered to refer to this Hon'ble Court for its decision the questions set out in Exhibit D to the petition and the question, whether the cash and investments referred to in paragraph 8 of the petition should be taken into consideration for purposes of excess profits duty, together with his opinion upon those questions, or, in the alternative, why the Chief Revenue Authority should not be ordered to hear and determine accord-

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ing to law the petitioners' application to refer the above questions to this Hon'ble Court. The alternative prayer seems unnecessary. An affidavit in reply has been put in annexing the decision of the Chief Revenue Authority to the effect that the reference asked for was quite unnecessary as the provisions of section 6 of the Act, and Schedule II thereto, were absolutely clear on the point.

Section 45 of the Specific Relief Act provides that—

"The High Court may make an order requiring any specific act to be done or forbore within the local limits of its ordinary original civil jurisdiction by any person holding a public office :

"Provided (a) That an application for such order be made by some person whose property franchise or personal right would be injured by the forbearing or doing of the said specific act.

"(b) That such doing or forbearing is under any law for the time being in force clearly incumbent on such person in his public character.

"(c) That in the opinion of the High Court such doing or forbearing is consonant to right and justice.

"(d) That the applicant has no other specific and adequate legal remedy. And

"(e) That the remedy given by the order applied for will be complete."

Act X of 1919 is an Act to impose a duty on excess profits arising out of certain businesses, and it is admitted that the Act applies to the business carried on by the petitioners. Sections 5 and 6 provide for the methods in which the excess profits are to be ascertained for the purposes of assessment.

Section 7 gives the Collector power to make allowances for special circumstances.

Section 8 provides for an appeal to the Chief Revenue Authority against the decision of the Collector on an application under section 7. The decision of the Chief Revenue Authority is final.

Section 15 provides that certain sections of the Indian Income Tax Act (VII of 1918), including sections 10 to 52, shall apply as if they referred to excess profits duty instead of to income tax.

Section 51 of the Indian Income Tax Act (VII of 1918) provides that if, in the course of any assessment under the Act, a question has arisen with reference to the interpretation of any provision of the Act or of any rule thereunder, the Chief Revenue Authority shall refer any such question on the application of the assessee with its own opinion thereon to the High Court, unless it is satisfied that the application is frivolous or that a reference is unnecessary.

The wording of the section is not very satisfactory. On a strict construction the Chief Revenue Authority could always avoid referring a question on the application of the assessee by saying it was satisfied the reference was unnecessary, and then it would be difficult for the Court to hold that it was incumbent under the Act for the Chief Revenue Authority to refer the question. I think, however, it would be open to the Court to consider the grounds on which the Chief Revenue Authority was satisfied that a reference was unnecessary. For instance, if a question arose with regard to the interpretation of a section which was so complex, so intricate, that it was clearly advisable that the question should be finally determined by a Judicial Authority rather than by the Chief Revenue Authority, I doubt whether that Authority would be justified in saying that it was satisfied that a reference was unnecessary. In order, therefore, to decide whether, in this case, the Chief Revenue Authority had reasonable grounds for being satisfied that a reference with regard to the questions which had arisen was unnecessary, we must consider the sections of the Act which provide for the assessment of excess profits duty.

Section 2 defines the accounting period as the twelve months ending the 31st March 1919, or, if the accounts of the business have been made up within the twelve months for the purpose of the Indian Income Tax Act, 1918, in respect of a year ending on any date other than 31st March, then the year ending on that date.

Section 4 imposes a duty of 50 per cent. on the amount by which the profits in the accounting period exceed the standard profits.



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Section 6 (1) (a) and (b) prescribe various methods for calculating standard profits. If they are calculated under (b), there is a proviso that, if, the average capital employed in the business in the years adopted for the purpose of determining the standard profits is less or more than the capital so employed at the end of the accounting period, there shall be made to or from the standard profits an addition or deduction, as the case may be, which shall bear to the standard profits the same proportion as such decrease or increase of capital bears to the average capital so employed in the year so adopted. For the purpose of ascertaining the average capital, the capital employed in the business in any year shall be deemed the capital so employed at the end of that year.

By sub-section (4) no increase of capital made after the 31st December 1918 shall be taken into account in any case and no such increase before that date shall be taken into account, when it appears, or to the extent to which it appears, that the increase was made with intent to evade or has the effect of evading the payment of the excess profits duty. To take, therefore, a concrete instance, if the standard profits are one lac on an average capital of ten lacs, and the capital at the end of the accounting period is twenty lacs then the standard profits will be increased to two lacs. It is obvious, then, that the more the capital at the end of the accounting period can be increased, the greater the addition to the standard profits, with a corresponding decrease in the amount on which the excess profits duty can be levied.

Schedule II to the Act prescribes how capital is to be ascertained:

"1. The amount of the capital of a business shall, so far as it does not consist of money, be taken to be—

"(a) So far as it consists of assets acquired by purchase, the price at which these assets were acquired, subject to any proper deduction for depreciation or for unpaid purchase money.

"(b) So far as it consists due to the business, the nominal amount of those debts subject to any deduction which has been allowed or is allowable in respect of those debts under the Indian Income Tax Act, 1918. And

"(c) So far as it consists of any other assets which have not been acquired by purchase, the value of the assets at the time they became assets of the business, subject to any proper deduction for depreciation.

"Any borrowed money or trade debt shall be deducted in computing the amount of capital for the purposes of this Act."

Then there is the proviso which has given rise to the matter in dispute in this case.

Accumulated profits, other than those made in the accounting period, would, in the ordinary course, remain to the credit of the profit and loss account and would not be capital, but nothing in the provisions regarding the ascertainment of the capital of a business is to prevent accumulated profits being treated as capital if they are employed in the business.

Now, the petitioners' balance-sheet for the year ending the 31st December 1918 shows a total of 119 lacs, odd, for cash and investments. No doubt a portion of this amount was required to meet recognised liabilities appearing on the other side of the balance-sheet, but it is equally clear, and I do not think the petitioners dispute it, that some portion of this amount represented accumulated profits for the years prior to the accounting period. Those profits, which are not employed in the business, cannot be treated as capital for the purposes of the Act. There is nothing, therefore, with regard to the interpretation of Schedule II which can give rise to any difficulty. Assuming that the questions were referred to us, what is the proper interpretation of the proviso to clause (1) of the Second Schedule, we could only say that accumulated profits cannot be treated as capital unless they are employed in the business. Whether or not they are employed in the business, is a question of fact which the Chief Revenue Authority is entitled to decide on the materials before it.

The petitioners claimed that the whole of their cash and investments were employed in the business. They made no attempt to assist the Collector or Chief Revenue Authority in deciding how much was employed in the business with the

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result that a haphazard guess was made at the amount, instead of employing proper accounting methods. The question which the petitioners formulated in their letter of the 5th August to the Chief Revenue Authority, were really questions for a Chartered Accountant and not questions with regard to the interpretation of the Act. Supposing those questions were before the Court, they could only be answered with the assistance of experts. But it may be permissible to make a few remarks on the facts as presented to us. Ordinarily speaking, the excess in a balance-sheet of assets over liabilities is profit. On the balance sheet produced before us that excess is over sixty lacs, if the reserve fund is not considered as a liability since it represents past profits which have not been distributed. But if the ships are valued as the petitioners wish them to be valued for the purpose of increasing the capital as at the end of the accounting period, the profits would be over rupees eighty-six lacs including, of course, the profits earned during the accounting period. This amount is actually represented by cash and investments; and could be distributed among the share holders by way of dividend. If, however, it was represented by ships, even though they were purchased at the end of the accounting period, it would be profit employed in the business.

As on the 31st December 1918 it had not been so employed, it cannot be argued that it makes no difference so long as it was intended to be employed. The Act does not say that profits intended to be employed in the business can be treated as capital. We have not got the calculations before us on which the Collector came to the conclusion that the capital at the end of the accounting period was twenty-four lacs, but the best advice I can give the petitioners is that they should ask the Collector or the Chief Revenue Authority to re-consider its decision, and, instead of adopting an absolutely impossible attitude in calculating the capital, to satisfy him by proper accounting methods what part of the accumulated profits now represented by investments are actually employed in the business.

In my opinion, the Chief Revenue Authority had reasonable grounds for being satisfied that it was unnecessary to refer to the High Court

the questions which had arisen with regard to the interpretation of the Act and the Rule should be discharged with costs.

Fawcett, J.—I agree that it has not been shown to be "clearly incumbent on" the Chief Revenue Authority to refer the questions mentioned in this petition under section 51 of the Indian Income Tax Act, 1918, and that the Rule should be discharged with costs.

The words "employed in the business" in the proviso to rule 1 of Schedule II to the Excess Profits Duty Act, 1919, *prima facie* bear their natural meaning of "actually employed in the business", and cannot properly be construed as if the words were "employed or intended to be employed in the business." If the latter had been intended, they would presumably have been used, just as they are used in Schedule D, Cases I and II, rule 3 (f) of the English Income Tax Act, 1918, which specifies "any sum employed or intended to be employed as capital in such trade profession, employment or vocation."

In my opinion, the interpretation put on the proviso by the Chief Revenue Authority is correct, and he had reasonable grounds for being satisfied that it was unnecessary to make the reference to the High Court, which the petitioners asked for.

*Rule discharged.*

### SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 10 OF 1917.

February 27, 1920.

*Present:*—Mr. Fawcett, J. C. and Mr. Kemp, A. J. C.

Seth GIDASING CHIMANSING AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

BIKHCHAND BHOJRAJ—PLAINTIFF  
—RESPONDENT.

*Partnership—Sub-partner, right of, to sue partner for accounts.*

A suit by a sub-partner for an account of the partnership is maintainable against his partner, and he must accept the accounts in the main partnership as settled between the partners of that partnership, unless he can show that the accounts have been taken wrongly or *mala fide*. [p. 968, col. 2.]

Appeal from the decree of the Assistant Judge, Sukkur.

Mr. Sri *risandas H. Lala*, for the Appellants.

Mr. *Kamatrai Bhojraj*, for the Respondent.

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## JUDGMENT.

FAWCETT, J. C.—In 1909 a partnership was entered into between one Chimansing and his son Narainsing with some other persons for carrying out Government contracts. It has been held by both the lower Courts that the plaintiff-respondent was a sub partner of Chimansing and Narainsing. Under the main partnership agreement, the partnership was due to terminate on the 30th of June 1911, and (as shown by the judgment which has been admitted in evidence in the appeal as Exhibit 11) has been held to have actually terminated on the 30th of March 1911. Plaintiff-respondent filed a suit in 1912 against Narainsing and the legal representatives of Chimansing, claiming accounts on the basis of his being their sub partner. In this suit he also impleaded the other main partners. Objection was taken to their being joined in this suit and it was also contended that the suit was premature. The Trial Judge held that the other partners were not necessary parties in the suit, but there was no objection to their being joined, and that this was desirable in their interests, so that the main partnership accounts could be enquired into in their presence. He also held that the suit was not premature. Accordingly, he passed a preliminary decree declaring the plaintiff to be entitled to take accounts and to receive his share out of the share belonging to Narainsing and Chimansing. On appeal to the District Court, the Assistant Judge held that the suit was not premature but that the suit lay against plaintiff's own partner and not against any of the other partners of the main partnership. He, accordingly, modified the lower Court's decree by expunging the names of those defendants from it.

In this second appeal, two points have been taken. The first is that, until the accounts of the main partnership are settled, the plaintiff has no cause of action against the appellants in regard to the sub partnership. The law in regard to a case like the present is dealt with in *Ohidambaram Ohetty v. Karuthan Ohetty* (1). I agree with the view there taken that, there being nothing in the Indian Contract Act on this subject, we should have regard to the

law contained in section 31 of the English Partnership Act. It was urged that the section did not cover the case of a sub partner like the plaintiff, but only the case of an assignee of a share in a partnership. But a sub partner is, in fact, an assignee of a share in the partnership. In this particular case the plaintiff is the assignee of a 6-pie share out of the appellant's share of Rs. 1-3, and there is, in my opinion, no ground for distinguishing the case of a sub partner from that of an assignee, as the Judge did in the lower Appellate Court. Accordingly, it follows that the plaintiff is entitled only to receive the share of profits to which the appellants are entitled in the main partnership accounts, and that he must accept the account of profits agreed to by the partners. Also, as laid down in sub-section (2) of that section, in the case of dissolution of partnership, he is entitled to receive his share of the partnership assets to which the assigning partner is entitled as between him and the other partners and, for the purpose of ascertaining that share, to an account as from the date of the dissolution. The present suit was filed after the partnership was dissolved, whether that date be taken as the 30th March 1911 or 30th June 1911; and he has clearly under the provisions, as I have referred to, a cause of action for an account as against the appellants. I, therefore, agree with the view taken by the lower Court that the suit is not premature.

The second point raised was that, as a sub partner, he must accept the accounts in the main partnership as settled between the partners of that partnership unless he can show that the accounts have been taken wrongly or *mala fide*. This contention is, in my opinion, correct. It follows from the provisions of section 31 of the English Partnership Act and the English cases on the subject, which are cited in the case of *Ohidambaram Ohetty v. Karuthan Ohetty* (1), already mentioned. The decree which has been given to the plaintiff respondent does not specifically limit his right to an account so as to conform with the law just mentioned. I would, therefore, vary the decree by adding a clause that, if the main partnership accounts have been taken in either of the suits pending in regard to them or have been otherwise settled, the amount for which appellants are held to be entitled in those accounts will have to be

(1) 34 Ind. Cas. 543; (1916) 2 M. W. N. 18; 4 L. W. 10; 20 M. T. 134.



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accepted by the plaintiff-respondent, unless he can prove that the accounts have been taken or settled wrongly or *mala fide*. But I do not mean he necessarily should wait until the main partnership accounts are settled, for the plaintiff-respondent can no doubt adduce evidence in regard to the share of the appellants.

A third point which has been referred to in the arguments, is the date on which the main partnership should be deemed to have terminated for the purpose of the account to which the plaintiff-respondent is entitled. On the one hand, it is urged that it has been held to be the 30th March 1911, and, on the other, that this was an arrangement not binding upon the plaintiff-respondent, who became a sub-partner of the appellants on the understanding that the partnership would extend to 30th of June 1911. For the purpose of preventing any further litigation on this point, we think it desirable to say that we see no reason to interfere with the finding of both the lower Courts that, so far as the plaintiff is concerned, the partnership should be taken as dissolved on the 30th of June 1911, although another date has been accepted in the suits about the main partnership accounts. That date, no doubt, is correct on the particular facts, but at the same time it is based on a technicality rather than on any actual closing of the partnership, and we do not think that the plaintiff respondent should be prejudiced thereby in the account to which, subject to the limitation I have mentioned, he is entitled.

In the circumstances of the case, we allow appellants 1/3rd of their costs from the respondent, and respondent 2/3rds of his costs from the appellants.

**KEPP, A. J. C.**—This is an appeal against the lower Appellate Court's decree in favour of the plaintiff respondent in a suit filed by him as sub partner against his partner and his partner's partners. The suit arose under the following circumstances :

There were three groups of main partners, Chimansing and his son Narainsing, Asudmal and his son Fatechand, and Hasenand and Dewan Wadhumal. The main partnership was entered into on the 23rd August 1903 for a period to end on the 30th June 1911. The sub-partnership agreement was between the plaintiff and the 1st group of main partners, Chimansing and Narainsing, and the

plaintiff brought his suit in 1912 impleading all the partners of the main partnership.

Now it is not, to my mind, clear from the pleadings exactly, whether the plaintiff asked the Court to take the main partnership accounts or whether he was asking that those accounts should be taken merely as incidental to an account between himself and his own partner. But having regard to the laxity with which pleadings in the *Mufassil* are very often drawn, I am willing to infer from these particular pleadings that what the plaintiff sought was an account against his own partner and, with the view of taking that account, he required his own partner should render an account of the main partnership. That being so, there is nothing, to my mind, which prevents a sub-partner suing his own particular partner for an account.

Then, it is contended that that account should be taken as of the 30th March 1911 on which date the main partners entered into an agreement to continue their partnership up to the 30th June 1914. But the plaintiff's answer to this contention is to my mind correct, viz., that his agreement with his own immediate partner was that the sub-partnership should continue until the 30th June 1911, and his own partner cannot by any arrangement with the partners in the main partnership affect the plaintiff's rights. Moreover, I doubt very much whether there was an interruption of the main partnership on the 30th March 1911. It is doubtful if what took place on that date cannot be regarded merely as a continuation of the original partnership with an agreement to extend it for a period beyond the date when the main partners had previously agreed that it should terminate.

I, therefore, agree with the order proposed by my learned brother.

*Decree varied.*

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT NO. 1754 OF 1919.

April 14, 1920.

Present:—Mr. Justice Rankin.

D. E. D. J. EZRA—PLAINTIFF

1675148

J. E. GUBRAY—DEPENDENT.

(c)  $P = b_0 + b_1(1 - P)$  of 1985, O XXI.

EZRA V. GUBBAY.

rr. 97, 99—Decree for possession—Decree-holder resisted in obtaining possession—Sub-tenant of judgment-debtor, claiming possession—Decree-holder, remedy of.

G. obtained from E a lease of certain premises, one of the conditions of the lease being that the lessee could not sub-let without the consent of the lessor. Contrary to these terms, G. sub-let the premises to W. whereupon E. brought a suit for possession against G. and obtained a decree. In attempting to obtain possession E. was resisted by W. and he thereupon applied under Order XXI, rule 97 of the Civil Procedure Code, complaining of the resistance. W. contended that he was in possession on his own account and that the decree could not be enforced against him in a summary procedure under Order XXI:

*Held*, that as W.'s tenancy began before the suit for possession was instituted, E.'s remedy was by a suit against him. [p. 971, col. 2.]

An action for possession based upon forfeiture of a term should, for practical reasons, be brought against all persons in possession, including constructive possession, at the date of the suit. [p. 971, col. 2.]

Mr. A. A. Austoom, for the Plaintiff.

Mr. L. P. E. Pugh, for the Respondent.

**JUDGMENT.**—This suit was instituted on the 7th July 1919 by lessor against lessee for recovery of possession of certain premises upon the determination of the term by forfeiture for breach of conditions in the lease. The suit was contested by the lessee unsuccessfully, and an order for recovery of possession was made on 14th December 1919, by which the lessee was given until the 29th February 1920, to make over possession. This not being done, an order, dated 12th March 1920, was obtained by the lessor directing the Sheriff to put him into possession. The Sheriff, on the 8th April 1920, was obstructed in the execution of this order by a Mrs. Wallace who is respondent to the present application made by the lessor before me as the Judge in Chambers.

Mr. Pugh, who appears for Mrs. Wallace, admits that his client holds as a tenant under the defendant in the suit. He does not file any affidavit on her behalf; but he says that she was in possession as under tenant before the suit was instituted and he indicates a desire to contend, or at least a willingness to allege, (on what grounds I do not know) that the suit was collusive. Mr. Austoom, for the lessor, contends that, though not a party to the suit, Mrs. Wallace is bound by the decree

whether her tenancy began before or after action brought, that she is in law a privy though not a party, and her under-tenancy has determined by the forfeiture of the lease.

It is not absolutely necessary to join as defendants all persons in possession: in some circumstances it may be wrong and oppressive so to do: *Geen v. Herring* (1). The risk taken by omitting to join any such person is the risk that after decree he may set up a right to possession, independently of the lease which has become forfeited, whether by equity against the lessor or by other adverse title. This, however, is the extent of the risk and, apart from the Code, I should have no difficulty in enforcing this decree against Mrs. Wallace, her estate or interest having come to an end with the forfeiture of the lease [*Minet v. Johnson* (2)] and there being no tittle of evidence before me as to the action having been collusive.

There is nothing, however, in the least paradoxical in the suggestion that, in order to get an effective right to actual possession through the Sheriff, a plaintiff must make all persons defendants who were in possession at the date of his suit. This used to be the law in England, and there may well be special reasons in favour of insisting on this rule in India. I have to see what the Code provides.

Mr. Pugh's first point is, that the respondent comes within rule 36 of Order XXI and that the plaintiff has wrongly obtained the order of 12th March 1920 under rule 35. I do not think there is anything wrong with the order. The rules in question are simply directed to the form of possession which the Court will give to a plaintiff. The rights established by any decree are established *inter partes* and are always liable to be denied by strangers claiming an interest; but if the plaintiff has obtained a decree on the footing of which he is entitled to actual possession and not merely to the form of possession appropriate to a reversion expectant upon another's occupancy right, an order made

(1) (1905) 1 K. B. 152; 74 L. J. K. B. 62; 92 L. T. 87; 53 W. R. 826; 21 T. L. R. 93.

(2) (1891) 63 L. T. 507.

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under rule 35 is not bad or void. The question is simply whether that order can be enforced against the person objecting to its operation. The answer to this question must, I think, be given as far as any summary procedure is concerned, by looking first to rules 97, 98 and 99 of the same Order. Rule 98 deals with two cases, viz., where the obstruction is occasioned without just cause, (1) by the judgment-debtor, (2) by some other person at his instigation. Rule 99 likewise deals with two cases of claimants in good faith: (1) persons claiming on their own account, (2) persons claiming on account of some person other than the judgment-debtor.

Now, I am certainly not satisfied that the respondent was acting at the instigation of the lessee defendant against whom the decree was passed. I cannot, therefore, act under rule 98.

As regards rule 99, if "claiming in good faith to be in possession" means "claiming in good faith to have a right to be in possession," I am not satisfied in the least of the respondent's good faith. In the absence of any affidavit by her, and knowing that she holds under the lessee, I think the suggestion that the suit was collusive points rather to bad faith than good. If, however, the words cited are satisfied by her being able to say truly that she is in possession as a matter of fact, I have no doubt of this nor is it contested; it is indeed admitted that she was in possession as an under-tenant in December 1919 at the time of the trial.

Now, in my opinion, rule 101, which deals with exactly the same class of person as rule 99, but deals with that class after and not before dispossession by the Sheriff, shows that the latter meaning of the words in rule 99 is the correct one. The Court has only to be satisfied that the respondent was in possession on her own account and it will restore her even after dispossession.

The only question which remains, so far as I can see, is whether this construction must be abandoned on the ground that it gives no meaning to the final words of the first clause of rule 35. In view of rule 102, and of the fact that persons taking an interest *pendente lite* are persons "bound by the decree", this objection falls to the ground. No doubt the draftsmanship of the Order is defective even as regards

them, for such persons are not necessarily within rule 98 since they not always act at the instigation of the "judgment-debtor". This trouble, however, does not arise at present.

The result is that, in my view, an action for possession based upon forfeiture of a term should, for practical reasons, be brought against all persons in possession [including constructive possession, which seems to be covered by rule 99, *Mancharam v. Fakirchand* (3)], at the date of the suit: not that the suit is necessarily defective otherwise, but because the decree will be difficult to enforce under the Court.

Unless, therefore, Mr. Avetoom desires to contend that the respondent's tenancy began after the suit was instituted, I must make an order under rule 99 dismissing the plaintiff's application, and must leave him to his remedy by a suit against the respondent. Mr. Avetoom disclaiming this desire, I make the order under rule 99 with costs.

*Application dismissed.*

(3) 25 B. 478; 8 Bom. L. R. 53.

# SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 8 OF 1917.

March 18, 1920.

*Present*:—Mr. Fawcett, J. C., and

Mr. Kennedy, A. J. C.

TULSIDAS DULOMAL—APPELLANT

*versus*

WADERO ALLAHBUX KHAN AND OTHERS

—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 61—Suit to recover defendant's share of money expended in clearing canal—Limitation applicable.*

A private arbitration award provided, among other things, for the clearance of a canal by P. who was to recover from D. a certain share of the cost at the time of beginning the work. P. cleared the canal and brought the present suit to recover from D. his share of the sums spent in such clearance in six years. The question was as to what period of limitation was applicable to the suit:

*Held*, that the period of limitation contained in Article 61, Schedule I to the Limitation Act applied



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to the suit, as the money that represented D's share of the clearance expenses was clearly money paid by P. for D. [p. 973, col. 2.]

Appeal from the decree of the Assistant Judge, Sukkur.

Mr. Tolasing Khushalsing, for the Appellant.

Mr. Hirjaram Mewaram, for Respondents Nos. 1 to 5.

#### JUDGMENT.

FAWCETT, J. C.—In this case a decree was passed on a private arbitration award, under which certain properties were divided between the parties, and it was provided, amongst other things, that the clearance of a canal, called Galwah, would be effected by the plaintiffs-respondents who would recover a 14-annas, 7-pies share of the cost out of a total of 16-annas from the defendants at the time of beginning the work. The plaintiffs alleged that they had effected the clearance in accordance with the provision of this decree from 1903 to 1913 and claimed Rs. 3,000 as representing the defendant's share of the cost less Rs. 30 credited to the defendants for a certain item due to them. The Trial Court awarded them Rs. 577-5-10 disallowing all items incurred before 29th May 1914, the date of joining the third plaintiff, as time-barred under Article 61 of the Limitation Act, and some of the later items as either not being sufficiently proved or not being properly debitable to the defendants. The Assistant Judge, Sukkur, on appeal from this decision, held that Article 61 of the Limitation Act did not apply to the case, and that there being no other specific Article applicable, the suit was governed by the six years' rule under Article 120. Accordingly, he allowed the plaintiffs proved items from 29th May 1908, but concurred with the lower Court in its disallowing certain items subsequent to the 29th May 1911.

Defendants appeal from this decision, on the ground that the lower Appellate Court erred in not holding that the items prior to 29th May 1911 are time-barred. Mr. Tolasing in support of the appeal has urged that Article 61 applies or in the alternative Article 113, 115 or 65 is applicable. As regards the latter contention, I agree with the view taken in *Somjimal v. Tulsonal* (1), that a suit for recovery of money due under an award is not a suit for specific performance

of a contract or for compensation for breach of contract, within the meaning of Articles 113, 115 and 116; and this conclusion also disposes of Article 65, which relates to a suit for compensation for breach of a certain promise.

The only question, therefore, is whether Article 61 applies in the present case. On this point it seems to me that the decision in *Sri Raman Lalji Maharaj v. Gopal Lalji Maharaj* (2) is one which strongly supports that contention. In that case the plaintiff and the defendants were liable in equal moieties for the expenses of a temple, and the plaintiff, alleging that he had paid more than his share of expenses, sued the other for the balance, in excess of the moiety for which he was liable. It was held that Article 61 applied. Another case that I think supports the contention is that of *Sukhamoni Chaudhuri v. Ishan Chunder Roy* (3). In that case plaintiff and defendant were co-owners of land subject to the payment of rent, and the owner of the rent obtained decrees for a large sum in arrears and the plaintiff, in order to save the estate from sale, paid off the claim of the decree-holder and then sued the defendant for contribution to the extent of defendants' share in the estate. The Indian Courts applied Article 61 and on appeal the Privy Council, without discussion, assumed that the Article applicable was 61. In the arguments the ruling in *Sri Raman Lalji Maharaj v. Gopal Lalji Maharaj* (2) was cited before their Lordships, and though they gave no definite decision on the point, yet the case does show, at any rate, that they saw no obvious reason for holding Article 61 to be inapplicable. There are also various other decisions of the High Courts, in which this Article has been held to be applicable to suits for contribution, and it may be noted that in this case we are not concerned with the question whether an involuntary payment comes under this Article, or whether it applies to a case where the amount is recovered by the sale of the plaintiff's property instead of being directly paid by the plaintiff. The words "for money payable to the plaintiff for money paid for the defendant" are very wide, and *prima facie* I can see no reason for holding that

(2) 13 A. 211; A. W. N. (1337) 43; 9 Ind. Dec. (N. S.) 160.

(3) 25 C. 641; 25 I. A. 95; 2 O. W. N. 402; 7 Sar. P. C. J. 294; 13 Ind. Dec. (N. S.) 550.

(1) 19 Ind. Cas. 376; 6 S. L. R. 143.

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they do not cover a case like the present. Mr. Hirdaram for the respondents cited the case of *Viswanadha V. Kumara Banga* 100 v. B. G. Orr (4), as being against the appellant's contention. That was a case where the plaintiffs had executed certain necessary repairs to a tank which irrigated their lands and the defendants' lands and also the lands of other persons. After completing the repairs they filed a suit for contribution against the defendants, relying on section 70 of the Contract Act. It was held there that Article 120 and not Article 61 of the Limitation Act was applicable to the case. But it would seem from the judgment that that view was mainly based on the fact that it is an essential part of the cause of action under section 70 of the Contract Act that the defendants shall have received a benefit from what the plaintiffs have done. Mr. Justice Oldfield in his judgment points out that in certain cases where the benefit is immediate, the case can fall under Article 61, but distinguishes the case where the benefit will only arise at a subsequent stage, and the plaintiffs' cause of action will not be complete until the subsequent stage is reached. In the present case the award vests a right of recovery in the plaintiffs at the time of the beginning of the work, and, therefore, any payment made by them after the beginning of the work can clearly be held to be a payment made so far the defendants' share is concerned for the defendants; and the claim is based on the defendants' liability under the award decree and not on the application of the provisions of section 70 of the Contract Act. Therefore, I do not think that the ruling I have just mentioned is good authority for holding that Article 61 does not apply. The Assistant Judge in his judgment gives two reasons for saying Article 61 cannot apply. He says "firstly, the cause of action is not merely that the plaintiffs have paid this money for the defendants under circumstances from which the liability to re-pay arises without regard to any prior agreement, but that both the right to incur the expenses and the right to recover a certain share of them arose under a decree. I cannot myself understand why the fact that the liability of the defendants arises under a decree should prevent the application of Article 61 except, of course, so far the

case might, therefore, fall under Article 99. But in cases where Article 99 does not apply, then I can see no sufficient reason for not applying the general Article 61. Nor is there anything in this Article which says that the liability to re-pay should arise without regard to any prior agreement. It seems to me that the ordinary case under Article 61 would be the result of some prior agreement. No authority in support of this view was brought to our notice in the arguments.

The second reason that he gives is that, "if Article 61 were applicable the limitation period would begin to run from the date of payment whereas in the present case the time for recovering the money has been fixed by the decree to be that when the clearance work is begun." This was supported by Mr. Hirdaram, but I agree with Mr. Tolasing that the fact that a different time is fixed in the award for the liability commencing to the time fixed in Article 61 for the period of limitation beginning to run is quite immaterial. The main factor of importance in deciding whether a particular suit falls under a particular Article of the Limitation Act is, the description of the suit in the first column of the First Schedule, and the description of the time from which the period begins to run in the third column could at most be an ancillary aid to the construction of the first column. Here the third column adds nothing to the description in the first column that affects its construction. In the circumstances of the present case, I think that the money that represented the defendants share of the clearance expenses was clearly money paid by the plaintiffs for the defendants, and I think the Trial Court was right in applying Article 61.

I would, therefore, reverse the lower Appellate Court's decree and restore that of the Subordinate Judge of Shikarpur with costs throughout.

KENNEDY, A. J. C.—I agree.

*Decree reversed.*

SAROJINI DASÍ V. RAJLAKSHMI DASÍ.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 275  
OF 1918.

March 15, 1920.

Present:—Justice Sir Ernest Fletcher, Kt.,  
and Mr. Justice Ghose.

SAROJINI DASÍ—APPELLANT

versus

RAJLAKSHMI DASÍ—RESPONDENT.

*Probate and Administration Act (V of 1891), s. 16*  
—Will, proceedings to establish, validity of—Executor,  
general citation to—Non-appearance of executor—  
Special citation—Letters of Administration—Procedure  
—Executor, when can renounce executorship.

Where in proceedings to establish a Will, a general citation is issued to the executor named in the Will to attend and watch the proceedings, and he fails so to attend, and the validity of the Will is established, the Court ought to issue a special citation under section 16 of the Probate and Administration Act to the executor, and, in the event of his renouncing or failing to accept the executorship within the time limited for the acceptance or refusal thereof, to issue Letters of Administration with a copy of the Will annexed. [p. 974, col. 2; p. 975, col. 1.]

An executor is not bound to renounce his executorship until the validity of the Will is established. [p. 975, col. 1.]

Appeal against the decree of the Additional District Judge, Dacca, dated July 29th, 1918.

Dr. Sarat Chandra Basak and Babu Nabadwip Chandra Saha, for the Appellants.

Babus Upendra Lal Roy and Jitendra Coomar Sen Gupta, for the Respondent.

#### JUDGMENT.

FLETCHER, J.—This is an appeal preferred by the objectors against the judgment of the learned Additional District Judge of Dacca, dated the 19th July 1918, directing Letters of Administration with a copy of the Will annexed of one Rebati Mohan Saha Biswas to issue to the petitioner. Dr. Basak, who appears for the appellants, with his customary fairness admits that, having regard to the opinion of the learned Judge expressed in his judgment with reference to the oral evidence, it would not be possible for him to challenge the findings arrived at by the Court below. That is obviously so. The Judge had the opportunity of seeing the witnesses and examining their demeanour and, on a consideration of the facts, he arrived at a definite conclusion as to the credibility of the witnesses. That finding cannot be displaced. But the point that has been raised in support of the appeal is this: there was

an executor named in the Will. The general citation went to the executor to be made a party to the proceedings. He did not appear. But still he was a party to the proceedings and the Will has been established. Now, the executor would strictly, in the first place, be the person to obtain Probate of the Will under the law. In this case, Letters of Administration with a copy of the Will annexed have been directed to issue to the respondent. The question that we have got to consider is—"Is the course adopted a right one?" Now, section 16 of the Probate and Administration Act provides that Letters of Administration in a case like this shall not be granted to any other person until a citation has been issued calling upon the executor to accept or renounce his executorship. Section 17 provides the manner in which the renunciation of the executorship is to be made. Section 18 provides that, if the executor renounce or fail to accept the executorship within the time limited for the acceptance or refusal thereof, the Will may be proved and Letters of Administration with a copy of the Will annexed may be granted to the person who would be entitled to administration in case of intestacy. It is not denied in this case that, up to the present, no special citation, such as is mentioned in section 16 of the Probate and Administration Act, has been issued. The citation issued on the executor was the ordinary citation to attend and watch the proceedings. The Will has been established in his presence, but the citation under section 16 has not issued. Now, what is to be done in a case like this? It is quite clear that the Judge was wrong in issuing Letters of Administration with a copy of the Will annexed, because he acted with clear disregard to the provisions of section 16 of the Probate and Administration Act. The point evidently was raised before the learned Judge, because it appears in his judgment and the remark that the learned Judge made thereon, was that he declined to consider the point in the case. We have to consider it and it seems to me that we ought to set aside the grant of Letters of Administration with the Will annexed. What ought now to be done is this: the executor was a party to the proceedings establishing the Will. The Will was clearly established in the presence of the parties, and, amongst



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others, the executor was served with a general citation to attend and watch the proceedings as a party to the suit, so the validity of the Will is established. It is quite clear that, unless and until the validity of the Will was established, the executor was not bound to accept or renounce his executorship. He could not be compelled to say whether he would accept or renounce the executorship until the Will was established. But once the Will was established, the executor is now bound to accept or renounce his executorship. The proper order would be to set aside so much of the order of the Court below as directs the issue of Letters of Administration in respect of the estate of the deceased with a copy of the Will annexed and in lieu thereof direct that Court to issue a special citation to the executor named in the Will as mentioned in section 16 of the Probate and Administration Act and, in the event of the executor renouncing or failing to accept the executorship within the time limited for the acceptance or refusal thereof, to issue Letters of Administration with a copy of the Will annexed to the present respondent, Rajlakshmi Dasi.

The only other question that we have got to deal with in this case is the question of costs. It is quite clear that the appellants were compelled to come here. They have got an interest in seeing that the executorship is entrusted to the person the testator selected. Moreover, the point raised in the appeal was raised before the learned Judge of the Court below and pressed on him; but the learned Judge said that he declined to consider it. Therefore, the appellants were compelled to prefer this appeal. In these circumstances, I am of opinion that both parties are entitled to recover their costs in this appeal out of the estate of the deceased. As regards the costs of the Court below, we see no reason to disturb the order made by the learned District Judge.

GHOSE, J.—I agree.

*Case remanded.*

ALLAHABAD HIGH COURT.  
FIRST APPEAL FROM ORDER No. 91  
OF 1920.

December 21, 1920.

*Present*:—Mr. Justice Piggott and  
Mr. Justice Walsh.

Musammât MASIHUNISSA AND OTHERS  
—DEFENDANTS—APPELLANTS

*versus*

Musammât KANIZ SUGHRA—  
PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 105 (2)  
O. XLI, rr. 23, 25, 26—Appeal, second—Remand by  
Single Judge under r. 23—Remand order, no appeal  
against—Order, correctness of, whether can be ques-  
tioned at later stage—Remand under r. 25—Appeal  
coming before different Judge or Bench—Order, whe-  
ther binding.*

Where in a second appeal a party submits to an order of remand made by a Single Judge of a High Court, under Order XLI, rule 23, Civil Procedure Code, from which an appeal lies he cannot dispute its correctness at a later stage of the appeal. [p. 976, col. 2.]

Where, however, a Judge of a High Court has remitted issues under Order XLI, rule 25, of the Civil Procedure Code, and the appeal subsequently comes up for disposal before another Judge, or Bench of the Court differently constituted, the Bench which is seized of the appeal, and on which the law casts the burden of finally disposing of the same is not bound by the order remitting the issues, and may consider whether the order was a proper one, and, if it comes to the conclusion that it is not, it can ignore the findings on the remanded issues and any evidence which may have been taken after the order remitting the said issues. [p. 976, cols. 1 & 2.]

First appeal from the order of the Subordinate Judge, Saharanpore, dated the 8th of March 1920.

Mr. Ibni-Ahmad, for the Appellants.

Mr. S. A. Haidar, for the Respondent.

JUDGMENT.—The plaintiff in this case sued for possession over a half share in a certain house. The defendants pleaded that, whether or not the plaintiff had a good title, neither she nor the transferors from whom she claimed had been in possession within 12 years of the institution of the suit. They further pleaded that they themselves had been in adverse possession for more than 12 years prior to the institution of the suit. The first Court dismissed the suit as barred by limitation, and that finding was upheld by the Court of first appeal. On second appeal a learned Judge of this Court held that the decision of the two Courts below had proceeded upon an erroneous view of the law. He treated the finding

MASIHUNNISSA v. KANIZ SUGHA.

of the lower Appellate Court as amounting to nothing more than a finding that the plaintiff and her transferors had not been in actual possession within 12 years of the institution of the suit. He held that it had not yet been determined whether the plaintiff's transferors had been ousted by the defendants so as to set limitation running in favour of the latter and against the plaintiff and her transferors. On this view he set aside the decision of the lower Appellate Court and remanded the case to that Court under Order XLI, rule 23, of the Code of Civil Procedure, for a decision on the merits. The lower Appellate Court has now recorded a finding that the defendants have failed to prove ouster, i.e., the defendants have not satisfied the lower Appellate Court that their possession had become adverse to that of the plaintiff's vendors more than 12 years prior to the institution of this suit. Upon this finding the lower Appellate Court has set aside the decree of the Trial Court and has once more passed an order of remand under Order XLI, rule 23, of the Civil Procedure Code, directing the Trial Court to dispose of the suit on the merits, the issue of limitation being finally determined in favour of the plaintiff. The appeal before us is against this order of remand. The first point taken is, that the Court of first instance had found that the defendants had been in adverse possession and that this finding had been upheld by the lower Appellate Court before the second appeal to this Court was filed. In effect, we are asked to reconsider the correctness of the order of remand passed by the Single Judge of this Court when disposing of the second appeal. There is authority for the proposition that, where a Judge of this Court has remitted issues under Order XLI, rule 25 of the Code of Civil Procedure, and the appeal subsequently comes up for disposal before another Judge, or a Bench of this Court differently constituted, the Bench which is seized of the appeal and on which the law casts the burden of finally disposing of the same is not bound by the order remitting the issues. It can consider the question whether that order was a proper one and, if it comes to the conclusion that that order should never have been passed, it can ignore the findings on the remanded issues and any evidence which may have

been taken after the order remitting the said issues. The reason for this is obvious. No appeal lies against the order remitting issues, nor does that order dispose of the pending appeal. Consequently, the Tribunal which undertakes the responsibility of finally disposing of the appeal is seized of the entire case and has jurisdiction to reconsider the propriety of an *interim* order, such as that remitting issues, passed by another Judge, or by a Bench differently constituted. In the present case the Single Judge of this Court disposed of the appeal then pending before him finally by means of his order of remand, which was not under Order XLI, rule 25, but under Order XLI, rule 23, of the Civil Procedure Code. We have no responsibility for the result of that appeal. The decision of the Single Judge of this Court could have been challenged by appeal under the Letters Patent and was not so challenged. The principle laid down in section 105, clause (2), of the Civil Procedure Code, which prohibits a party, after submitting to an order of remand from which an appeal lay, from disputing its correctness at a later stage applies also to the case now before us. We are satisfied that the appellant is not entitled to challenge the correctness of the order of remand passed by this Court on the second appeal. As the case stands, this finding disposes of the appeal before us. Whatever may have happened previously the lower Appellate Court has now recorded a finding that adverse possession for 12 years prior to the institution of the suit is not proved on behalf of the defendants. That is a finding of fact which cannot be successfully impugned on any of the grounds taken in the memorandum of appeal before us. This appeal, therefore fails and we dismiss it accordingly with costs.

*Appeal dismissed.*

DASARATHY SINHA v. MAHAMULYA ASH.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 227 OF 1917.

March 17, 1920.

*Present*:—Mr. Justice Rankin.

DASARATHY SINHA—PLAINTIFF

*versus*

MAHAMULYA ASH—DEFENDANT.

*Insolvency—Bankrupt, undischarged, after-acquired property of, title to—Stranger, right of, to dispute.*

It is not open to a stranger to dispute, as against an undischarged bankrupt, his title to after-acquired property, without alleging and proving that the Official Assignee has intervened. [p. 979, col. 1.]

Mr. H. D. Bose, for the Plaintiff.

Mr. Avetoom, for the Defendant.

**JUDGMENT.**—This is a suit brought in February 1917 by Dasarathy Sinha, who claims to be entitled to an undivided eight-annas interest in certain premises in Calcutta, known as No. 21, Harodhone Lane. The plaintiff's claim is made on these lines. He says that these premises belonged at one time to a joint Hindu family of which Jitram Rakhit and Ramsabek Rakhit were the members. The plaintiff has set out the various steps in his title, but these do not concern the present question until we come down to a conveyance, dated the 1st December 1911, from one Srimanto Kumar Datt to one Joygopal Pal. It appears that Joygopal had a vesting order made against him on two occasions under the Indian Insolvency Act, being the Imperial Statute 11 & 12 Victoria, Chapter 21 of 1848. According to the admissions made by the plaintiff's witnesses, and according to the original documents produced, these orders were made on the following dates, the first on the 2nd December 1899 and the second on the 4th May 1905. It appears that, in the case of neither insolvency, did Joygopal Pal get his final discharge, though in the first insolvency he got an order for his personal discharge on the 5th June 1900. After his death, namely, on the 25th August 1915, one Shabai Narain Pal took a conveyance of the premises in question from the administrator appointed by the Court to Joygopal Pal's estate. Shabai Narain Pal, according to the plaintiff's evidence, was a mere *benamidar* for himself, and it appears that on the 26th May 1916, he executed a deed of relinquishment to the plaintiff, thereby vesting in the plaintiff all the rights

that accrued to the purchaser under the transaction of 25th August 1915.

The defendant is sued as a person in possession of an interest in the premises in question, and, according to the plaintiff's case, the defendant is a purchaser of the interest that at one time belonged to one Ram Sabek Rakhit and afterwards to his adopted son, Rajessar Rakhit. The issues in the case are, broadly speaking, the question whether the plaintiff can prove his title, and the question whether the plaintiff has been out of possession or the defendant in adverse possession for 12 years before the date of the institution of the suit.

The defence, so far as the allegations in the plaint are concerned, does not admit the various steps in title which the plaintiff has pleaded and it also raises the question whether the transactions were fictitious, but it does not in any way expressly refer to the fact of either of the two insolvencies of Joygopal Pal. Those insolvencies have apparently been brought to the notice of the defendant's advisers at a late stage, if not actually during the conduct of the plaintiff's case. In this state of things, at the end of the plaintiff's evidence and after he has closed his case, Mr. Avetoom, for the defendant, takes the point that, in view of the fact of these insolvencies under the Act of 1848, it appears that Joygopal's administrator had no title whatsoever to convey; that the title vested in the Official Assignee, and that, therefore, the plaintiff's case should be dismissed without calling upon the defendant, the ground being that the title has been shown to be vested in some one else according to the plaintiff's evidence.

I am going to consider this matter from two points of view. I am going to consider first, whether I ought, at this stage, to stop the case and dismiss the plaintiff's suit. If the answer to that question is in the negative, I will then proceed to consider what amendments, if any, I ought to allow Mr. Avetoom's clients to introduce into their pleading.

Now, the section of the Act of 1848 upon which the first question turns is section 7, and that section is one which runs upon very well known lines, or, more correctly, upon lines which, almost a hundred years ago, were very well-known in the Courts. The wording of it is as follows:—



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"That upon filing of any such petition as is aforesaid, it shall be lawful for the said Court and the said Court is hereby authorised and required to order that all the real and personal estate and effects of such petitioner, whether within the territories within the limits of the Charter of the East India Company or without, except the wearing apparel . . . . and all debts due to him and all the future estate, right, title, interest and trust of the said petitioner in or to any real or personal estate or effects within or without the said territories which such petitioner may purchase, or which may revert, descend, be devised or bequeathed, or come to him, and all debts growing due to him before the Court shall have made its order in the nature of a certificate as hereinafter mentioned, do vest in the Official Assignee for the time being of the said Court, and that all books . . . . in any way relating to such petitioner's estate and effects in his possession or under his custody or control, shall be deposited with such Assignee, and such order shall be entered of record in the said Court and such . . . . and shall instantly and without any conveyance or assignment, vest all the real and personal estate, effects, and debts as aforesaid . . . . and shall hold and stand possessed of the same for the purposes and in manner herein-after mentioned."

It is quite true that, on the face of this section, what may be called "after-acquired property" is just as much, and apparently just as quickly, vested in the Official Assignee as is the property which belongs to an insolvent at the moment when the bankruptcy commences. The words "shall instantly and without any conveyance or assignment" are directed to show that the older form of practice by which the Commissioner in Insolvency executed a deed of assignment in favour of Assignees is no longer to obtain under this Act of 1848. There is no doubt, however, upon the authorities that, although on the face of this section, "after-acquired property" and property acquired previous to insolvency appear to be on the same footing, there is in fact a substantial difference between the vesting in one case and the vesting in the other. That matter is now amply covered by authority, it is concluded by the authority, first of all, of the Privy Council in the case of

*Moses Kerakoose v. Benjamin Brooks* (1) and by later authority in the case of *Kristocomul Mitter v. Suresh Ohunder Deb* (2), by the decision of *Fatimabibi v. Fatimabibi* (3) and the case of *Rowlandson v. Champion* (4). All these cases agree in this—that the reasoning laid down in England in the case of *Herbert v. Sayer* (5), is applicable to the Act which I have now to construe. That being so, the first point which Mr. Bose takes is that, although in a case as between the Official Assignee or his assigns and the insolvent or some one claiming under him, as having acquired a right in "after acquired property," there may be a question whether the full doctrine, afterwards more precisely formulated or developed in the case of *Cohen v. Mitchell* (6), applies or does not apply to these transactions in Calcutta land, this much at all events is certain and is unchallenged by any case, viz, that it is not a defence which a stranger can take as against an insolvent or some one claiming under him, to say that the right in question was the "after acquired property" of an insolvent and is vested in the Official Assignee unless he also can plead and prove that the Official Assignee has intervened. The case of *Herbert v. Sayer* (5), which I have referred to, has apparently been some times thought to go the whole length afterwards covered by the decision of *Cohen v. Mitchell* (6). With that view I am not prepared to agree, but the exact point decided in *Herbert v. Sayer* (5), is the point which Mr. Bose takes. *Herbert v. Sayer* (5) was a decision as to the validity of a demurrer. The defendant in that case had taken a plea, viz, Plea No. 7, alleging the proceedings in bankruptcy, the appointment of the Official Assignee, the fact that the estate did not produce nor has as yet produced sufficient to pay off the creditors; that the bill of exchange sued upon was endorsed to the plaintiff and the cause or causes of action thereon accrued to him

(1) 8 M. I. A. 339; 4 W. R. 61 (P. C.); 1 Sath. P. C. J. 426; 1 Sar. P. C. J. 778; 19 E. R. 559.

(2) 8 C. 556; 12 C. L. R. 253; 4 Ind. Dec. (N. S.) 358.

(3) 16 B. 452; 8 Ind. Dec. (N. S.) 780.

(4) 17 M. 21; 6 Ind. Dec. (N. S.) 14.

(5) (1844) 5 Q. B. 965; 2 D. & L. 49; 18 L. J. Q. B. 209; 8 Jur. 812; D. & Mer. 723; 114 E. R. 1512.

(6) (1890) 25 Q. B. D. 262 at p. 266; 59 L. J. Q. B. 409; 68 L. T. 206; 88 W. R. 551; 7 Morrell 207.

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after the said signing and writing of the last certificate. In other words, what was pleaded is, that the plaintiff was suing upon the after-acquired right of an insolvent, and that the insolvent, having no rights of his own, could not maintain the action. Now, the exact decision of the Court upon that matter was that the insolvent had a good right except against the Assignees and that, as the plea did not state that they had interfered, it did not contain a complete defence. In other words, the Official Assignee himself and, of course, an assign from him may dispute the title which an insolvent has, or has purported to give, to his after-acquired property; no stranger may dispute that title except upon condition that he allege and prove that the Official Assignee has intervened.

Now, that question is an entirely different question to the one which arises in connection with the doctrine of *Cohen v. Mitchell* (6). In connection with that doctrine the questions that arise are, whether, at the time when the insolvent purported to give the right, the Official Assignee had intervened or not, and whether the purchaser from the insolvent took for value and in good faith. It may or may not be, either in England or in India, that certain interests in land are not within the scope of the doctrine of *Cohen v. Mitchell* (6). To my mind, it is another proposition and one unsupported, so far as I know, by any authority, to say that the narrower rule in *Herbert v. Sayer* (5) is subject to any exception in the case of land. In order that the rights given by the Statute in after-acquired property shall enure to creditors only and shall not be used by strangers to enlarge their own rights, any mere third person desiring to plead the bankruptcy as a defect in the title which an insolvent has purported to give to some one else in his after-acquired property, must show that the Official Assignee has intervened. There may be—I think there are—other reasons for preventing this very special kind of *just tertii* from being made to serve the ends of a stranger even in actions to which *just tertii* is in general a defence. But the reason stated applies to interest in land as fully as to any other interests;

though it may well be that the reasons given in *New Land Development Association and Gray, In re* (7) for exempting certain interests in realty from the wider doctrine of *Cohen v. Mitchell* (6) were well-founded. The scope of that exemption has since been narrowed: *Clayton and Barclay's Contract, In re* (8), *Kent County Gas Light and Coke Co. Ltd., In re* (9) and its principle doubted (*Official Receiver v. Cooke* (10)); the exemption has finally been abolished by Statute so far as England is concerned. But, for my purpose, and with reference to the authorities binding upon me, the important thing to notice is that in no one of the cases has the rule in *Herbert v. Sayer* (5) been relaxed. *Rawlandton v. Champion* (4), *Bird v. Philpott* (11), *Official Receiver v. Cooke* (10) and *London and County Contracts Ltd. v. Tallack* (12) are cases where the Official Assignee or a purchaser from him was one of the parties.

On the first point, and for these reasons, it seems to me that it would be wrong of me to dismiss the plaintiff's action at the end of his evidence. I treat this for the moment not as a matter of pleading but as a matter of proof. There is not only no pleading before me, but there is no proof before me, that, at the date when this action was brought or indeed at any other date, the Official Assignee, in respect of this property, No. 21, Harodhone Lane, had ever intervened at all. That being so, I cannot stop the case at the end of the plaintiff's evidence, and I cannot now dismiss the action.

The action, therefore, must go on, and I have to consider Mr. Avetoom's application for leave to amend, and it is necessary for me to make up my mind as to what leave I propose to give. What I propose to do in that matter is this: I shall allow Mr. Avetoom by an amendment to raise the fact of each of those two insolvencies. I shall allow him also to aver and give him

(7) (1892) 2 Ch. 138; 61 L. J. Ch. 323; 66 L. T. 401; 40 W. R. 235.

(8) (1895) 2 Ch. 212; 64 L. J. Ch. 615; 13 R. 556; 72 L. T. 764; 43 W. R. 549; 2 Manson 345; 59 J. P. 489.

(9) (1903) 2 Ch. 195 p 201; 78 L. J. Ch. 625; 100 L. T. 983; 16 Manson 185.

(10) (1906) 2 Ch. 661; 75 L. J. Ch. 757; 13 Manson 337.

(11) (1900) 1 Ch. 822; 69 L. J. Ch. 487; 82 L. T. 110; 7 Manson 251.

(12) (1803) 51 W. R. 408; 19 T. L. R. 156.

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an opportunity of proving, if he can, that at any date down to the date of the bringing of this action, the Official Assignee had intervened, but I will not allow any amendment which alleges an intervention by the Official Assignee after the date on which this plaint was filed. My reason for that is, that if it is open still to the Official Assignee to claim the benefit of any judgment which the plaintiff may recover in this action, it is much better that that should be done in separate proceedings, and it may or may not be done in the Insolvency Court, but any such claim as that I am going to keep out of this action. It may well be that as between the plaintiff and the Official Assignee there are by this time many complicated questions. While I shall allow these defendants to allege specifically and found upon any intervention by the Official Assignee, before action brought, I am not going to allow this suit to be defeated by anything that the Official Assignee might do for the first time now. On those terms, if Mr. Aveloom's client produces in writing the amendment to the written statement which he proposes to make, I shall allow it. So far as the plaintiff is concerned, if there are any matters which require specific pleading after that, I shall be able to deal with that question later.

### PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 173  
OF 1918.

March 1, 1921.

*Present*:—Mr. Justice Das and  
Mr. Justice Ross.

RAMGULAM SAHU AND OTHERS—  
APPELLANTS

versus

DURGA PERSHAD—PLAINTIFF  
AND GAYA PERSHAD AND OTHERS—  
DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1903), O XXXII,  
s. 7—Compromise—Minor—Express approval of Court,  
whether necessary.*

The sanction of the Court to a compromise on  
behalf of minor cannot be inferred merely from

the facts that the petition of compromise gave  
notice to the Court that the interests of the minors  
were intended to be affected by the compromise,  
and that the Court passed a decree in accordance  
with the compromise. [p. 933, col. 2.]

The attention of the Court must expressly be  
drawn to the fact that the minors' interests are  
affected by the compromise and the approval of the  
Court must be obtained. [p. 934, cols 1 & 2]

It is only when leave is asked to settle the case  
on behalf of the minors that the vigilance of the  
Court is attracted and the Court is called upon to  
examine the terms of the settlement for the purpose  
of protecting the interests of the minors. [p. 932,  
cols. 1 & 2.]

Appeal from a decision of the Additional  
Subordinate Judge, Chapra, dated the 1<sup>st</sup> August 1918.

Mr. Kulwant Sahai for Mr. Rajendra  
Prasad and Mr. Sambhu Saran, for the Appel-  
lants.

Messrs. Sivanandan Ray and Ram Prasad,  
for the Respondents.

### JUDGMENT.

DAS, J.—This was a suit for partition. The material defence was that there was a previous suit for partition by Gaya Pershad, the father of the plaintiffs, on his own behalf and on behalf of the plaintiffs which was compromised on certain terms which are binding on the plaintiffs. To this the plaintiffs replied that they were not parties to the compromise decree at all and that, in fact, the previous suit was compromised in contravention of the express provision of Order XXII, rule 7, of the Code, that is to say, it was compromised without the leave of the Court having been obtained and that, accordingly, they are entitled to ignore the consent-decree and to ask to be placed in the same position which they occupied before that decree was passed.

In order to determine the point which has been argued before us at great length, it is necessary to deal with the antecedent events and to see how those events affect the plaintiffs.

In 1902 there was a suit by Gaya Pershad against Ramgulam Sahu and others for partition of joint family properties. That suit was compromised and a decree was passed in accordance with the petition of compromise. The petition of compromise ran as follows:—

"In the above suit a compromise has been made between the plaintiff and the defendants. Whatever property has been mentioned in the plaint is correct. The



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plaintiff has one-ninth share therein and he is in possession of his one ninth share jointly with the defendants. At present there is no necessity to have partition of his share under the amicable settlement arrived at, rather, possession will be held jointly. Hence your petitioners file this petition and pray that the plaintiff's possession over all the properties mentioned in the plaint to the extent of one ninth share may be declared. There is no necessity of partition. The plaintiff and the defendants will get the properties partitioned or will have partition made through the Court whenever they will like to do so afterwards. The parties will bear their own costs. Your petitioners pray that the suit may be decided in terms of this *sulehnama* and all the contents thereof may be entered in the decree. Be it known that this plaintiff shall have one-ninth of the ornaments, dues, cash money and *asmindari* that will be found under *bahi khata* at the time of partition and the defendants shall have no objection thereto."

This decree, it is conceded, did not effect a partition of the joint family properties; it determined the share of the plaintiffs and their father, Gaya Pershad, in the joint family properties, and its effect was to destroy the joint tenancy between the parties and to make them tenants in common. The plaintiffs and their father, Gaya Pershad, were entitled on the foot of this decree to institute a suit for partition and this suit they actually brought in 1905. At the time of this suit, the plaintiffs were minors and the suit was actually brought by Gaya Pershad on his behalf and on behalf of his minor sons, the plaintiffs in the present action. This suit again resulted in a consent-decree and we are in this appeal concerned with the validity of this consent decree so far as it affected the interests of the minors. The compromise petition was as follows:—

"Hail Oberisher of the Poor!

"In the above suit a compromise has been made between the plaintiffs and defendant No. 1. Details of the immoveable properties belonging to the plaintiff and the defendants and which are joint are given below. They are the joint properties of ... and are in possession of the plaintiffs and the

defendants. The plaintiff's share therein is one ninth, so long they will remain joint, the plaintiffs shall have possession over the same to the extent of one-ninth share. When there will be partition, the plaintiffs will get a share of one-ninth after partition. In the remaining moveable properties belonging to the plaintiffs and the defendants the plaintiff's share has been declared to be one-ninth, equivalent to Rs. 7,002 in cash, gold ornaments 41 rupees, 4 annas in weight, and silver and *rupa* (alloyed silver) 602 rupees in weight. Out of the same plaintiff No. 1 received Rs. 3,501 in cash, gold ornaments, weighing 20 rupees 10 annas, and silver and *rupa* ornaments weighing 301 rupees from the defendants. The remaining cash money Rs. 3,501, gold ornaments 20 rupees 10 annas in weight and silver and *rupa* 301 rupees in weight due to plaintiffs Nos. 2 and 3 are deposited with defendants Nos. 1 and 4, under a *sharkhati*, signed by defendant No. 4. Defendants Nos. 1 and 4 will support and look after plaintiffs Nos. 2 and 3 in lieu of the interest of the money deposited. When plaintiff No. 2 will attain majority defendants Nos. 1 and 4 will give Rs. 1,750 8 0 gold ornaments 10 rupees 5 annas in weight and silver and *rupa* ornaments 150 rupees 8 annas in weight to him and they will give to plaintiff No. 3 Rs. 1,750 8 0 gold ornaments 10 rupees 8 annas in weight, and silver and *rupa* ornament 150 rupees 8 annas in weight when he will attain his majority. In case plaintiffs Nos. 2 and 3 do not live, plaintiff No. 1 shall have right to receive the money, gold and silver ornaments mentioned in the said *sharkhat*. Now the plaintiffs have no right remaining in any portion of other moveable properties excepting with Rs. 3,501 gold ornaments 20 rupees 10 annas in weight and silver and *rupa* (alloyed silver) 301 rupees in weight, deposited with defendants Nos. 1 and 4 under the *sharkhat*. Now there is no contention of any sort between the plaintiffs and defendants Nos. 1 and 4. Hence your petitioners pray that a partition decree may be passed in terms of the *sulehnama* and the parties will bear their own costs."

It will be noticed that the effect of this consent-decree was to determine the actual value of the plaintiffs' share in

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the moveables; the immoveable properties were again left undivided. The Court passed a decree in accordance with the terms of settlement and it is now argued on behalf of the appellants that that decree must operate in bar of the plaintiffs' right to maintain the present action.

Order XXXII, rule 7, of the Code provides as follows:—

"No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor."

It is not pretended in this case that the leave of the Court was expressly recorded in these proceedings. But it is argued that we must assume that the Court did its duty and impliedly granted leave to the adult plaintiff, Gaya Pershad, to settle the case on behalf of the minor plaintiffs especially as the petition of compromise, on the face of it, dealt with the interests of the plaintiffs. Even if this argument is admissible in view of the express provision of the law in Order XXXII, rule 7, there is, in my opinion, evidence in the record suggesting an inference that the Court never intended to exercise its judgment on the question whether the settlement was for the benefit of the minors. There is nothing in the petition to suggest that the minors were parties to the compromise. No doubt, the compromise affected the interest of the minors in so far as it declared that the minor plaintiffs in that suit would get a certain proportion out of the share allotted to plaintiff No. 1. But if they were not parties to the compromise petition they would be wholly unaffected by the compromise and the Court would not be called upon to exercise its judgment on the question whether the compromise was for their benefit. There was no power in the Court to refuse to pass a decree in accordance with the settlement arrived at between Gaya Pershad and his father, Ramgulam Sahu; they were both *sui juris*, and it was competent to them to settle their disputes in any way they liked. It is only when leave is asked to settle the case

on behalf of the minors that the vigilance of the Court is attracted and the Court is called upon to examine the terms of the settlement for the purpose of protecting the interests of the minors.

Now, in this case the petition was signed by Gaya Pershad and not by him on his own behalf and on behalf of the minors; in other words, the petition was the petition of plaintiff No. 1 in that case and was not the petition of plaintiffs Nos. 2 and 3, who are the plaintiffs in the present case. The order-sheet of the learned Subordinate Judge suggests the inference that the compromise was between the plaintiff No. 1, Gaya Pershad, and defendant No. 1. On the 6th August 1906 the learned Subordinate Judge recorded the following order in the order-sheet: "Plaintiff and defendant No. 1 file compromise. Put up to-morrow for orders." The next day, that is to say, the 7th August the following order was recorded by the Subordinate Judge—"Petition of compromise filed yesterday by plaintiff No. 1 and defendant No. 1 taken up. Pleadings heard, the suit is decreed in terms of compromise (torn in original) defendant No. 1 only. The plaintiffs called upon to file non judicial stamp for drawing up decree within a week from this day, failing which the decree shall not be drawn up." It is unfortunate that the original document was torn at a very critical point but we are, of course, not entitled to draw any inference adverse to the appellant. But the order sheet both of the 6th August and 7th August 1906 certainly suggests the inference that the compromise was between the plaintiff No. 1 and defendant No. 1, and that the Court was dealing with the matter as a compromise between the plaintiff No. 1 and defendant No. 1. Mr. Kulwant Sahai relied on the fact that Pleadings were heard but in my view no argument can be built on so slender a foundation. Pleadings are heard whenever any compromise petition is filed, even though no minors are concerned in the compromise. In my view, it must follow, from a careful perusal of the petition of compromise and the order sheet in the case, that the Court did not think that it was called upon to exercise its judgment on the question whether the compromise was for the benefit of the minors. It must also be remembered

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that there was no petition by Gaya Pershad asking for the leave of the Court to compromise the case on behalf of the minors. In my view, it is impossible to hold, on these materials, that the learned Subordinate Judge was called upon or that he thought that he was called upon to protect the interests of the minors.

Order XXXII, rule 7, rests on the principle that a suit relating to the estate of an infant and for his benefit has the effect of making him a ward of Court and that no act can be done affecting the property of the minor unless under the express direction of the Court itself.

It was held by the Judicial Committee, so far back as 1871, that "where a compromise of a suit is made, it ought to be carried out by proper deeds and filed in Court, particularly where infants are concerned, so as to have the assent of the Court at the time instead of its being totally concealed from them;" see the case of *Moulvie Abdool Ali v. Mczuffer Hossein Ohowdhry* (1). It will be noticed that this decision was given before the Code of 1882 and it has been suggested that the Code of 1882 framed a section dealing with this point as a result of the decision of the Judicial Committee in the case cited.

In the case of *Sharat Chunder Ghose v. Kartik Chunder Mitter* (2), it was held by Mr. Justice Prinsep and Mr. Justice O'Kinealy, that, "where a compromise of a suit is entered into on behalf of an infant defendant, the approval of the Court to such compromise must be express, and will not be inferred from the subsequent passing of a decree in terms of such compromise. Without such approval, the compromise will not bind the infant, and will be set aside at his instance." In this case the Court recorded no finding that the compromise was prejudicial to the interests of the minor, but merely on the finding that there was no express approval of the Court, it came to the conclusion that the consent-decree was not binding upon the minor and that he was entitled to be restored to the position which he occupied previous to the consent-decree.

(1) 16 W. R. P. O. 22; 2 Suth. P. C. J. 482.

(2) 9 O. 810; 12 O. L. R. 453; 4 Ind. Dec. (N. S.) 1188.

In the case of *Manohar Lal v. Jadunath Singh* (3), the question was argued before the Judicial Committee; and it was contended that, as the compromise petition gave full notice to the Court that the interests of the minors were intended to be affected by the compromise, the compromise decree must be taken to have been made with the leave of the Court within the meaning of section 462, Civil Procedure Code. The Judicial Committee held that, "in order to show that the exigencies of the provisions of the section had been complied with there ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise; and it ought to be shown on petition, or in some way not open to doubt, that the leave of the Court was obtained. The mere facts that the minor was so described, and as appearing by a guardian, and that the compromise was before the Court were not sufficient." In my view these decisions establish the proposition that the sanction of the Court cannot be inferred merely from the facts that the petition of compromise gave notice to the Court that the interests of the minors were intended to be affected by the compromise and that the Court passed a decree in accordance with the compromise.

The last case of the Judicial Committee, the case of *Ganesha Row v. Tulja Ram Row* (4), supports this proposition. It must follow, therefore, that the plaintiffs are entitled to avoid a consent-decree.

Mr. Kulwant Sahai argues that this is not a suit to avoid the consent-decree but in my view the argument is unsubstantial. The plaintiffs state in the 7th paragraph of the plaint that no compromise was filed on behalf of the plaintiffs, and they submit that the decree is not binding on them. It is quite true that they have not asked for a relief that the consent-decree is not binding on them but in my view the question of relief is for the Court.

(3) 28 A. 585; 8 Bom. L. R. 489; 4 C. L. J. 8 (P. C.); 10 C. W. N. 898; 9 O. C. 219; 1 M. L. T. 210; 16 M. L. J. 291; 3 A. L. J. 710; 33 I. A. 128.

(4) 19 Ind. Cas. 515; 17 C. W. N. 765; 11 A. L. J. 559; 36 M. 295; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 40 I. A. 132 (P. C.).



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Provided the material allegations are there, it is for the Court, and the Court alone, to give the plaintiffs appropriate relief in the circumstances of the case. All the allegations are in the plaint entitling the Court to say that the decree is not binding upon the plaintiffs. I am of opinion that the plaintiffs have established their case that the consent decree, so far as it affected their interests, does not bind them and that they are entitled to a partition of the joint family properties both moveable and immovable as they existed on the date of the suit.

Now, I ought to mention that one of the plaintiffs, Kalika Prasad, has compromised his claim with the defendants. We are, therefore, only concerned with the plaintiff No. 2 whose share in the joint family properties is one-twenty-seventh both in the moveables and immovables.

The Court below has found, on what principle we do not know, that the share of plaintiff No. 2 in the moveables is one-ninth. The decree of 1902 undoubtedly effected a separation between the parties and expressly stated that the share of Gaya Pershad and his sons, both in the moveables and immovables, was one-ninth. That decree must stand, and is wholly unaffected by any change that may have taken place in the constitution of the family subsequent to the date of that decree. The plaintiff is undoubtedly entitled to a partition by metes and bounds, but he can only sue on the basis of that decree. In accordance with that decree he is only entitled to one-third of one-ninth, that is to say, to one-twenty-seventh, both in the moveables and in the immovables.

We vary the decree of the lower Court to this extent that we award him one twenty-seventh both in the moveables and in the immovables. Subject to this variation, we dismiss the appeal with costs.

Ross, J.—I agree.

*Appeal dismissed.*

CALCUTTA HIGH COURT.  
APPEAL FROM ORIGINAL DECREE No. 294  
OF 1918.

April 6, 1920.

Present:—Mr. Justice Richardson and  
Justice Sir Syed Shamsul Huda, Kt.  
JOGESH CHANDRA ROY—PLAINTIFF  
—APPELLANT

versus

MAKBUL ALI—RESPONDENT.

*Itmam, what it imports—Taluk, meaning of—Tenure, transferability of—Marfatdari receipts, whether proof of non-transferability—Grant of tenure for indefinite period, nature of.*

As applied to a tenure in the permanently settled parts of Chittagong, the word "itmam" primarily imports a permanent, heritable and transferable tenure. [p. 985, col. 2.]

A taluk is prima facie a permanent tenure and is transferable. [p. 985, col. 1.]

The fact that rent receipts are granted "marfatdari" in the name of an original grantee is not conclusive to show that the tenure is not transferable. [p. 985, col. 1.]

A grant made to a man for an indefinite period enures, generally speaking, for his lifetime, and passes no interest to his heirs, unless there are some words showing an intention to grant an hereditary interest. [p. 985, col. 2; p. 986, col. 1.]

Appeal against the decree of the Subordinate Judge, Chittagong, dated July 31st, 1918.

Sir Rosh Behary Ghose (with him Babus Dheerendralal Kaitgir and Saroenath Mukherji), for the Appellant.

Babu Bijitkari Ghose, Jr. (with him Babus Chandrasekhar Sen and Narendra Kumar Das), for the Respondents.

JUDGMENT.—An estate, now vested in the plaintiff, the appellant before us, was originally held in two undivided moieties. The owner of one moiety granted a tenure thereof in favour of two persons, Fateh Ali Miji and Asauddin Miji, evidenced by a *kabuliyat* which they executed, dated the 1st Chaitra, 1271 (1865). In this document the tenure is referred to as an *itmam*. The other moiety was also held by the same two persons as a tenure, described as a *taluk*. It may be conceded to the plaintiff, as his case is, that the *taluk* was created orally at the same time as the *itmam*, though there is really no evidence how the *taluk* came into existence.

In 1878, after the death of Fateh Ali and Asauddin, the widow and grandson of the former and the widow and daughter of the

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latter conveyed the two tenures to Haider Ali, the predecessor in interest of the defendants.

The suit was brought on the basis that the terms and conditions of the *itmam*, as they appear in the *kabuliyat* of 1865, are inconsistent with the permanent tenure which the defendants claim. As to the *taluk*, the plaintiff's theory, rather a weak one, is, that it must be presumed to have been granted on the same terms as the *itmam*. There is more force in the argument for the defendants that the *taluk* is, *prima facie*, a permanent tenure, and that if there is any doubt as to the permanency of the *itmam*, it must be resolved in their favour. The plaintiff, acting on his view of his rights, treated both tenures as tenancies from year to year and served notice to quit on the defendants. They refused to quit and the present suit was brought to eject them. The appeal is from the decree of the Subordinate Judge dismissing the suit.

We concur in the view taken by the learned Subordinate Judge.

As to the facts, we have already indicated that the tenures descended from Fateh Ali and Asauddin to their heirs. They passed by transfer from the latter to Haider Ali and have now devolved on Haider Ali's heirs and representatives. The rent has never been raised since 1865. The fact that rent receipts were granted "*marfatdari*" in the names of the original grantees is certainly not conclusive, in the present case, to show that the tenures were not transferable. A *taluk* is *prima facie* transferable and we shall hold on the construction of the *kabuliyat* of 1865 that the *itmam* is also of a transferable character.

There was some discussion whether the term "*itmam*," which is used in the heading of the *kabuliyat* and thrice in the body of the document, imports permanency. The term, it appears, may be applied to a *raiyyati* holding or to a tenure. In *Amber Ali and Fannane's Tenancy Act* (2nd Edition, page 807) it is stated that, in the permanently settled tracts of Chittagong, an "*itmam*" is transferable, heritable and held at a fixed rate of rent in perpetuity. In temporarily settled areas, the rent may be liable to enhancement, at any rate, when a fresh settlement is

made. *Jogesh Chandra Roy v. Makbul Ali* (1). Reference may also be made to Mr. Allen's *Settlement Report of 1888—898* for Chittagong (page 27), to his "*Note upon Itmamdars and Dar-itmamdars in Chittagong, to be found in Volume V of the Selections from the Records of the Board of Revenue, L. P.*" (page 200, esp. page 225) and to the *District Gazetteer of Chittagong* (page 149). It may be that such reports and books are not, strictly speaking, evidence, or that they do not come or do not at all come within the scope of section 35 of the Evidence Act, but we see no objection to their being read for what they may be worth. *Of Garuradhwa's Prasad v. Superundhwaja Prasad* (2)] and Sir Rash Behary did not insist on the objection, which he rather suggested than argued. Our conclusion is that, as applied to a tenure in the permanently-settled parts of Chittagong, the word "*itmam*" primarily imports a permanent, heritable and transferable tenure. It is well settled that the word *taluk* primarily imports permanency. *Sarada Kripalala v. Akhil Chandra Biswas* (3), *Upendralal Gupta v. Jogesh Chandra Roy* (4). No doubt, the terms of a written instrument may be inconsistent with the ordinary implication of either term. Either term may be loosely or mistakenly applied to a tenure which is not in fact permanent and which does not become permanent merely because it is called a *taluk* or an *itmam*.

We pass to the *kabuliyat*. It is described as a "*bandobasti kabuliyat*" or settlement *kabuliyat*. Nothing turns on that. The lease was for an indefinite period and there are no words of limitation or inheritance: "We shall," say the grantees, "pay into your *sarkar*, year after year, the aforesaid *jama* (or rent) in accordance with the *kists* (or instalments) mentioned above." A lease from year to year is really out of the question. That being so, the strict rule seems to be that "if a grant be made to a man for an indefinite period, it enures, generally speak-

(1) 54 Ind. Cas. 850; 23 C. W. N. 945; 30 C. L. J. 140.

(2) 23 A. 37; 27 I. A. 238 at p. 248; 10 M. L. J. 267 (P. C.); 5 C. W. N. 33; 2 Bom. L. R. 831; 7 Sar. P. C. J. 724.

(3) 41 Ind. Cas. 530; 21 C. W. N. 903; 28 C. L. J. 18.

(4) 18 Ind. Cas. 76; 22 C. W. N. 275.

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ing, for his lifetime and passes no interest to his heirs, unless there are some words showing an intention to grant an hereditary interest." But "that rule of construction does not apply if the term for which the grant is made is fixed or can be definitely ascertained :"  
*Lekhraj Roy v. Kunhya Singh* (5). The lease, therefore, endured at least for the lifetime of the grantees. Then there are words which go to indicate that a permanent lease was intended. The provisions of the Patni Regulation are expressly made applicable to the tenure and the tenure is described as an *itmam*. It was argued that, under section 8, the Regulation might be made applicable by agreement to a lease, for instance, for a long term of years. That may be so, but the preamble (section 1) shows that the Legislature were thinking of "leases at a rent fixed in perpetuity." Moreover, the lease in the present case is not a lease for a long term of years. It is absurd to suppose that the parties could ever have thought of applying the Regulation to a lease from year to year. As we have said, the plaintiff's suggestion of a lease from year to year cannot be entertained.

Much was made of the clause in which the grantees state that, without the grantor's permission, they will not be entitled to transfer the *itmam* to others. But there is no clause of re-entry. Such a condition against transfer is often inserted merely as a foundation for a claim to *nazar* (or premium) when a transfer is made, and if the condition is not, void or of no effect at all, it does not, in such a case as the present, render an assignment or transfer of the lease inoperative: *Nil Madhab Sikdar v. Narattim Sikdar* (6), *Basarat Ali Khan v. Manirulla* (7).

Regard being had to the terms of the *kabuliyat* of 1865 and to the history of the tenures, we are of opinion that they are permanent, heritable and transferable. The true title to the tenure is, therefore, in the defendants and no question of adverse possession arises.

The appeal fails and must be dismissed with costs.

*Appeal dismissed.*

(5) 3 C. 210; 4 L. A. 223 at p. 225; 3 Suth. P. C. J. 453; 3 Sar. P. C. J. 759; 1 Ind. Jur. 636; 1 Ind. Dec. (N. S.) 722.

(6) 17 C. 826; 8 Ind. Dec. (N. S.) 1095.

(7) 2 Ind. Cas. 416; 36 C. 745; 10 C. L. J. 49.

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 926 OF 1919.

September 30, 1920.

*Present:*—Sir Norman Macleod, Kt.,

Chief Justice, and Mr. Justice Fawcett.

FAKI IBRAHIM—PLAINTIFF—APPELLANT

*versus*

FAKI GULAM MOHIIDIN—DEFENDANT—

RESPONDENT.

*Specific Relief Act (I of 1877), s. 27, ill. 3 to clause (b)—Agreement to sell—Purchaser put in possession—Subsequent sale to third person—Prior purchaser, whether can enforce agreement against subsequent purchaser.*

Plaintiff was in possession of certain property as mortgagee. The mortgagor agreed to sell the property to the plaintiff, but he subsequently sold it to a third person who made no enquiry as to the plaintiff's interest in the property:

*Held*, that the plaintiff could enforce specific performance of the agreement to sell in his favour as against the subsequent purchaser of the property. [p 987, col. 2.]

Second appeal from the decision of the District Judge, Ratnagiri, in Appeal No. 52 of 1919, confirming the decree passed by the Second Class Subordinate Judge, at Dapoli, in Civil Suit No. 90 of 1918.

Mr. *Fais Tyobji* (with him Mr. D. S. *Warde*), for the Appellant.

Mr. K. H. *Zelkar*, for Respondent No. 2.

## JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to get a sale-deed of the plaint-property executed, alleging that the defendant No. 1 had agreed to pass a sale-deed in his name on the 4th March 1917, but afterwards refused to convey the plaint property to the plaintiff. The 2nd defendant relied upon a sale-deed executed by the 1st defendant in his favour on the 19th January 1918. It is admitted that the plaintiff was in possession, and that the 2nd defendant knew that the plaintiff was in possession, and made no inquiry as to the circumstances in which the plaintiff was in possession.

The Trial Judge dismissed the suit on the ground that the 2nd defendant had no notice, actual or constructive, of the contract between the 1st defendant and the plaintiff. The plaintiff had been in possession since 1914, and admittedly was a mortgagee. The learned Trial Judge seemed to think that, although defendant No. 2 might be fixed with notice of the plaintiff's possession as



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mortgagee, he could not be fixed with the notice of the agreement to sell. In appeal, this decision was confirmed. The same distinction was made by the learned Appellate Judge, namely, that the constructive notice would only be of the plaintiff's holding as mortgagee and not as a person having an agreement to sell from the 1st defendant.

Now in *Mancharji Sorabi Ohulla v. Kongscoo* (1) it was held by Chief Justice Cough that the English authorities on the question were applicable where a person bought an estate of which some one, not the vendor, had possession. The leading case cited was *Daniels v. Davison* (2), in which the Lord Chancellor held that—

"Where there was a tenant in possession under a lease, or an agreement, a person purchasing part of the estate, must be bound to inquire, on what terms that person was in possession...that this tenant being in possession under a lease, with an agreement in his pocket to become the purchaser, those circumstances altogether gave him an equity repelling the claim of a subsequent purchaser, who made no inquiry as to the nature of his possession."

That principle has been followed by a Bench of this Court in *Sharfudin v. Govind* (3). Mr. Justice Batty said at page 473:

"It appears to be the result of the Bombay decisions that no purchaser can protect himself merely by registering his document of title, against the title of a person in possession of the subject-matter, and if he ignores that possession and fails to make inquiry into its nature and origin, he will be affected by all the equities which the person in possession is proved to have. This being the case, I think that, when the plaintiff found that the property of which he bought the equity (of redemption) was in the possession of the defendants, it was for him to inquire into the nature of his vendor's title and the extent of the liabilities to which he was subject."

The result, therefore, must be that the 2nd defendant having knowledge of the plaintiff being in possession, and having made no inquiry why the plaintiff was in possession,

must be taken to have had constructive notice of all the equities in favour of the plaintiff. It would have been a different matter if he had made inquiries and had been told that the plaintiff was only in possession as mortgagee, but if he chooses to make no inquiries at all, then he is liable to all the risks that might result from the discovery that the person in possession was entitled to equities against the vendor. The result, therefore, must be that the appeal must be allowed. The plaintiff will be entitled to a conveyance of the suit property from the 2nd defendant who has a registered sale-deed from the 1st defendant. The plaintiff will be entitled to his costs throughout.

Fawcett, J.—I concur. I would also refer to the 3rd illustration to clause (b) of section 27 of the Specific Relief Act, which authoritatively declares the law in accordance with the case of *Daniels v. Davison* (2). "A contracts to sell land to B for Rs. 5,000. B takes possession of the land. Afterwards A sells it to C for Rs. 6,000. C makes no inquiry of B relating to his interest in the land. B's possession is sufficient to affect C with notice of his interest and, he may enforce specific performance of the contract against C." Therefore, the lower Courts were not justified in making the distinction upon which they dismissed the plaintiff's suit.

*Appeal allowed.*

# CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No. 85  
OF 1919.

February 16, 1920.

Present:—Justice Sir Asutosh Mookerjee, Kt.,  
and Justice Sir Ernest Fletcher, Kt.

UDAICHAND PANNA LALL—

APPELLANTS

versus

DEBIBUX JEWANRAM—

RESPONDENTS.

*Arbitration Act (IX of 1899), ss. 11 (2), 15 (1)—Award, filing of, by arbitrator. Notice of filing not given, effect of—Arbitrator proceeding ex parte—Notice, absence of—Award, validity of.*

(1) 6 B. H. C. R. (O. C. J.) 59.

(2) (1809-11) 18 Ves. (Jun.) 249; 33 E. R. 978; 17 Ves. (Jun.) 438; 10 R. R. 171.

(3) 27 B. 452; 5 Bom. L. R. 144.

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The moment an award is filed in Court by an arbitrator, it becomes enforceable as if it were a decree, and it is not necessary, before it is enforced, to show that notice of the fact of filing was given by the arbitrator to the parties concerned: the omission to give such notice would not destroy the operative character of the filed award. [p. 988, col. 2; p. 989, col. 1.]

Before an arbitrator proceeds *ex parte* he should give notice in writing to each of the parties, otherwise the award may be liable to be set aside. [p. 989, col. 1.]

Appeal from the judgment of Mr. Justice Greaves.

Mr. T. C. P. Gibbons, K. O. (Advocate General) (with him Mr. H. O. Majumdar), for the Appellants.

Sir B. O. Mitter, for the Respondents.

#### JUDGMENT.

MOOKERJEE, J.—This is an appeal from a judgment of Mr. Justice Greaves dismissing an application to set aside an award.

The contract between the parties provided for a reference to arbitration in the following terms: "Any dispute under the contract was to be finally settled by two European arbitrators appointed by buyers and sellers respectively or by an umpire in case of difference." The respondent appointed Mr. Appollonato as arbitrator and requested the appellant to nominate another arbitrator. The appellant did not respond, with the result that the arbitrator proceeded to deal with the matter in controversy. He gave notice that he would hold the arbitration on the 26th June 1919, and requested that any written statement intended to be sent should be sent before the date, and that the parties should be present on the appointed day with witnesses and documents. It was not till the day previous, that is, the 25th June 1919, that the appellant, through his Attorney, forwarded to the arbitrator his case; but on the date fixed there was no appearance on his behalf. The arbitrator, thereupon, made an *ex parte* award in favour of the respondent, which is now impeached on two grounds: *first*, that no notice that the award had been filed was given under subsection (2) of section 11 of the Indian Arbitration Act, 1899, and that till such notice had been given, the award could not be enforced as a decree of Court; and, *secondly*, that the arbitrator could not have proceeded *ex parte* without express notice given of his intention to do so. Mr. Justice

Greaves has overruled these contentions; in our opinion, there is no substance in either of them.

As regards the first point, sub section (2) of section 11 provides that the arbitrator shall cause the award to be filed in the Court and the notice of the filing shall be given to the parties by the arbitrator. This provision imposes a duty on the arbitrator, after the award has been filed, to give notice of the fact of filing to the parties: *Bajinath v. Ahmed Musaji Saleji* (1). Sub-section (1) of section 15 then provides that an award on a submission, on being filed in the Court in accordance with the foregoing provisions, shall (unless the Court remits it to the re-consideration of the arbitrators or umpire or sets it aside) be enforceable as if it were a decree of the Court. The appellant has argued that an award which has been filed in Court, but the filing of which has not been notified to the parties, is not enforceable as if it were a decree of the Court. We cannot accept this contention, because we are invited, in substance, to read into sub section (1) of section 15 the words "and its filing notified to the parties" after the words "filed in the Court." In our opinion, sub section (2) of section 11, read with sub section (1) of section 15, shows that the moment an award has been filed in the Court by the arbitrator, it becomes enforceable as if it were a decree of the Court, even before the arbitrator has notified to the parties the fact of its filing under section 11 (2). Consequently, it is not necessary, before the award is enforced, to show that notice of the fact of filing has been given by the arbitrator to the parties concerned. The provisions of the Indian Arbitration Act in this respect are substantially different from the provisions of the English Arbitration Act, 1889, and we see no reason why we should not give effect to the plain language of section 15. We may observe that section 11 contemplates notices by the arbitrator to the parties at two stages, namely, *first*, notice of making and signing the award, and *secondly*, notice of the filing of the award in Court. In the present case, we are concerned only with the effect of an alleged omission to give

(1) 18 Ind. Cas. 978; 40 C. 219; 17 C. W. N. 395.

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the second notice; such omission, as we have seen, does not destroy the operative character of the filed award. The first contention of the appellant accordingly fails.

As regards the second point, reliance has been placed by the appellant upon the decision in *Gladwin v. Ohlcote* (2). That case is an authority for the proposition that in general the arbitrator is not justified in proceeding *ex parte* without giving the party absenting himself due notice. It is advisable to give the notice in writing to each of the parties or their Solicitors, and the notice should express the arbitrator's intention clearly, otherwise the award may be set aside: *Waller v. King* (3), *Wood v. Leake* (4) and *Hall v. Anderson* (5). There is no statutory rule, however, that if an arbitrator proceeds *ex parte* without giving notice of his intention to proceed in that manner, the award made by him must be set aside. In the absence of such an inflexible statutory provision, the procedure recommended in *Gladwin v. Ohlcote* (2) and the other cases mentioned can be regarded only as a rule of prudence and convenience. As Lord Denman, C. J., put it in *Scott v. Van Sandau* (6), the law is that, if either party, after the arbitrator has given him sufficient notice and proper opportunities of attending, will not appear, the arbitrator may proceed in his absence. There is obvious good sense in the view that notice that the arbitrator will proceed with the reference on a certain day is notice that he will then proceed *ex parte* if one of the parties absents himself without sufficient reason. But, let us assume that when an award has been made *ex parte*, the absent party may *prima facie* be deemed to have been prejudicially affected thereby; surely, it is open to his adversary to rebut that presumption. If, for instance, it is made fairly clear that notwithstanding the service of notice upon him, that in his absence the arbitration would proceed *ex parte* he would not have entered appearance, it cannot reasonably be

urged that the omission to serve such notice has invalidated the award. The appellant has contended that it is not open to the Court to take into account the subsequent conduct of the appellant, to determine whether, at the time of the arbitration proceedings, he had or had not made up his mind not to join in them. His argument, in substance, is that this could not have affected the judgment of the arbitrator, that we must limit ourselves to the facts and circumstances known to the arbitrator when he proceeded *ex parte*, and hold that his omission to intimate to the absent party that the arbitration would proceed *ex parte* is by itself sufficient to invalidate the award. We are clearly of opinion that this is not the proper test to be applied to determine the validity of the award in a case of this description. The true test is, has the complainant, who takes exception to the validity of the award, been in fact prejudiced by the omission of the arbitrator to serve the special notice on him. If it is established that, notwithstanding such warning, he would not have appeared before the arbitrator, he has really no grievance and cannot invite the Court to set aside the award on account of the alleged defect in procedure.

In this case, the conduct of the appellant reasonably leads to the conclusion that he was determined not to join in the arbitration proceedings. We have the fact that, notwithstanding the invitation of the respondent, he refused to appoint an arbitrator. This could hardly be attributed to abundant confidence in the gentleman selected by his opponent. But his subsequent conduct unmistakeably shows his true attitude. He disputed the competence of the arbitrator to act in that capacity on the allegation that he was not a European but an Asiatic. He submitted his case to the arbitrator, only the day before that fixed for the hearing and took no further steps. Finally, he has taken no steps to contradict the allegation contained in an affidavit filed on behalf of his adversary, where it is asserted in the plainest possible terms that he never intended to join in the arbitration. In these circumstances, we must hold that he has not been prejudiced by the omission of the arbitrator to notify that the proceedings would be held *ex parte*, and, that

(2) (1841) 9 Dowl. P. C. 550; 5 Jur. 749; 61 R. R. 825.

(3) (1724) 9 Mod. 62; 88 E. R. 317.

(4) (1808) 12 Ves. (Jpn.) 412; 23 E. R. 156.

(5) (1840) 8 Dowl. P. C. 826.

(6) (1844) 6 Q. B. 237; 8 Jur. 1114; 115 E. R. 92.



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the award cannot be impeached on that ground.

The result is, that this appeal is dismissed with costs, and the stay order vacated.

FLETCHER, J.—I agree.

*Appeal dismissed.*

ALLAHABAD HIGH COURT.  
SECOND CIVIL APPEAL No. 389 of 1918.

December 18, 1920.

Present:—Mr. Justice Rafique and  
Mr. Justice Piggott.

LAL BAHADUR AND ANOTHER—  
DEFENDANTS—APPELLANTS

*versus*

RAMESHWAR DAYAL AND OTHERS—  
PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. I, r. 8—  
Suit by one inhabitant of village for declaration of  
right of way on behalf of himself and other inhabitants  
—Leave of Court not obtained, nor proclamation  
issued—Suit, whether maintainable—Easement—Right  
of driving cattle over another's land, whether can be  
acquired by prescription.*

Where a plaintiff sues for a declaration for himself and other inhabitants of a village of their right to take their cattle to a certain grazing ground through the jungle of another village, he is not entitled to the declaration, unless the leave of the Court has been obtained and a proclamation issued, as required by Order I, rule 8 of the Civil Procedure Code [p. 990, col. 2.]

A right to drive cattle promiscuously across the lands of another is not an easement capable of being acquired, no matter for what length of time the right may have been enjoyed. [p. 991, col. 1.]

Second appeal, from a decree of the District Judge of Cawnpore, dated the 12th February 1918.

The Hon'ble Dr. Tej Bahadur Sapru and Dr. K. N. Katju, for the Appellants.

Dr. S. N. Sen and Mr. P. D. Tandon, for the Respondents.

JUDGMENT:—This is a second appeal by the defendants in the suit which was dismissed by the learned Subordinate Judge of Cawnpore, but has been decreed by the District Judge on appeal. The plaintiffs claim a declaration that they, along with other

"inhabitants of village Keotra," have a right to take their cattle to a certain grazing ground through the "jungle of village Chapar Ghata." The defendants are the Zamindars of Chapar Ghata. The first Court, besides recording the evidence, appointed a Commissioner to examine the locality and relied upon the report of the said Commissioner, to the effect that he could find no defined track used by cattle across the defendants' jungle in the direction indicated by the plaintiffs. The lower Appellate Court, as we understand it, has found that the plaintiffs have acquired a right of easement to drive their cattle in any fashion they please, i.e., straggling generally across the waste lands, through the jungle of Chapar Ghata from south to north in order to reach their own grazing land on the other side of a certain stream. In second appeal two main points are taken, and both of them are, in our opinion, valid. It has been pointed out, in the first instance, that the plaintiffs have been given a declaration for the benefit of themselves and the other inhabitants of village Keotra, but that the leave of the Court had not been obtained and no proclamation had been issued as required by Order I, rule 8 of the Code of Civil Procedure. There is no valid answer to this objection, and the decree, as it stands, could in no case be maintained. The question has been argued before us whether a decree in favour of the individual plaintiffs should, nevertheless, be allowed to stand. The question is, whether the right which the learned District Judge has found to exist in favour of the plaintiffs is a right of easement, capable of being acquired, or whether the evidence on the record is evidence sufficient to establish the existence of a right of way in a form other than that in which it has been decreed by the lower Appellate Court. On the first point there seems no room for doubt. The learned District Judge himself felt that there was a difficulty about this aspect of the case. He concludes his judgment by saying that it is open to the defendants to prevent the plaintiffs' cattle from wandering wild in their jungle and grazing it, by making a definite route or cutting through the jungle for the plaintiffs' cattle. It seems to us extraordinary and altogether inadmissible to throw a burden of this sort upon the defendants, (the owners of the alleged servient heritage). Our attention has been drawn to an old case of the Calcutta

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High Court which seems exactly in point, the case of *Joy Deorga Doesia v. Juggernath Roy* (1). The learned Judges in that case had to consider almost precisely the same point which is now before us. In their judgment they say: "The Judge, however, says that the plaintiffs' cows have been for very many years driven by him over these lands and that this must be considered to have given him a right of way which cannot now be interfered with. If the having driven the cattle over the lands generally, that is to say, not by any particular path but straggling promiscuously over the lands, which is the right claimed by the plaintiff, be held to give the plaintiff a right in all time to come so to drive his cattle, it would be interfering with the lands to such an extent as to make it impossible that they should ever be used for any useful purpose. A right of way or other easement must not be so large as to extinguish or destroy all the ordinary uses of the servient property and, in our opinion, no length of time would have given the plaintiff such a right as he claims, namely, a straggling right to the promiscuous use of the whole property for the purpose of driving his cattle over it."

That is, in our opinion a correct statement of the law and we cannot improve upon the manner in which it has been there expressed. Yet this is obviously the right which the lower Appellate Court has found to exist in favour of the present plaintiffs. The learned District Judge says, in so many words, that it cannot be supposed that the cattle of the plaintiffs would travel by any circumscribed and definite route through the jungle. So far from rejecting the report of the Commissioner on the questions of fact observed by him, he seems to accept and endorse it. For this reason also, the decree as passed in favour of the plaintiffs cannot be maintained. What we have been asked to do on behalf of the plaintiffs has been to send down an issue as to whether or not, as a matter of fact, the plaintiffs had acquired by prescription a right of easement in the form of a right of way over a circumscribed and definite path through the defendants' jungle. We have considered this argument carefully, but in our opinion, no such assertion is specifically made in the plaint and the finding of the

lower Appellate Court is actually against it. We must, therefore, decline to accede to this request. The result is, that the appeal prevails. We set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs throughout, including in this Court fees on the higher scale.

*Appeal decreed.*

### ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 93 OF 1920  
December 21, 1920.

Present:—Mr. Justice Piggott and  
Mr. Justice Walsh.

JAI PRASAD MINOR THROUGH GANESH—  
DEFENDANT—APPELLANT

*versus*

DALSINGAR—PLAINTIFF—  
RESPONDENT

*Agra Tenancy Act (II of 1901), ss. 84, 177—Appeal to District Judge against decision of Assistant Collector—Remand by District Judge—Appeal to High Court, whether lies.*

There is no appeal to the High Court, from an order of remand passed by a District Judge in an appeal under the provisions of the Agra Tenancy Act from the Court of an Assistant Collector.

First appeal from an order of the District Judge, Allahabad, dated the 20th of March 1920.

Mr. M. L. Agarwala, for the Appellant.

Mr. Lakshmi Narain, for the Respondent.

JUDGMENT.—A preliminary objection is taken to the hearing of this appeal on the ground that no appeal lies. Ever since the case of *Vilayat Hussin v. Maharaja Mahendra Ohandra Nandy* (1) it has been regarded as settled law that no appeal is provided to this Court from an order of remand passed by a District Judge in an appeal preferred to his Court under the provisions of the Agra Tenancy Act (II of 1901) from the Court of an Assistant Collector. The learned Counsel for the appellant has endeavoured to distinguish

(1) 15 W. R. 295.

(1) 25 A. 86; A. W. N. (1905) 198.

TALIB HUSAIN KHAN v. DUKKHU KHAN.

this case on the ground that the suit for arrears of rent in the Assistant Collector's Court was brought in this instance by the plaintiff in virtue of the special provisions of section 34 of the said Act. We do not think that this makes any difference. We hold that no appeal lies and we dismiss this appeal accordingly with costs.

*Appeal dismissed.*

# ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 25 OF 1920.

December 13, 1920.

*Present:*—Mr. Justice Tudball and  
Mr. Justice Rafique.

TALIB HUSAIN KHAN AND OTHERS—  
DEFENDANTS—APPELLANTS  
*versus*

DUKKHU KHAN—PLAINTIFF, AND OTHERS—  
DEFENDANTS—RESPONDENTS.

*Custom—Pre-emption—Wajib-ul-arz, entry in, construction of—Karabatmand karibi, who is.*

Where a *wajib-ul-arz* gives the right of pre-emption to a *karabatmand karibi*, a person, who is eleven degrees removed from the vendor, cannot pre-empt, inasmuch as he does not fall within the category of *karabatmand karibi*.

First appeal from an order of the Subordinate Judge, Ghazipur, dated the 13th January 1920.

Dr. S. M. Sulaiman, for the Appellants.  
Mr. Iqbal Ahmat, for the Respondents.

**JUDGMENT.**—Appeals Nos 25 and 26 of 1920 arise out of two suits for pre-emption. The point in the two appeals for our decision is the same. The plaintiff claimed a right to pre-empt on the basis of a custom. The defendants-vendees pleaded *inter alia* that, assuming that there was a custom of pre-emption, the plaintiff had no preferential right over them to take the property. The Court of first instance held in favour of the defendants-vendees and dismissed the suit. The lower Appellate Court on the plaintiff's appeal reversed the finding of the first Court on this

one issue and remanded the case for decision on its merits. Hence the present appeal.

The *wajib-ul-arz* on which the plaintiff relies divides up the co-sharers of the village into three categories. The *first* is, near relations of the vendor in the same *patti*. *Secondly*, near relations of the vendor in another *patti*. *Thirdly*, co-sharers of the *mahal*. It is an admitted fact that the vendore, vendees and the pre-emptor are all co-sharers in the same *patti* and they are also all relations. Accepting the plaintiff's pedigree, the plaintiff is at least eleven degrees removed from the vendore. The vendees are slightly more distant. The custom as set out in the *wajib-ul-arz* does not give to one relation preferential right over another relation by reason of his being more closely related. The plaintiff must show that he falls within the words *karabatmand karibi* before he can pre-empt as against the defendants. It has more than once been held in this Court that the words *karabatmand karibi* do not include a relation who is so distant as the plaintiff, namely, eleven degrees removed. We can see no reason to go behind the decisions of this Court. We think the relationship between the plaintiff and the vendors is far too distant to enable the Court to hold that the plaintiff is a *karabatmand karibi*. The plaintiff, therefore, does not fall within the first two categories, he must of necessity fall within the third category *hissedar mahal*. The defendants-vendees fall in the same category. The custom does not give the plaintiff a preferential right because he is more closely related. The decision of the Court below is clearly wrong and the decision of the Court of first instance was clearly right. We allow the appeal, and set aside the order of the Court below. The plaintiff's suit will stand dismissed with costs in all Courts.

*Appeal allowed.*



EMPEROR V. UTTAMLAL NAROTTAMDAS.

BOMBAY HIGH COURT.

CRIMINAL APPEAL NO. 260 OF 1920.

November 17, 1920.

Present:—Sir Norman Macleod, Kt,  
Chief Justice, and Mr. Justice Shah.

EMPEROR—PROSECUTOR

versus

UTTAMLAL NAROTTAMDAS—ACCUSED

*Penal Code (Act XLV of 1830), s. 420—Cheating  
—Hundi negotiated with knowledge that it will be  
dishonoured—Offence.*

Accused negotiated a *hundi* payable at sight and drawn on a firm which he knew would not pay the *hundi*. The *hundi* when presented was dishonoured. The accused spent the money obtained by him on speculative transactions and took no step to have the *hundi* honoured or to re-pay the amount obtained by him;

*Held*, that the accused was guilty of cheating.  
[p. 996, col. 1.]

Criminal appeal from an order of acquittal passed by the Acting Sessions Judge, Surat, reversing the conviction and sentence passed by the First Class Magistrate, Surat.

Mr. S. S. Patkar, Government Pleader,  
for the Crown.

## JUDGMENT.

MACLEOD, C. J.—The accused was charged before the First Class Magistrate of Surat City with having cheated one Nagin Dalabham with Rs. 5,000, an offense punishable under section 420, Indian Penal Code. The Magistrate found the accused guilty and sentenced him to suffer rigorous imprisonment for two years and pay a fine of Rs. 1,000, or in default to suffer rigorous imprisonment for six months more. On appeal, that conviction was set aside by the Acting Sessions Judge. From that order of acquittal the Government of Bombay have appealed. There is no dispute about the facts of the case. The accused, a young man of twenty two years old, a resident of Gandevi in the Baroda Territory, came down to Surat and opened a business on the 1st of February 1919, in his own name in partnership with one Harkisondas Motiram. After the 1st of February the accused entered into certain transactions. He contracted to buy a certain quantity of sesamum from one Vijubhai Hargovan of the value of over Rs. 5,000. He entered into a contract with one Aslaji for the purchase of empty kerosine oil tins of the value of Rs. 1,100. He enter-

ed into a contract to purchase twenty-five shares of the Finlay Mills for which the broker wanted Rs. 1,500 as margin money. He also entered into a contract for some cotton business with one Govindji Girdharlal. It does not appear that the accused had any money whatever to finance these transactions. After the middle of February, it seems that he went to Bombay and had an interview with one Parbhudas, who carried on business as a commission agent, with a view to enter into business transactions with him. What the result of that interview was is not quite clear. But we have letters written by the accused to Parbhudas about business. The answers sent by Parbhudas before the 28th February have not been kept by the accused, and there are no press copies, but from the letters written by the accused it is impossible to suppose that any definite arrangements for entering into business were made. Then, on the 27th February 1919, the accused wrote to Parbhudas:

"Tomorrow we will draw from here on you a *hundi* up to rupees ten thousand. Please take note of the same. Likewise, we shall send under cover to you *avej* also to the extent of rupees five thousand. Please take note of the same. And in two or three days we shall send under cover the other *avej*. Please take note of the same. Therefore, when the *hundis* come to you, please make it convenient to accept and pay for them immediately. Further, you were requested to write quoting the rates of kerosine oil, empty tins, safety matches, wax and other articles but there is no reply from you. Please, therefore, write forthwith. As far as practicable we are going to come to you personally on Monday. So that should we not send under cover other *hundi* then we shall come with cash. Please take note of the same."

Therefore, in that letter the accused was asking Parbhudas to honour his *hundi* on the promise that he would be supplied with funds to meet the *hundis* when presented. There is no evidence, and I cannot say that there is the slightest reason to suppose, that on the 27th February Parbhudas had made any representations to the accused that he would honour the *hundis* drawn by the accused without first being placed in funds.

On the 28th February Parbhudas replied to that letter saying:

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"Your letter was received. Further you wrote (asking me) to write about the particulars as to the drawing of a *hundi*. The same was noted. We (or I) shall do the work of (accepting) *hundi* according to "*avej*" (the moneys deposited). Further you wrote about sending empty tins for being sold here. But we (or I) have got no such facilities. Therefore, if we (or I) got such facilities we (or I) shall write to you (accordingly)."

But before that letter was received by the accused he went to the complainant and asked him to negotiate a *hundi* for Rs. 5,000 drawn on Parbhudas. The complainant appears to have made certain enquiries which could not have been very minute. But evidently he was satisfied with the assurances of the accused, who went together with his Munim Gulabchand, that it was perfectly safe to negotiate the *hundi*. Accordingly, the accused was paid Rs. 5,000 by the complainant on a *hundi* drawn by the accused on Parbhudas. The *hundi* was sent the same day to Bombay but Parbhudas, having with him no funds belonging to the accused, was not prepared to give credit and honour this *hundi*. Parbhudas said:

"*Hundi* Exhibit No. M/2 was shown to me on Maha Vad 14th, Saturday (1st March 1919). It was not honoured and cashed by our firm because there was no balance available in our accounts on behalf of the drawer Uttamlal Narottamdas. I know him because he had once come to me about seven or ten days before Exhibit No. M/2 was presented and asked me if our firm would keep an account in his name and I replied that our firm would do business on his behalf so long as there was any balance available in his favour at our firm. Before the date of *hundi*, which is 28th February, the accused had no account with us."

What happened to the Rs. 5,000 which the accused obtained from the complainant appears from the evidence of Narottamdas, the father of the accused:

"I was at Gandevi when M/2 was written. The accused met me at Bilimora Station on the 28th February 1919 accidentally, as I had gone to ask the Station Master of Bilimora, if he can give trucks for despatching bricks to Bombay. The accused had travelled on

that date from Surat and got down at Bilimora. I asked him on the station what brought him to Bilimora. He said that he had drawn a *hundi* of Rs. 5,000 upon Parbhudas Vanarshi and gave it to the firm of Khushal Keshavji of Surat, in which the complainant is a Munim, and that Gulabchand Kastureband had got it cashed at Khushal's firm and that he got Rs. 5,000. He said that he paid out of Rs. 5,000, Rs. 1,500 to Harkishandas to be paid to the merchants of Surat from whom he had purchased cloth, empty tins, sesamum, etc., that he had got Rs. 3,500 with him. He also said that he had bought sesamum for a Braach man named Brijmohan Keshavlal Bhagat from Vijubhai Hargovandas but no money or *hundi* was received from him on account of the purchase. I advised him to sell off the sesamum, and the accused sold it to one Alibhai within two or three days. As the accused had Rs. 3,500 in cash, I advised the accused to send Rs. 3,000 out of it to Parbhudas Vanarshi as the accused had opened dealings with him for the first time. He gave me Rs. 3,000 for remitting the money by a *hundi*."

Therefore, it was the accused's father who, evidently seeing that his son was getting into difficulties, got Rs. 3,000 from him and sent it down to Parbhudas to provide some credit in an account between Parbhudas and the accused.

Then the accused went to Bombay, and, on the 3rd of March, he paid a visit to Parbhudas. Meanwhile, on the 1st of March, Parbhudas having received Rs. 3,000 from the father of the accused had opened a credit in the name of the accused in his books. On the 3rd of March the accused withdrew Rs. 2,000 out of that Rs. 3,000. Parbhudas said:

"At the time he withdrew Rs. 2,000 I told him that Exhibit No. M/2 was not cashed, and if he paid Rs. 2,000 more, it would be cashed. He replied that his man was to come to Bombay with Rs. 10,000 and that amount would be paid to me on the next day morning and that he should be paid Rs. 2,000 as he wanted the sum badly. On the 3rd day he came to me to withdraw Rs. 1,000 and said that he himself had paid the amount of Exhibit No. M/2 and that I should pay to him the balance of Rs. 1,000. He took Rs. 1,000 and I took his signature in the receipt book."

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That Rs. 3,000 was not returned to the complainant who remained out of pocket to the extent of Rs. 5,000. The complainant began to get anxious about his money. The *hundi* was returned protested on the 8th of March. On the 11th he made a complaint. A search was made for the accused at his firm in Surat. The accused had absconded and could not be found. He was arrested on the 1st of September in Bombay. The question is, whether the accused fraudulently or dishonestly induced the complainant by deceiving him to deliver to him Rs. 5,000. That question depends upon whether we could come to the conclusion that on the 28th February when he drew the *hundi* on Parbhudas he had a genuine expectation that the *hundi* would be honoured. We must rule out of consideration, I think, any suggestion that Parbhudas had said or written anything to the accused which could possibly have made him think that he, Parbhudas, would honour the *hundi* of the accused, if he had not been previously provided with money to pay the *hundi*; in other words, there is nothing to show that Parbhudas had ever consented to give credit to the accused, or ever said or written to him anything which might induce him to believe that he, Parbhudas, would give him credit. The result must be that the accused drew a *hundi* on a firm which he must have known perfectly well would not pay the *hundi*. The *hundi* was payable at sight, so that it was not a case of a *hundi* drawn on a firm in which the drawer had no funds at the time, but made payable after some days so that the drawer might urge that he had a legitimate expectation of putting the drawee in funds before the due date. The accused was speculating in various ways. He had contracted to purchase sesamum which he had no means to pay for. He had bought shares which he had no money to pay for. He bought kerosine oil tins when he had no means to pay for them, and likewise he entered into cotton transactions without any money. If he had been able to obtain credit, then he might have been put in funds to take up those contracts, and if they had resulted in profits he might have been able to re-pay what he had borrowed. But this is not a case of an accused person getting credit from the

drawee. He got credit from the complainant on the representation that the *hundi* would be honoured.

It has been pressed upon us very urgently that the accused was merely speculating on the chances of the market; that he had a reasonable expectation that the market would go in his favour, and that he would be able to re-pay what he had borrowed. In order to see whether the mental attitude of the accused was so innocent, as it was represented to us by his Counsel, we are entitled to look at the conduct of the accused after the *hundi* had been dishonoured. We may take it, first of all, that he knew perfectly well that, unless some miracle happened, Parbhudas would not honour that *hundi*. If he had been able to raise from some other persons Rs. 5,000 to put Parbhudas in funds for the *hundi* before it had been actually protested, no doubt, so far as the complainant was concerned, he would have been saved from a criminal charge. But he made no attempt to save the complainant from even part of the loss which he was incurring. I have no doubt that the father of the accused induced him to give him Rs. 3,000 to send to Bombay, as the father must have seen in what jeopardy the accused was placing himself; and if the Rs. 3,000 which he had sent to Parbhudas had been kept there, and restored to the complainant in part-payment of his loss, the aspect of the case would have been a different one. But as soon as the accused got away from the influence of his father, he goes to Bombay and takes away the Rs. 3,000 from Parbhudas where it might have remained at any rate as part-payment against the *hundi*, and dissipates it in the various speculations which he had at the time. Whether he made a contract for the purchase of Finlay Mills shares before or on the 3rd of March makes very little difference. If he had made a contract on the 3rd of March and took Rs. 2,000 away from Parbhudas in order to supply the margin, which the broker demanded, then, of course, that will in no way make his case better. If he had entered into a contract before the 3rd of March, and owing to the fall in the market the broker was demanding the margin in order that the contracts might be



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kept open, then the result would be the same. The accused declined to act in the way which might have shown that his conduct in drawing the *hundi* was not so dishonest as it was on the face of it, and he might have been able to partially retrieve the mistake which he had made in drawing the *hundi* on an account which did not exist. In my opinion, the evidence is convincingly clear to show that the accused committed the offence of cheating: and it seems to me that the learned Sessions Judge has erred in thinking that, because the accused had entered into contracts, for which money was required, he could have no guilty intention when he got Rs. 5,000 out of the complainant. There is no harm in getting credit from a person if all the necessary parts of the case are disclosed. If these are placed before the person who is asked to advance money, and he chooses, on a full disclosure of all the relevant facts, to give credit, then if he loses that is his own look-out. But the mere fact that the accused had entered into contracts before the 28th February without having any means to carry out those contracts, has no bearing whatever on the question. He had no real expectation that Parbhudas would honour this *hundi*. He found himself in difficulties. He wanted a considerable sum of money. He knew perfectly well that Parbhudas would not honour that *hundi* unless he was provided with funds to meet it, or unless he had distinctly stated that he would give credit to the accused; yet with that knowledge the accused obtains Rs. 5,000 from the complainant on the strength of that *hundi*, which he must have known was not worth the paper it was written on. Therefore, the order of acquittal by the Sessions Judge must be set aside and the accused must be convicted of the offence of cheating under section 420, Indian Penal Code. But considering the youth of the accused we sentence him to one year's rigorous imprisonment and a fine of Rs. 1,000 or in default to suffer rigorous imprisonment for six months more under section 420, Indian Penal Code. The fine, if not paid, shall be recovered under section 536, Criminal Procedure Code. The fine, if recovered, shall be paid to the complainant as compensation under section 545, Criminal Pro.

cedure Code. Any part of the one year's sentence which has been suffered by the accused from the 5th January 1920 will be taken into account.

SHAH, J.—I agree.

*Order accordingly.*

### ALLAHABAD HIGH COURT. FULL BENCH.

CRIMINAL REVISION No. 694 of 1920.  
December 2, 1920.

*Present:*—Sir Grimwood Mears, KT,  
Chief Justice, Mr. Justice Rafique and  
Mr. Justice Ryves.

SHEO SHANKAR—APPLICANT

*versus*

MOHAN SARUP—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1899), ss. 179, 181 (2):—Jurisdiction of Criminal Court—Misappropriation by servant—Money collected in one district—Shop in another district—Servant, duty of, to account at shop.*

M. owned a cloth shop at Mirzapur. S was employed as a servant of the shop and his duty was to collect money due to his master and deposit it in the shop at Mirzapur: he was sent to two villages in the Allahabad District to collect money, which he did collect, but misappropriated. M instituted criminal proceedings against S. at Mirzapur, and the question was whether the Courts at Mirzapur had jurisdiction to entertain the complaint:

*Held*, that as S. had to account to his master at Mirzapur, the Courts there had jurisdiction. [p. 997, col. 2.]

Criminal revision from an order of the Magistrate, First Class, Mirzapur, dated the 21st of September 1920.

Mr. A. P. Dube, for the Applicant.

Mr. B. K. Mukerji, for the Opposite Party.

**JUDGMENT.**—This is an application in revision at the instance of Sheo Shankar. His case is that he has been brought before the Magistrate of Mirzapur District, who has commenced to try a criminal charge against him, without having any jurisdiction so to do. Sheo Shankar says that the jurisdiction should be Allahabad and not Mirzapur.

Now, the question of jurisdiction must be decided at the outset by a perusal of the complaint. It is on the terms of the com.

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plaint that the Magistrate first has to inform himself as to the nature of the case, and see whether, from the allegations made in the complaint, it would appear that he had jurisdiction to entertain it. For sometime we have had our attention drawn to the authorities on one or the other side of the line and there is no doubt that, during part of the hearing, we were under the impression that this case raised in a convenient form all the facts necessary for a definite decision on section 179 of the Code of Criminal Procedure. Our inclination was expressed to be to uphold the decision in *George Langridge v. George Atkins* (1). But a translation of the complaint which was laid before us towards the close of the case has made it perfectly clear that this is a simple matter. The complainant alleges that Sheo Shankar was a servant of a cloth shop situated in Mirzapur, and as such servant it was his duty to realise the price of cloth from traders according to the directions given by the master of the shop and to deposit the money thus realised in the shop at Mirzapur. The complainant then goes on to allege that on the 27th of December 1919 the servant was sent in the course of his duties to two villages to collect money and that he did collect some Rs. 1,500; that those two villages were in the District of Allahabad, and that the collections were made on account of the money due to the petitioner's master. Then, paragraph 6 sets out that, instead of depositing the aforesaid sums at the shop of the petitioner's master the accused No. 1, at the instigation of, and in consultation with the accused No. 2, who is his brother-in-law, and in order to conceal his criminal breach of trust, the accused No. 1 made a report at the Police station at Manda, in the Allahabad District, that a dacoity had taken place. On the investigation made by Manda Police and the Police Inspector of the Allahabad District, the said report was found to be absolutely false and groundless and to have been made in collusion with the accused No. 2. Subsequently, the complaint asked that both the accused may be punished under sections 408, 114 of the Indian Penal Code. It should be stated that the

residence of accused No. 2 (the brother-in-law of the applicant here) is stated to be in the Mirzapur District. Therefore, when the Magistrate perused this document he was, we think, entitled to assume that the matter was within his jurisdiction. According to the complaint, the plan to misappropriate this money was conceived in Mirzapur and the subsequent journey to Manda was undertaken only to give colour to what was said to be a false story. Accused No. 1 was the servant of the complainant and had a duty to account to his master at the shop at Mirzapur. In the circumstances, the case does not present any feature of importance or make it necessary for us to consider which of the various decisions on section 179 of the Code of Criminal Procedure we prefer. But we do take the opportunity of saying that at one moment this case did appear to us to be indistinguishable from the case of *George Langridge v. George Atkins* (1). The application, therefore, must be rejected and the record will be returned for the trial of the case on the merits.

*Application rejected.*

#### UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 662 of 1920.

September 7, 1920.

*Present:*—Mr. Heald, A. J. C.

NGA SAN DUN—ACCUSED

*versus*

EMPEROR—OPPOSITE PARTY.

*Upper Burma Criminal Justice Regulation, Sch., sec. XV—District Magistrate, order of—Revision—Interference, when permissible.*

Under the provisions of section XV of the Schedule to the Upper Burma Criminal Justice Regulation, the Judicial Commissioner will not interfere with an order of a District Magistrate, even where the procedure is irregular, unless that procedure has occasioned a failure of justice. [p. 998, col. 1.]

JUDGMENT.—The Police reported petitioner to the Sub Divisional Magistrate, Amarapura, for action under section 107 of the Code of Criminal Procedure

(1) 17 Ind. Cas. 792; 15 A. 29; 10 A. L. J. 11; 13 Cr. L. J. 856.

TILAK RAI v. EMPEROR.

On that report the Magistrate decided to take action against petitioner under section 110 instead of section 107 of the Code, and after taking evidence directed petitioner to enter into a bond in Rs. 200 with two sureties to be of good behaviour for one year.

Petitioner appealed to the District Magistrate, who set aside the order for security for good behaviour, and directed the Magistrate to make further enquiry against petitioner under section 107 of the Code.

The Magistrate, instead of taking proceedings against petitioner under section 107, noted in the diary of the record of the proceedings under section 110 that he had been referred to a ruling which debarred the District Magistrate from ordering further enquiry in proceedings under section 110 of the Code, and gave petitioner time to apply to this Court for revision of the District Magistrate's order.

I have heard petitioner and referred to the case mentioned by the Magistrate, namely the case of *Dayanath Taluqdar v. Emperor* (1), and I find that what the learned Judges said in that case was: "It appears to us that the District Magistrate had no power under the law to order further enquiry in the terms in which he did." In that case an order for security for good behaviour had been made against the petitioner, and on appeal the District Magistrate set aside that order and directed that there should be a further enquiry, and, at the same time, required increased security from the petitioners.

It seems to me clear that in an appeal under section 406 the District Magistrate has power under section 423 (c) and (d) of the Code to alter or reverse the order under appeal and to make any consequential or incidental order that may be just and proper.

If the District Magistrate considered that the order for security for good behaviour was not warranted by the evidence or the circumstances of the case but was of opinion that the case was one in which an order for security to keep the peace might be justified, I see no reason to believe that he was not competent to set aside the order for security for good be-

haviour and at the same time to order proceedings to be taken under section 107. That procedure would be analogous to that prescribed in section 423 (b), which empowers an Appellate Court in an appeal from a conviction to reverse the finding and sentence and to order the accused to be re-tried, and would not, in my opinion, be open to any objection.

Further, apart from the provisions of section 423, the District Magistrate had power to initiate proceedings against petitioner under section 107 of the Code, and in view of the provisions of section XV of the Schedule to the Upper Burma Criminal Justice Regulations, which says that no order shall be reversed or altered on appeal or revision on account of any irregularity of procedure unless the irregularity has occasioned a failure of justice, I should not interfere, even if I thought that the District Magistrate's procedure was irregular, since I fail to see that that procedure has occasioned any failure of justice.

I, therefore, see no reason to interfere and I dismiss the application.

*Application dismissed.*

# ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 645 OF 1920.

December 17, 1920.

*Present:*—Justice Sir P. C. Bannerji, Kt.

TILAK RAI AND OTHERS—PETITIONERS  
versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 106 (3)—Appellate Court, power of, to make order for security, irrespective of powers of Trial Court.*

Under sub-section (3) of section 106 of the Criminal Procedure Code, an Appellate Court has power to make an order for security, even though the original Trial Court, from whose decision the appeal was heard, had no such power under sub-section (1) of that section.

Criminal revision from an order of the Magistrate, First Class, Ballia, dated the 9th September 1920.

Mr. J. M. Banerji, for the Applicants.

Mr. E. Malcomson (Assistant Government Advocate), for the Crown.



DARBARI CHOUDHURY v. EMPEROR.

**JUDGMENT.**—This is an application for revision of an order of an Appellate Court directing the applicants to furnish security to keep the peace under section 106 of the Code of Criminal Procedure. The applicants were convicted by a Magistrate of the Second Class of the offence punishable under section 352 of the Indian Penal Code and each of them was sentenced to a fine of Rs. 10. They appealed. The Appellate Court dismissed their appeals, but held that, as there was a long standing feud between the complainant and the accused, it was desirable to order the accused to furnish security under section 106 of the Code of Criminal Procedure. It is contended on behalf of the applicants that, as the Court of first instance which had the powers of a Second Class Magistrate only was not competent to order security to be furnished under section 106, the Appellate Court was also incompetent to make such an order and it is urged that the Appellate Court could only exercise such powers as the Court of first instance could have done and as in the present instance the Court of first instance could not have ordered security to be furnished under section 106 the Appellate Court could not have made an order under that section. It is further contended that the case was not one in which an order under section 106 ought to have been made. As regards the first point, the matter is concluded by the decision of this Court in *Dharam Das v. Emperor* (1). That was a decision of a Division Bench of two Judges and I am bound to follow it. There are, no doubt, decisions of the Calcutta and Madras High Courts to the contrary, but the learned Judges who decided the case referred to above did not agree with the rulings of the Calcutta and the Madras Courts and agreed with a decision of the Bombay High Court to which they referred in their judgment. It seems to me that sub-section (3) of section 106 is wide enough to include an Appellate Court whatever may have been the powers of the original Trial Court from whose decision the appeal was heard. Sub-section (1) specifies the different descriptions of Courts which could make an order under the section and sub-section (3) adds another class of Courts to the Courts mentioned in sub-section (1), namely, Appellate Courts. Had the object of the Legislature been

(1) 7 Ind. Cas. 412; 33 A. 48; 7 A. L. J. 910; 11 Cr. L. J. 480.

to limit the powers of the Appellate Court one would expect to find in that sub-section a limitation of the powers of the Appellate Court, such as we find in section 439 of the Code of Criminal Procedure in the case of enhancement of a sentence passed by a Magistrate of the first class. However, as there is a decision of two Judges of this Court on the subject which is against the applicants I feel myself bound by that decision and I see no reason to differ from it. As regards the second point raised, it appears that there has been enmity between the parties for some time and that the accused deliberately lay in wait to commit an assault on the complainant. In these circumstances, although the assault actually committed was not so severe as to justify a heavy sentence, the Appellate Court cannot be held to have exercised its discretion unwarrantably in directing the applicants to furnish security. For these reasons I dismiss the application.

*Application dismissed.*

**PATNA HIGH COURT.**  
CRIMINAL REVISION No. 10 of 1921.  
January 27, 1921.

Present:—Mr. Justice ROSS.

DARBARI CHOUDHURY AND OTHERS—  
PETITIONERS

*versus*

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 109, 379—Person charged with theft, whether can be convicted of abetment of offence.

A person charged with an offence under section 379 of the Penal Code cannot be convicted of abetting that offence, where he is not charged with such abetment.

*Padmanaba Payi Kanniah v. Emperor*, 5 Ind. Cas. 145; 33 M. 284; 7 M. L. T. 79; 20 M. L. J. 84; 11 Cr. L. J. 49, followed.

Criminal revision against the order of the District Magistrate, Purneah, dated the 20th September 1920, affirming in appeal the order of the Magistrate, Second Class, Araria, dated the 27th July 1920.

Mr. Lakshmi Kant Jha, for the Petitioners,  
The Assistant Government Advocate, for the Opposite Party.

**JUDGMENT.**—The petitioner has been convicted of theft and has been sentenced to

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pay a fine of Rs. 25. The facts of the case are that, during the absence of the complainant, (the owner of the goat) one Deokant Thakur, peon of the petitioner, who is a Tahsildar, went and forcibly took his goat away under the petitioner's order; and the complainant hearing this on his return went to the Zemindari Kasbari and demanded the return of his goat, but the petitioner refused to return it and had it killed.

It is contended on behalf of the petitioner that, whatever offense he may have committed, the offense could not be theft because there was no removal of the goat by him. In answer to this argument the learned Assistant Government Advocate contends that the theft by the petitioner occurred when he ordered the goat to be killed. In my opinion, this argument is not sound, because the theft had already taken place when the goat was removed from the complainant's house by Deokant, the peon. It was then suggested that, even if the petitioner could not be convicted of theft, he was guilty of abetment of theft and the failure to frame a charge under that section has not prejudiced him. The case of *Admoniba Payi Kanniah v. Emperor* (1) is against the contention of the learned Assistant Government Advocate.

The Rule must be made absolute, the conviction set aside and the fine if paid must be refunded.

*Conviction set aside;  
Rule made absolute.*

(1) 5 Ind. Cas. 145; 33 M. 264; 7 M. L. T. 79; 20 M. L. J. 84; 11 Cr. L. J. 49.

LAHORE HIGH COURT.  
CRIMINAL REVISION PETITION NO. 1660  
OF 1920.

February 11, 1921.

Present:—Mr. Justice Le Rossignol.

NARAIN DAS AND ANOTHER—

COMPLAINANTS—PETITIONERS

versus

MEWA SINGH—ACCUSED—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), ss. 259, 439—Procedure—Charge framed—Complainant, absence of—Acquittal, order of, legality of—Revision—High Court, power of.*

No section of the Criminal Procedure Code allows a Court to pass an order of acquittal after a charge has been framed, except upon a finding on the merits of not guilty.

Where a charge has been framed it is the duty of the Trial Court to proceed with the trial in the absence of the complainant and to convict or acquit on the merits.

The High Court has no power to convert an acquittal into a conviction, but it has power to direct the Trial Court to conclude the trial in the manner provided by law.

Petitioner under section 439, Criminal Procedure Code, for revision of the order of the Sessions Judge, Ambala, at Simla, dated the 28th July 1920, affirming that of the Magistrate, First Class, Ambala, dated the 12th June 1920.

Mr. N. O. Pandit, for the Petitioner.

Mr. O. L. Gulati, for the Respondents.

JUDGMENT.—The Trial Court passed a bold order of acquittal in this case, because, after the prosecution evidence had been recorded, after charge had been framed, after the bulk of the defence evidence had been recorded, an adjournment was given for the summons of one last witness for the defence.

On the date fixed, the eighth hearing in the case, the complainants and their Pleader failed to arrive in time, whereupon the Court, by reason of their absence and not on the merits, acquitted the accused. Such an order is contemplated by no section of the Code, so far as I am aware, and no section allows a Court to pass an order of acquittal after a charge has been framed, except upon a finding on the merits of not guilty.

In this case it was the duty of the Trial Court to proceed with the trial in the absence of the complainant and to convict or acquit on the merits.

This Court has no power to convert an acquittal into a conviction, but it has power to direct the Trial Court to conclude the trial in the manner provided by law.

I set aside the Magistrate's order of acquittal and direct him to proceed to judgment after taking the evidence of the remaining witness for the defence.

*Acquittal Order set aside.*

NGA THET SHE v. EMPEROR.

## UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 836 of 1920.

September 28, 1920.

Present:—Mr. Heald, A. J. C.

NGA THET SHE AND OTHERS—PETITIONERS  
versus

EMPEROR—OPPOSITE PARTY.

*Upper Burma Criminal Justice Regulation, Sch.,  
sec. XII—Revision—District Magistrate, power of.*

Under the provisions of section XII of the Schedule to the Upper Burma Criminal Justice Regulation, a District Magistrate has extensive powers of revision allowing him to deal with the cases of Second and Third Class Magistrates as he thinks fit instead of reporting them to the High Court.

Mr. N. M. Mukerjee, for the Applicant.

JUDGMENT:—Petitioners were sent up by the Police for trial under section 325 of the Indian Penal Code in respect of serious injuries received by one Po Ka during a fracas which resulted from gambling at Puzanetkin village in the Myingyan District.

The Magistrate discharged the petitioners, but noted at the end of his judgment that many of the witnesses mentioned by Po Ka in his deposition, which was recorded in hospital when it was thought that he was likely to die, had not been examined.

The District Magistrate, having called for the case in revision, said that there appeared from the proceedings and the Police papers to be grounds for further enquiry and ordered that enquiry to be held by the Senior Magistrate.

Petitioners ask me to set aside that order in revision and I have read the records and heard their learned Advocate.

One of the grounds argued is that a District Magistrate in Upper Burma has no power to revise the orders of First Class Magistrates. In view of the express provisions of sections 435 to 438 of the Code of Criminal Procedure, this argument would not be worth notice, but, for the fact that it is constantly cropping up in cases in this Court. It is, of course, based on the provisions of section XII of the Schedule to the Upper Burma Criminal Justice Regulation which says that a District Magistrate in revising the order of a Second or Third Class Magistrate, may, subject to certain limitations, "pass such

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order as he thinks fit." That provision obviously does not limit the District Magistrate's ordinary powers in revision under the Code but, on the contrary, extends his powers under section 438 by allowing him to deal with the cases of Second and Third Class Magistrates as he thinks fit, instead of reporting them to this Court for orders.

So far as the merits of the present case are concerned, it is perfectly clear from the Magistrate's own note that there was scope for further enquiry, and I see no reason to interfere with the District Magistrate's discretion in the matter.

The application is dismissed.

*Application dismissed.*

## SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 164  
OF 1919.

October 10, 1919.

Present:—Mr. Kincaid, J. C., and, Mr.  
Kemp, A. J. C.HARBHAGWANDAS METHARAM—  
APPLICANT  
versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 439—  
(5)—Revision—Appeal competent—Revision, whether  
entertainable.*

Where it is open to an accused person to appeal and he does not do so, clause (5) of section 439 of the Criminal Procedure Code bars the entertainment of an application for revision.

Application for revision against the order of the Judicial Commissioner, Sind.

Mr. Wadhmal Oodharam, for the Applicant.

Mr. T. G. Elphinston, Public Prosecutor for Sind, for the Crown.

JUDGMENT.—The next point raised by the learned Pleader was that the Court should revise the proceedings against his client under section 439 of the Criminal Procedure Code.

It was open to the applicant to lodge an appeal. Unfortunately for him clause (5) of section 439 runs as follows:—



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"Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed."

The learned Pleader has urged that the case is already before the Bench and the Court can, therefore, on its own motion act under section 439. It is not, however, the case that the proceedings are before the Court that it may revise the conviction. They are before the Court that the applicant may show cause why his sentence should be enhanced. The only way that we could act to his advantage under section 439 would be to admit this application in revision which the learned Pleader has tendered. But to do that would be to entertain the proceedings by way of revision at the instance of the party who has not appealed: This we are expressly forbidden to do by clause (5), section 439. A somewhat similar opinion was expressed by Fawcett, J. C., and Crump, A. J. C., in *Jumo v. Emperor* (1). The learned Judges observed: "It would be pure quibble to say that, in spite of the provisions of section 439 (5) of the Code, the Court could do what applicant wants of its own motion. This would be a mere evasion of the Statute which the Court cannot permit."

A further request made by the learned Pleader was that the Court should, if it finds itself unable to admit the application for revision, treat this application for revision as an appeal and give the applicant the benefit of section 5 of the Limitation Act. But the grounds given by the applicant for not filing the appeal are, that he "has undergone expenses, trouble and the anxiety of the prosecution for about 10 months, and, therefore, did not appear to file an appeal." These reasons do not appear to us to be a sufficient cause within the meaning of section 5 of the Limitation Act.

We, therefore, dismiss the application under section 439 of the Criminal Procedure Code.

*Application dismissed.*

(1) 28 Ind. Cas. 108; 8 S. L. R. 229; 16 Cr. L. J. 252.

## ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 109 OF 1920

November 17, 1920.

Present :— Mr. Justice Ryves.

KALLU alias KALLAN—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code Act V. of 1898, s. 110—  
General repute, evidence of, whether sufficient to justify  
taking security.*

Where in a case under section 110 of the Criminal Procedure Code the prosecution witnesses testify merely to the reputation of the accused, and know nothing about him beyond that reputation, and are entirely ignorant of the circumstances of, or of the business carried on by, the accused, an order requiring him to furnish security is not justified. [p 10, 3, col. 1.]

Criminal revision from an order of the District Magistrate, Agra, dated the 24th July 1920.

Mr. Kaila Nath Mukerji, for the Applicant.

The Assistant Government Advocate, for the Crown.

**JUDGMENT.**—In this case Kallu has been ordered to be bound down under section 110 of the Criminal Procedure Code. The notice issued against him under section 112 of the Criminal Procedure Code states that he is a thief by profession and habitually commits extortion. A large number of witnesses for the prosecution were produced and they generally say that Kallu has the reputation of being a harbourer of thieves and commits extortion. They go on to say that he has no other means of livelihood, and in cross-examination, most of them said that he had no cultivation or business. The learned Magistrate has accepted this evidence and on the strength of this evidence has passed the order under section 110 of the Criminal Procedure Code, which was confirmed in appeal, but it is quite evident from the learned District Magistrate's order that the evidence against Kallu is extremely slight; indeed, he says so himself. The accused, who is a man of sixty years, had apparently never been suspected by the Police until early in this year when a dacoity was committed at the house of one Gobardhan Jat. He was suspected, not of having taken part in the dacoity, but of helping one of the accused, a relation of his, in the dacoity to evade arrest.

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It was only after that that a history sheet was opened for him. The District Magistrate admits that there was no evidence of his having been suspected in any definite case either before or after history sheet was opened, and that the case can only succeed if the evidence of general repute can be believed. It is, of course, very easy for witnesses to say that so and so is by repute a bad character. All these witnesses, seventeen in number, who were produced for the prosecution, were tested as to their real knowledge of Kallu's circumstances and they said that they knew nothing about the accused personally beyond his reputation. The District Magistrate has found, as did the trying Magistrate, that the witnesses for the defence are to be believed when they say that the accused has some cultivation, has a bullock and a camel, does a little money-lending and a little grain-dealing business. All the prosecution witnesses, although they are quite aware that this man has such an evil reputation, are entirely ignorant of the business carried on by him which, however, must be patent to the people of the locality. A man cannot have grain-dealing, and cultivation and use oxen and camels without it being apparent to his neighbours, I am, therefore, not at all satisfied with the evidence for the prosecution. I note, however, that the District Magistrate, having held that the accused carries on cultivation and business in a small way, goes on to say that his position in life makes it so highly probable that he is an associate of thieves and dacoits; that he apparently for this reason feels justified in supporting the order of the Magistrate. It would be a dangerously broad rule to lay down that a small shop keeper must, therefore, be an associate of dacoits and that it is necessary, therefore, to bind him down.

In my opinion, this is not a case, on the Magistrate's own showing, for an order under section 110 of the Criminal Procedure Code.

I set aside the conviction and order that security bonds be discharged

*Conviction set aside.*

## MADRAS HIGH COURT.

CRIMINAL REVISION CASE No 54 OF 1920.

CRIMINAL REVISION PETITION No. 44 OF 1920.

April 27, 1920.

*Present:*—Justice Sir Abdur Rahim, Kt., and Justice Sir William Ayling, Kt.,

*In re* T. G. KRISHNASAMI NAIDU

AND OTHERS—ACCUSED—PETITIONERS.

*Madras District Municipalities Act IV of 1884*, ss. 4, 280—Chairman, delegation of powers of, to third person—Complaint by delegate, legality of.

Where the Chairman of a Municipal Council lawfully authorises a person under section 2 of the Madras District Municipalities Act to exercise his powers, including the power to lodge a complaint, that person is entitled to exercise that power so long as the authorisation lasts, and he does not need express authorisation under section 280 to institute a complaint in respect of an offence under the Act.

Petitioners, under sections 455 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the First Class Magistrate, Tiruppathur Division, in Criminal Appeal No. 14 of 1920, preferred against the judgment of the Sub-Magistrate of Tiruppathur in Calender Case No. 55 of 1919.

FACTS appear from the judgment.

Mr. B. O. Sankaranarayana, for the Petitioners.—The Chairman delegate was not competent to lodge this complaint. The general authority to him by the Chairman to perform the latter's functions under section 32 (4) of the District Municipalities Act will not cover cases under section 280. There must be express authorisation under section 280.

The expression "Chairman" in section 280 does not include a Chairman delegate.

Mr. O. Narasimhachariar, for the Public Prosecutor, for the Crown.—The authorisation under section 32 (4) extends to the institution of complaints under section 280. The object of the section is to relieve the Chairman and it would be meaningless to insist on express authorization for each complaint under section 280. Exhibit D, the authority, is very wide, the only things excepted being the signing of cheques and incurring expenditure in anticipation of the Council's sanction. See *Kaliaperumal Naidu v. Emperor* (1). Section 280 being only aimed

(1) 55 Ind. Cas. 599; 11 L. W. 120; 21 Cr. L. J. 327.

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against prosecutions by private persons, there is nothing against the exercise of functions by Chairman delegate.

#### ORDER.

ABDUR RAHIM, J.—In this case the conviction is attacked on the ground, that the complaint in respect of the offence which consisted in a breach of the District Municipalities Act (Mad. Act IV of 1884) was not made by one of the persons referred to in section 280 of that Act. That section says: "No person shall be tried for any offence against the provisions of this Act.....except upon complaint made by the Police, or by the Municipal Council or by the Chairman, or by a person expressly authorised in this behalf by the Municipal Council, or the Chairman." Mr. V. P. Row was the *Ex Officio* Chairman of the Municipality of Tirupathur and he, by an order, Exhibit D, dated 30th January 1919, authorised, under section 32, sub section (4), of the Act, Mr. A. N. Ardbanari Aiyar, a Municipal Councillor, to exercise all the powers conferred, and to perform all the duties imposed, on the Chairman by the said Act, with the exception of signing cheques and incurring expenditure, in anticipation of Council's sanction. It is the Councillor, Mr. Ardbanari Aiyar, that made the complaint in respect of the offence charged against the petitioners.

It was argued that, in spite of any general delegation of power under section 32, section 280 requires that a person, other than the Chairman, or the Municipal Council or the Police, could only lodge a complaint if he is specifically authorised to do so in that particular matter, and that Mr. Ardbanari Aiyar not being a person so expressly authorised was not entitled to institute a proceeding, which led to conviction of the petitioners. The argument has certain plausibility about it; but the answer is really quite plain. The Chairman undoubtedly could make a complaint by the express words of section 280. That being so, the person whom the Chairman lawfully authorised under section 32 to exercise his powers, including the power to lodge a complaint, would also be entitled to exercise that power, so long as the authorisation lasts. I may mention that I was at first inclined to think that there was some substance in the objection of petitioners; but on further consideration I am persuaded that the objection

is without any force. The petition is, therefore, dismissed.

AYLING, J.—The petitioners in this case were convicted of an offence under section 189, District Municipalities Act (Mad. Act IV of 1884) and their conviction confirmed on appeal. We are asked to set it aside on the sole ground that the case was not instituted as required by section 280 of the Act, which runs as follows:—

"No person shall be tried for any offence against the provisions of this Act, or of any bye-law made under section 15 except upon a complaint made by the Police, or by the Municipal Council or by the Chairman, or by a person expressly authorised in this behalf by the Municipal Council, or the Chairman."

The case was admittedly instituted not by the Chairman, but by the Chairman delegate (*vide* definition in section 32 (4) of the Act.) The delegation is Exhibit D. It authorises the Chairman delegate to exercise all the powers conferred and to perform all the duties imposed, on the Chairman by the District Municipalities Act, with the exception of signing cheques and incurring expenditure, in anticipation of Council's sanction. On the face of it, therefore, the delegation would seem to include the power of instituting a case on complaint under section 280.

It is, however, contended that this is not enough and that section 280 requires an express authorisation in this behalf. In my opinion, the words "by a person expressly authorised in this behalf by the Municipal Council or the Chairman," refer to an authorisation to prefer a specific complaint not to the general power of complaining. They are intended to obviate the necessity for the complaining Council or Chairman, as the case may be, of having to attend personally to make the complaint in the Magistrate's Court. This appears to be the interpretation put upon them by Sadasiva Aiyar and Odgere, JJ., in a recent case reported as *Kaliaperumal Naidu v. Emperor* (1). I see no ground for holding that the delegation of the power of complaining by a Chairman to a Chairman delegate need be in a particular form; or that by reason of the words in question Exhibit D, is in operative in this respect.



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The other contention is that the term 'Chairman' in section 280 does not include 'Chairman delegate.'

The word 'Chairman' is not among the definitions in the Act and it is curious that, although section 32 defines 'Chairman delegate,' the latter phrase is, as far as I can see, used in no subsequent sections. In numerous sections the Chairman is invested with certain powers or charged with certain duties without any reference to a Chairman delegate. I may instance section 30 which deals with the duty of presiding at meetings. Section 42 which gives a Chairman power over the Municipal Staff. Section 102 *et seq* which relates to the Collection of taxes. Section 147 *et seq* regarding water supply, and section 183 which gives emergency power in case of dangerous buildings. Unless it be conceded that the term Chairman in those sections includes a Chairman delegate (provided the latter's order of delegation covered the matters referred to), it would seem to follow that none of these powers could be exercised by a Chairman delegate. The delegation of a Chairman's powers may last as long as three months; but even in much shorter periods a Chairman delegate's inability to exercise some of these powers might be disastrous. In fact, unless the effect of delegation be to clothe the Chairman delegate with all the powers of a Chairman, so far as the delegation order extends, the delegation is meaningless.

If the word 'Chairman,' in the section I have referred to, includes a Chairman delegate, I fail to see why it should not be so in section 280. The object of that section is simply to prevent prosecutions for offences under the Act being instituted by private persons and I see no reason why the Legislature should have intended that in this special particular a Chairman delegate should be placed in the position of importance.

Section 32 (4) empowers the Chairman, with the previous permission of the Council, to delegate to a Councillor any of his powers or duties and it appears to me that the effect of delegation is to place a Chairman delegate, so far as the delegated powers extend, in precisely the same position as a Chairman subject to the three provisos contained in the clause, none of which affects the present cause. It seems to me that the term 'Chairman' in section 280

includes 'Chairman delegate' (if the delegation under section 32 is wide enough), and that the present prosecution was properly instituted.

I would dismiss the petition.

M. C. P.

*Petition dismissed.*

# BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 68 of 1920.

October 20, 1920.

Present:—Mr. Justice Shah and  
Mr. Justice Crump.

EMPEROR—PROSECUTOR

*versus*

TUKA NANA RAMOSHI—ACCUSED.

*Criminal Tribes Act (III of 1911), s. 23—Second and third convictions, what are.*

The second conviction contemplated by clause (a) of sub-section (1) of section 23 of the Criminal Tribes Act need not be the second conviction after the Act, nor is it necessary that it should be the second in fact. Taking the conviction or convictions prior to the Act as one group constituting one conviction, the first one after the Act would be the second conviction for the purpose of the section though, in point of fact, it may be one more in a series of convictions prior to the Act. Similarly, a third conviction within the meaning of clause (b) of the same sub-section must be at least the second after the Act. [p. 1006, col. 1.]

Criminal reference made by the District Magistrate, Satara.

Mr. S. S. Pathar, Government Pleader, for the Crown.

## JUDGMENT.

SHAH, J.—The accused No. 2 in this case has been convicted of robbery under section 392, Indian Penal Code, and sentenced to suffer rigorous imprisonment for eighteen months by the Trial Magistrate, though he is a member of a criminal tribe, and though he was once previously convicted in April 1903 and sentenced to six years' rigorous imprisonment under section 395 by the Sessions Court of Satara.

The District Magistrate has made a reference to this Court recommending that the conviction and sentence be set aside, and that the accused No. 2 be committed to the Court of Session for trial, in view of the provisions of section 23 [of] the Criminal Tribes Act (III of 1911).

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We have to consider, first, whether section 23 (1), clause (a), applies to this case, and, secondly, if it applies, whether, under the circumstances, it is necessary to give effect to the District Magistrate's recommendation.

As regards the construction of section 23, which is not quite easy, I am of opinion that, though the first conviction is prior to the Act of 1911, and the present conviction is the first after the Act and second, in point of fact, it is "a second conviction" within the meaning of clause (a) of section 23, sub-section (1). The "second conviction" contemplated by that clause need not be the second conviction after the Act, nor is it necessary that it should be the second in fact. Taking the conviction or convictions prior to the Act as one group constituting one conviction, the first one after the Act would be the second conviction for the purpose of the section though, in point of fact, it may be one more in a series of convictions prior to the Act. Clause (b) of the same sub-section does not apply to the present case. But in order to be able to construe the section as a whole, we have necessarily considered it; and in my opinion a third conviction within the meaning of the clause must be at least the second after the Act.

This is the construction adopted by the Madras High Court in *Sellamani, In re* (1). Though this construction is not free from difficulty, on the whole I think that out of all the alternative constructions, this seems to be the least open to objection, having regard to the words of the section, as also to the scope and object of the section. I am, therefore, of opinion that the section applies to the present case.

It appears, however, that the Trial Magistrate was aware of all the material facts. In the exercise of his discretion he has decided the case instead of committing it to the Court of Session for trial, and passed a sentence within his powers. It is true that he has not referred in terms to section 23 of the Criminal Tribes Act of 1911. But that does not necessarily mean that he was not alive to the provisions of the section. Assuming, however, that he passed the sentence without advertence to these provisions, we have to consider whether it is necessary to interfere now. The section provides that the

accused shall be punished in accordance with the requirements of clause (a), "in the absence of special reasons to the contrary to be mentioned in the judgment." The previous conviction in this case was in 1903; and presumably after the accused came out of jail in 1909 or earlier, he has led an honest life for over ten years. That is, in my opinion, a special reason, under the circumstances of this case, for not punishing the accused under the section.

I would, therefore, discharge the Rule.

CRUMP, J.—I agree. Whatever view I might be inclined to take were the matter *res integra*, I am, as it is, content to follow the decision of the Madras High Court cited by my learned brother. Section 23 (a) of the Criminal Tribes Act of 1911 is no doubt susceptible of more than one interpretation and there are perhaps more than one which are equally plausible. But in such a matter as this where one High Court has interpreted the section, I do not think that any advantage would be gained by adopting another interpretation, more specially as the interpretation which has found favour with the Madras High Court, is, on the whole, I think, reasonable. As to the particular case, I have nothing to add to the remarks of my learned brother.

*Rule discharged.*

### BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 501 OF 1921.

October 20, 1920.

*Present:*—Sir Norman Macleod, Kt.,  
Chief Justice, and Mr. Justice Shah.  
DINANATH SUNDRAJI RAVTE—

ACCUSED

*versus*

EMPEROR—PROSECUTOR.

*Evidence Act (I of 1872), s. 24—Confession obtained by inducement—Magistrate, duty of.*

As soon as an accused person, whose confession is being recorded, informs the Magistrate that he is making the confession under inducement, it becomes useless to record the confession, and such a confession, if recorded, is inadmissible in evidence and ought not to be allowed to go to the Jury. It makes no difference whether there actually was any inducement or not.

Criminal appeal from conviction and sentence recorded by the Sessions Judge, Thana.

(1) 83 Ind. Cas. 629; 40 M. 923; 17 Cr. L. J. 149; 32 M. L. J. 212; (1917) M. W. N. 419.

RAM RATAN V. EMPEROR.

Mr. Jinnah (with him Messrs. K. A. Padhye and M. K. Thakore), for the Accused.

Mr. S. P. Patkar, Government Pleader, for the Crown.

### JUDGMENT.

MACLEOD, C. J.—The accused was charged with the offence of murder before the Sessions Judge of Thana sitting with a Jury. There was an unanimous verdict of guilty under section 302, Indian Penal Code, and the accused was sentenced to transportation for life. In appeal it has been contended that the confession should not have been admitted in evidence and placed before the Jury, as it was not relevant under section 24 of the Indian Evidence Act. If the confession itself had been free of all defects, and then in the Sessions Court had been retracted, and the accused had made allegations that the confession had been made under inducement, then it would be a question for the Court to consider whether or not the confession was relevant; and it seems as if the learned Judge in directing the Jury had considered himself free to consider whether the confession was relevant under section 24 of the Indian Evidence Act. But on reading the confession, it appears that the accused told the Magistrate that he had been told to tell the truth by the Sahab who told him to tell the truth and he would be released. Obviously, then, the accused told the Magistrate that he was making a confession under an inducement, and it was quite useless for the Magistrate to continue further to record the confession. It does not matter whether as a matter of fact the Police Superintendent had told the accused that he would be released if he told the truth. It is rather difficult to believe that any Police Superintendent would have been so foolish as to tell the accused that. But once the accused had told the Magistrate that he was making the confession under inducement it was no use whatever continuing to record the confession. Therefore, we shall have to consider the record as if the confession had never been made. No doubt the Jury, in coming to the conclusion they did, under the direction of the Sessions Judge, took the confession into consideration and weighed it with the rest of the evidence, and it is impossible to say whether, supposing that the confession had never been placed before them, they would

have convicted the accused on the rest of the evidence. It would be open for us to consider the evidence, apart from the confession, and see whether it would be sufficient to support the conviction. But in a case like this, that is, an extremely difficult course for the Court to pursue, because no doubt we have read the record and it is almost impossible for us to exclude all consideration of the confession from our minds while looking at the rest of the evidence. Undoubtedly, there is a considerable body of evidence, apart from the confession, which the Jury might or might not believe, though speaking for myself I should find it extremely difficult to be able to come to a conclusion on that evidence with regard to the guilt or innocence of the accused. I think the best course to pursue is to set aside the conviction and direct a re-trial.

SHAH, J.—I agree.

*Conviction set aside: Re trial ordered.*

### ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No 853 OF 1920.

December 17, 1920.

Present:—Justice Sir P. C. Banerji, Kt.

RAM RATAN—ACCUSED

versus

EMPEROR THROUGH B. SHIVA

SHANKAR SHARMA OPOSITE PARTY.

*Criminal Procedure Code Act V of 1898, ss 190 (1) c, 191—Magistrate taking cognizance of case under s. 190 (1) c.—Failure to comply with procedure laid down in s. 191, effect of.*

Where a Magistrate takes cognizance of a case under section 190 (1) c of the Criminal Procedure Code, but omits to inform the accused before any evidence is taken that the latter is entitled to have the case tried by some other court, the proceedings before the Magistrate are illegal.

Criminal reference made by the Sessions Judge, Agra.

JUDGMENT.—It is clear that the Cantonment Magistrate took cognizance of this case under sub-section (1), clause (c) of section 190 of the Code of Criminal Procedure. He was, therefore, bound under the provisions of section 191 to inform the accused before any evidence was recorded that he was entitled to have the case tried by another Court. This was not done in



EMPEROR V. KESHAV GOVIND.

the present case and, therefore, the proceedings before the Cantonment Magistrate were illegal. I accordingly set aside the conviction and sentence and direct that the accused be re-tried by another Magistrate to whom the Magistrate of the District may refer the case for trial.

*Conviction set aside;  
Re trial ordered.*

BOMBAY HIGH COURT.  
CRIMINAL REFERENCE No. 95 OF 1920.  
January 26, 1921.

*Present:*—Sir Norman Macleod, Kt.,  
Chief Justice, and Mr. Justice Shah.  
EMPEROR—PROSECUTOR

*versus*

KESHAV GOVIND—ACCUSED.

*Bombay City Police Act (IV of 1912), ss. 40 (1),  
55—Magistrate, whether can command unlawful  
assembly to disperse.*

Under section 40 (1) of the Bombay City Police Act the only person who may command an unlawful assembly to disperse is an officer-in-charge of a Section; and under section 55 a Police Officer of superior rank, if on the scene, might perform the duty of the officer in charge of a Section.

It is not a sufficient compliance with the provisions of section 40 (1) for a Magistrate to give the command under the directions of a competent Police Officer who is himself present.

Criminal reference made by the Chief Presidency Magistrate, Bombay.

Mr. Jinnah, (with him Mr. D. W. Pilgaonkar), for the Accused.

Mr. S. S. Patkar, Government Pleader, for the Crown.

#### JUDGMENT.

MACLEOD, C. J.—Certain questions of law which arose in a case before the Chief Presidency Magistrate in the case of *Imperator v. Keshav Govind* and thirty-three others, have been referred for the opinion of the High Court, under section 432, Criminal Procedure Code. On the evidence, the Magistrate found that the accused were members of an unlawful assembly.

The question was, whether they had been commanded in the manner prescribed by law to disperse, and it is admitted that the crowd was commanded to disperse by Mr. Oliveira, the Presidency Magistrate.

Under section 127, Criminal Procedure Code, any Magistrate or officer-in-charge of

a Police Station may command any unlawful assembly to disperse. But the whole of Chapter IX of the Criminal Procedure Code, in which section 127 appears, was repealed by the Bombay City Police Act IV of 1902, and sections 127 and 128, Criminal Procedure Code, were re-placed by section 40 of that Act. Section 40 sub-section (1) makes no mention of a Magistrate. The only person who may command an unlawful assembly to disperse is an officer-in-charge of a Section; and under section 55 a Police Officer of superior rank, if on the scene, might perform the duty of the officer in charge of a Section. In this case it appears the Police Commissioner was on the scene. Instead of giving the command to disperse himself, he asked the Magistrate to give the command. If the section gives no power to the Magistrate to command an unlawful assembly to disperse, since it is only when a member of an unlawful assembly has been commanded in the manner prescribed by law to disperse that he could be found guilty under section 145, Indian Penal Code, it seems clear that a member of an unlawful assembly who has been commanded by a Magistrate to disperse cannot be convicted under that section; nor does the language of section 151, Indian Penal Code, make any difference, although the word "lawfully" is used instead of "in the manner prescribed by law." The explanation shows that it was not intended that the difference in phraseology in the two sections should make any difference in the proper construction of them. I think, therefore, that the construction placed by the learned Chief Presidency Magistrate on section 40 of the Bombay City Police Act is correct. Questions 1 and 3 should be answered in the affirmative and questions 2 and 4 in the negative. We think there was not much necessity to refer these questions to the High Court, as it would have been open to the Magistrate to send the papers to Government with his decision, for it is really a matter for the Legislature to decide whether section 40 of the Bombay City Police Act should be amended so as to bring it into line with sections 127 and 128 of the Criminal Procedure Code, all that the Court can do is to lay down what the law is not what it ought to be.

SHAH, J.—I agree.

*Answer accordingly.*

*S. N. Das*

Advocate High Court

Jammu & Kashmir

Srinagar.

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Held, that A's acts amounted to a dispossession of B, and B's suit, having been brought more than 12 years afterwards, was barred by limitation. **C MOHARAJ BAHADUR SINGH V. PULIN MAL** 386

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**Amendment of decree**—Executing Court, power of—Construction of judgment—Costs, interest on, from what date to be allowed—Civil Procedure Code (Act V of 1908), s. 35.

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Where the wording of a judgment can be read in either of two ways it would be quite wrong to presume that the correct reading is one which violates the provisions of both law and equity.

Interest should not be allowed to run on costs until such costs have been actually incurred.

A judgment directed that the plaintiff be given a decree for a certain sum, with proportionate costs and future interest from the date of institution of the suit till realisation, at Re. 1 per cent. per mensem:

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Where by the terms of a contract the parties agree to refer all disputes arising on, or out of, it to arbitration, the right to make a submission is not exhausted by reason of the mere fact that one award final and complete has issued from it: there may be an indefinite number of awards, as it is possible to have further disputes over the same claim which are not covered by the first award, and the arbitrators have jurisdiction to make awards from time to time in disputes arising out of the contract, as such disputes arise. **C BAL MUKUND RUIA v. GOPIRAM BHOTICA**, 24 C. W. N. 775 **195**

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— *Contract containing arbitration clause—Clause, whether imported into another contract by reference—Partial arbitration, whether allowable.*

D. entered into a contract with a firm LJ. for the purchase of 30 bales of dhotis, the contract having embodied in it a clause for arbitration in case of disputes. D. sold the identical 30 bales to C. under a contract which was in the following terms:—"We sold the goods as were bought by us of Lakshmichand Jagannath, Batta (allowance, chafage, all terms according to Bahar (importing) firms' godown due according to Bazar interest, coolie hire, according to Bhiton (Bazar)." A dispute having arisen between C. and D., the latter instituted a suit in respect of 27 bales, alleging that C. had wrongly refused to accept delivery of the goods, and thereafter referred the matter in respect of the remaining 3 bales to arbitration, which resulted in an award in his favour. C. thereupon instituted proceedings for cancellation of the award, and on his application being refused, he appealed questioning the validity of the award on the grounds: first, that the arbitration clause embodied in the contract between the defendant and the importers was not incorporated into the contract between the plaintiffs and the defendant, and, secondly, that even if the arbitration clause be deemed to have been incorporated, the defendant, by reason of the institution of the suit in respect of 27 bales, was not competent to make a reference to arbitration with regard to the three remaining bales:

*Held*, (1) that the arbitration clause contained in the contract between D. and LJ. was not incorporated into the contract between D. and C. and the reference to arbitration by D. was completely *ultra vires*;

(2) that having instituted a suit in respect of 27 bales, D. was not competent to make a reference to arbitration in respect of the remaining three bales even if it be deemed that the arbitration clause in the contract between himself and LJ. had been incorporated in his contract with C. **C CHATTURBHUJ CHANDUNMULL v. BASDEODAS DAGA**, 47 C. 789; 33 C. L. J. 146 **909**

**Arbitration**—*conold.*

— *Contract containing arbitration clause—Reference, after institution of suit—Suit not stayed—Award, effect of.*

Where an action has been commenced upon a contract which contains a provision for reference to arbitration, even if a reference to arbitration has been made before the commencement of the suit, the award is of no effect unless the suit has been stayed pending the arbitration.

If the Court has refused to stay the action or if the defendant has abstained from asking it to do so, the Court has seisin of the dispute, and it is by its decision, and by its decision alone, that the rights of the parties are settled. **C RAM PROSAD SURAJMULL v. MOHAN LAL LACHMINARAIN**, 47 C. 752 **895**

**Arbitration Act (IX of 1839), ss. 11**

(2), 15 (1)—*Award, filing of, by arbitrator—Notice of filing not given, effect of—Arbitrator proceeding ex parte—Notice, absence of—Award, validity of.*

The moment an award is filed in Court by an arbitrator, it becomes enforceable as if it were a decree, and it is not necessary, before it is enforced, to show that notice of the fact of filing was given by the arbitrator to the parties concerned: the omission to give such notice would not destroy the operative character of the filed award.

Before an arbitrator proceeds *ex parte* he should give notice in writing to each of the parties, otherwise the award may be liable to be set aside. **C UDAICHAND PANNA LALL v. DEBIBUX JAWANRAM**, 47 C 951 **987**

— **s. 15**—*Award, enforceability of—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 22—Application to execute award, whether application to enforce order.*

Inasmuch as section 15 of the Arbitration Act, subject to certain requirements, makes an award itself directly enforceable, as if it were a decree of the Court, an application to execute the award, is not an application in execution of an order within the meaning of section 22 of the Dekkhan Agriculturists' Relief Act. **S UDHAVIDAS v. UKAMAL PHATAMAL**, 14 S. L. R. 217 **942**

— **s. 19**—*Stay of proceedings, order for—Jurisdiction—Discretion—Appeal, interference in.*

Before the jurisdiction of the Court to make an order for stay of proceedings under section 19 of the Arbitration Act, can be invoked, it must be established beyond doubt that there is a valid submission: and before an order staying proceedings can be made the Court must be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration.

The making of an order staying proceedings is a matter largely in the discretion of the Court, and when the discretion has been exercised, a strong case must be made out to justify the interference of a Court of Appeal. **C KEDARNATH BABULAL v. SUMPATRAM DOOGUR**, 47 C. 1020 **951**

**Asthan**, Sannyasi, nature of—Separate and personal property of Mahant—Burden of proof—Alienation by Mahant—Breach of trust.

An *Asthan* is essentially an institution of Sannyasi celibates and ascetics, having no worldly connections either of wealth or of family, and there is a presumption that the Mahant of an *Asthan* has no property other than *Asthan* property and that his income consists in the profits of that property and the offerings made to him in the character of trustee of the institution, but this does not disable him from owning property of his own, only those who allege the separate and personal character of any property found in the possession of a Mahant must prove their allegation: and in the absence of such proof, or of proof of unavoidable necessity, an alienation made by a Mahant is *ultra vires*. The fact that there have been a large number of alienations by successive Mahants proves nothing more than breaches of trust by the alienors. **O BAMPAT v. DURGA BHARTI**, 7 O. L. J. 547; 23 O. C. 303 440

**Attaladakam heir**, right of, to sue for recovery of alienated properties. See MALABAR LAW 118

**Benamdar** for purchaser of separate account at Revenue sale, whether can maintain suit for joint possession—Bengal Revenue Sale Law (Act XI B. C. of 1859).

A suit for joint possession by the purchaser of a separate account in a sale held under the Bengal Revenue Sale Law is maintainable even though the plaintiff is a *benamdar*. **C MOHESH CHANDRA DE v. KALI KANTA SORMA** 708

**Bengal Alluvion and Diluvion Regulation (XI of 1825), s. 4 (3)**—*Chur* thrown up in large navigable river—Parties, rights of, how to be determined

The question of title to a *chur* thrown up in a large navigable river must be determined with reference to the condition of things prevailing at the time when the *chur* was first formed, and with reference to the terms of section 4 (3) of Regulation XI of 1825: but before applying this provision the Court must determine whether the bed of the river in which the *chur* is formed is the property of an individual, or is public domain. **C SURENDRA NATH MITRA v. SECRETARY OF STATE FOR INDIA** 395

**Bengal Land Registration Act (VII B. C. of 1876), s. 78**, applicability of—Suit for arrears of rent by assignee of rent, whether maintainable.

Section 78 of the Bengal Land Registration Act is no bar to a suit for recovery of arrears of rent by an unregistered assignee of the rent from the landlord. **PAT RAMESWAR PRASAD SINGH v. RAMJANAK SINGH**, 6 P. L. J. 109; 2 P. L. T. 370 390

**Bengal Municipal Act (III B. C. of 1884), 85 (a)**—Tax, assessment of—Means and property liable to assessment—Measure of means and property.

In assessing a tax under section 85 (a) of the Bengal Municipal Act, the means and property of an assessee outside the Municipality cannot be taken into account, it is only the means and property within the Municipality that are liable to assessment. To measure the means and property within the Municipality, the test is, not what is spent, but

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what is earned within the Municipality. **C DEBENDRA NATH RAI CHAUDHURY v. PRANAB CHANDRA GHOSE**, 32 O. L. J. 210; 25 O. W. N. 45 284

—**s. 85 (b), 86 (d) (f), 103, 279, 322 (1)**—Municipal rates in respect of holding—"Occupier" and "owner" distinction between—Owner not occupier, whether liable to pay water-rate and latrine-rate.

Bare ownership of a holding within a Municipality does not constitute rateable occupation; or, in other words, every owner is not an occupier just as every occupier is not an owner. In order to constitute rateable occupation there must be a use and enjoyment which is or is capable of being beneficial. **C SAMSHUDDIN v. PYARI LAL DAS**, 25 O. W. N. 242 498

**Bengal, N. W. P. & Assam Civil Courts Act—s. 21 (2)**. See CIVIL PROCEDURE CODE, O. XX, r. 12 346

**Bengal Patni Taluks Regulation (VIII of 1819), ss. 8, 14**—Sale, notice of, manner of publishing—Irregular sale, nature of—Second sale during pendency of proceedings to set aside first sale, effect of.

Where it is proposed to hold a sale under the Patni Taluks Regulation of a *patni* for arrears of rent due in respect thereof, the Regulation does not require that notice of the sale should be served personally on the defaulter; the posting of the notice at the Cutochery of the defaulter is a sufficient publication thereof, the receipt of the defaulter or his manager being merely evidence that the notice has been so published.

An irregular sale of a *patni* is not void, but voidable, but it can only be avoided by a suit properly framed under section 14 of the Patni Taluks Regulation.

Where during the pendency of proceedings to set aside an irregular sale, a second sale of the *patni* is held, the second sale is part of the first and will stand or fall with it. **C BEJOY CHAND MAHATAR BAHADUR MAHARAJADHIRAJ OF BURDWAN v. MRITUNJOY GHOSE**, 24 O. W. N. 786; 47 O. 782 182

—**s. 8 (1)**—Patni, diminution of area of—Rent, whether can be summarily levied.

The fact that since its creation a *patni* has diminished in area, from whatever cause, would not exempt the *patni* from the provisions of the Patni Regulation as to the summary levying of the rental. **SHARAJINI DAS v. KAZI ABDUL** 452

**Bengal Public Demands Recovery Act (III B. C. of 1913), s. 37**—Sale, holding of, without notifying date, time and place—Suit for declaration that sale is a nullity, maintainability of.

A sale held ostensibly under the Public Demands Recovery Act, by order of a Certificate Officer, without notifying the date, time and place of the sale is a nullity, and section 37 of that Act is no bar to a suit to obtain a declaration that the sale is null and void. **C REAJUDDIN v. SHAHANUTULLA MIA** 759

**Bengal Revenue Sale Law (Act XI B. C. of 1859)**. See BENAMDAR 708

**Bengal Tenancy Act (VIII B. C. of 1885), s. 15**—Omission by heirs of a tenure-holder to notify succession to landlord, effect of—Decree



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for rent against recorded tenants in actual occupation, whether operates as rent-decree.

The representatives of the original holders of a tenure did not follow the provisions of the law for giving notice of succession to the landlord and did not deposit the fee prescribed by the Bengal Tenancy Act. Two of them abandoned the tenure. The others remained in possession and had their names recorded in the books of the landlord as tenants in actual occupation. Default was thereafter made in the payment of rent in respect of the tenure, with the result that the landlord sued the recorded tenants and obtained a decree against them:

Held, that the tenure was fully represented in the suit and the decree which was obtained against the recorded tenants operated as a rent-decree. **C** ABHOY CHARAN DUTTA v. MONRANJAN RAI 510

— **s. 22 (3), 49 (b)**—Occupancy holding, acquisition of, by ijaradar from landlord—Sub-letting, effect of—Tenant inducted by ijaradar on holding, whether trespasser.

The plaintiffs were the owners of an *osat taluq* which was let out in *ijara* for a certain period. The *ijara* lease authorised the ijaradar to buy holdings at sales in execution of decrees for arrears of rent and also provided that during the term of the *ijara* he would be at liberty to sub-let the same. During the term of the *ijara* the ijaradar purchased a certain holding in execution of a decree for arrears of rent in respect thereof and sub-let the same to the defendants without any written agreement. On the expiry of the *ijara* lease the plaintiffs sought to eject the defendants as trespassers:

Held, that, having regard to the provisions of section 22 (3) of the Bengal Tenancy Act and also to the terms of the *ijara* lease, the holding continued and the defendants who were inducted upon the same by the ijaradar were in the position of under-*raiyats*, that, therefore, when the plaintiffs succeeded to the ijaradar in the possession of the holding, they took it burdened with the under-*raiyats* inducted by the ijaradar and the sub-letting not having been by a written lease, the defendants could not be ejected otherwise than after notice under section 49 (b) of the Bengal Tenancy Act. **C** NAYANJAN BISHI v. DURGADAS, 33 C. L. J. 575 449

— **s. 29**—Landlord and tenant—Rent, enhancement of—Holding, augmentation of—Increased rent for additional area—Section, whether applicable

Where a tenant's holding is augmented upon his taking a settlement of an additional area and a new arrangement is arrived at, and a new rental fixed thereby increasing the rent originally paid, the rent so increased is not an enhancement, and consequently section 29 of the Bengal Tenancy Act does not apply. **C** TARAK NATH SARKAR v. SRISH CHANDRA RAI 412

— **s. 50 (2)**—Rent, fixity of, presumption as to—Tenant, status of.

Where it is found that a tenant has, for more than twenty years, paid a certain rate of rent, and there is no proof of any variation in the rent at any prior period, the tenant acquires the status of a tenant holding at a fixed rent, and is entitled to the benefit of the presumption as to the fixity of the rent arising under section 50 (2) of the Bengal

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Tenancy Act. **C** KUMARI DASYA v. HEMANTA KUMARI DEBI 402

— **ss. 52 (1) (b), 179**—Landlord and tenant—Deficiency in area of tenure—Rent, reduction of—Land in the Sunderbunds—"Permanently settled area."

The respondents held land in the Sunderbunds under a permanent *mokurrari* lease granted by appellant. They claimed a reduction of rent under section 52 sub-section 1 b) of the Bengal Tenancy Act on the ground that part of the land leased had been diluviated. Appellant opposed the reduction, relying on the terms of the lease and on section 179 of the Act, which permits the holder of a permanent tenure in a permanently settled area to grant a permanent *mokurrari* lease on any terms agreed between him and the tenant. The land had been granted by Government in 1680 to appellant's predecessor at a rent increasing for a period of years, after which it was subject to survey and measurement, and the proprietary right in the grant was to be "under conditions generally applicable to owners of estates not permanently settled."

Held, that the land was not proved to be in a "permanently-settled area" and that, consequently, respondents were entitled to reduction of rent irrespective of the terms of their lease. **P C** KHETRAMONI DAS v. JIBAN KRISHNA KUNDU, 25 C. W. N. 67; 40 M. L. J. 232; 33 C. L. J. 214 1

— **s. 85**—Under-*raiyat* agreeing to accept heritable tenancy—Landlord, whether can eject heirs of under-*raiyat*.

It is not a violation of the provisions of section 85 of the Bengal Tenancy Act for an under-*raiyat* to agree to accept from his landlord a heritable tenancy; and when such agreement has been entered into, the landlord cannot ignore it and treat the tenancy as if it were not heritable and eject the heirs of the under-*raiyat*. **C** AMINULLA CHOWDHURY v. MAHABAT ALI, 25 C. W. N. 715 457

— **s. 85 (2)**—Registered sub-lease in perpetuity by *raiyat*, whether admissible in evidence—Estoppel, applicability of, doctrine of.

A sub-lease by a *raiyat* granted and registered in contravention of the provisions of section 85 (2) of the Bengal Tenancy Act is inadmissible in evidence.

A *raiyat* is not precluded from questioning the validity of a sub-lease, purporting to be a lease in perpetuity, by reason of the doctrine of estoppel where there was no misrepresentation by him as to the extent of his interest or as to his status as *raiyat*. In such a case the doctrine of estoppel has no application. **C** RAJ KUMAR DAS v. PANCHKORI TALUQDAR 507

— **ss. 104 to 104J, 192**—Land formed by accretion—New estate constituted and rent fixed by Revenue Authorities—Tenant, whether bound to pay rate of rent so fixed.

Where a new estate is constituted by the Revenue Authorities of lands formed by accretion, and a new tenure rent is recorded in the Record of Rights as actually fixed and settled under the provisions of the Bengal Tenancy Act, and no proceedings are taken to obtain a reversal or modification of the decision of the Revenue Authorities, the tenants are bound,

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under section 192, read with sections 101 to 104 of that Act, to pay the rent so fixed. **C KUMAR ARUN CHANDRA SINHA v. JOGENDRA LAL ROY** 391

— **s. 104 H**—Rent settled in Record of Rights, finality of—Plea of title contrary to entry in Record of Rights, whether can be raised in rent suit. Section 104 H of the Bengal Tenancy Act confers finality on the rent settled in the Record of Rights.

It is not open to a defendant in a rent-suit to urge the plea of title contrary to the entry in the Record of Rights. **C MANMATHA NATH v. KHIROD GOBINDA CHOWDHURI** 501

— **ss. 106, 113**—Record of Rights, rectification of, as regards rent—Suit for settlement of rent, whether barred.

Where, under section 106 of the Bengal Tenancy Act, a Record of Rights is rectified in respect of existing rent, such rectification does not amount to a settlement of rent, so as to bar a suit under section 113 of the Act. **C MANINDRA CHANDRA NANDI v. UPENDRA CHANDAR HAZRA**, 47 C. 1006 559

— as amended by Eastern Bengal and Assam Tenancy Amendment Act (I of 1909),

**s. 147-A**—Decree passed without compliance with provisions of section, whether can be objected to, in execution proceedings—Compromise decree in rent-suit—Tenant taking settlement of additional lands and agreeing to pay rent for the entire land.

Under the terms of a compromise arrived at in a suit for rent the defendant took some additional lands and a certain rent was fixed for the entire land (original area and the additional land). The Court in decreeing the suit upon the compromise did not comply with the provisions of section 147-A of the Eastern Bengal and Assam Tenancy Act:

Held, that the objection to the validity of the decree on the ground of non-compliance with the provisions of section 147-A of the Eastern Bengal and Assam Tenancy Act could not be entertained in execution proceedings. **C HEM CHANDRA CHOWDHURY v. CHANDRA MOHAN NAMODAS**, 24 C. W. N. 1070 204

— **s. 158 (b)**—Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Limitation Act (IX of 1908), Sch. I, Arts. 120, '66—Execution of decree—Sale—Suit to set aside sale—Limitation.

An execution sale which is bad on the ground of irregularity and fraud and is liable to be set aside under Order XXI, rule 90 of the Civil Procedure Code is voidable and not void, and an application to set aside such a sale must be made within thirty days of the sale.

On the other hand, an execution sale which takes place in contravention of the provisions of section 158 (b) of the Bengal Tenancy Act is void, and a suit for a declaration that such a sale is illegal and inoperative is governed by Article 120 of Schedule I to the Limitation Act. **PAT GHANSHYAM CHAUDHURY v. BASDEV JHA** 529

**Berar Electoral Rules, r. 10 (2), 27, 28, 29 (1)**, R. 10 (2), 27, 28, 29 (1)—Election petition—Government Agent, whether can be done by proposer or secondor, whether can be delegated—Certificate obtained by candidate, effect of—Election Agent, declaration of, whether should bear stamp—Declaration written on stamp paper and signature attested by Magistrate, effect of—Government of India Act, 1912, Council constituted under, member of, eligibility of, for election to Council constituted by Government of India Act, 1919.

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Under rule 29 (1) of the Berar Electoral Rules, the Governor of the Province has power to dismiss an election petition in those cases only in which the required security for costs is not deposited in accordance with the provisions of rule 28. The figure 27 in rule 29 (1) is a misprint for 28.

The principle of the whole scheme of Elections under the Berar Electoral Rules is, that what is required to be done by the proposer, or by the secondor, or by the candidate, or by an elector, cannot be permitted to be done by his agent, unless there is clear authority for it. Where, therefore, the rules require the nomination paper of a candidate to be transmitted to the Returning Officer by the proposer and secondor, its transmission by the candidate is not a proper transmission and renders the nomination invalid.

The certification of the facts required by clause (ii) of Regulation II of the Berar Electoral Rules, need not necessarily be by means of only a single certificate. The certification of those facts by means of two or more certificates given by different officers would not render a nomination paper invalid. But where the certificate required to be appended to the nomination paper is obtained and appended by the candidate, instead of by the proposer and secondor, the nomination is invalid.

The declaration of an Election Agent made by a candidate does not require to be stamped to render it valid. The mere fact that such a declaration is written on a stamp-paper, and the signature of the candidate is attested by a Sub-Divisional Magistrate, would not alter the nature of the document, and make it an invalid declaration.

The fact that a candidate is, at the time of his nomination, a member of a Legislative Council constituted under the Government of India Act, 1912, does not disqualify him from seeking election to a Legislative Council constituted by the Government of India Act, 1919.

The mere fact that a nomination paper is posted by a peon under the directions of the secondor, does not render the nomination invalid. **C P E C SADASHO WAMAN KELKAR v. R. V. MAHAJANI** 870

**Bombay City Police Act (IV of 1912), ss. 40 (1), 55**—Magistrate, whether can command unlawful assembly to disperse.

Under section 40 (1) of the Bombay City Police Act the only person who may command an unlawful assembly to disperse is an officer-in-charge of a Section; and under section 55 a Police Officer of superior rank, if on the scene, might perform the duty of the officer-in-charge of a Section.

It is not a sufficient compliance with the provisions of section 40 (1) for a Magistrate to give the command under the directions of a competent Police Officer who is himself present. **B EMPEROR v. KESHAV GOVIND**, 23 Bom. L. R. 350; 22 Cr. L. J. 320

**Bombay District Municipal Act (III of 1901), s. 46, cl. (1)**—*Rules and Bye-laws of Ahmedabad Municipality, rule 74, whether ultra vires—Provisions of rule not complied with, effect of.*

Rule 74 of the Rules and Bye-laws of the Ahmedabad Municipality is not *ultra vires*.

The effect of that rule is that, for any particular year, the Municipality is entitled to such amount as house and property tax as is determined by the beginning of the year, and not to any increase that may be determined at any time during the year.

Where the Municipality increases a tax without complying with the provisions of rule 74, the assessee is bound to pay only that amount which was fixed for the next preceding year and any excess levied by the Municipality can be recovered by him. **B ANBALAL SARABHAI v. AHMEDABAD MUNICIPALITY**, 23 Bom. L. R. 48; 45 B. 611 **578**

**Bombay Rent (War Restrictions) Act (II of 1918), s. 2**—*Landlord and tenant, whether includes tenant and sub-tenant—Standard rent, what is.*

The only object of including in the definition 'landlord,' a tenant who sub-lets, and in the definition of 'tenant,' a sub-tenant, in the Bombay Rent (War Restrictions) Act, is to extend the benefits of the Act to sub-tenants, and it was not intended that the standard rent should be determined by different standards between the original landlord and the tenant and between the tenant and the sub-tenant.

'Standard' means a rule or a mode and can only be one. The whole object of the Rent Act is to prevent tenants being made to pay rent which the Legislature considers excessive or unreasonable. In regard to the same premises, rent which the law regards as unreasonable or excessive between the original landlord and tenant ought not to be regarded as reasonable between the tenant and the sub-tenant. Similarly, rent which the law regards as reasonable between the original landlord and tenant ought not to be regarded as unreasonable between the tenant and the sub-tenant. Standard rent must mean the rent at which the premises were originally let. The standard rent is to be fixed in relation to premises and not in relation to persons, and can, therefore, be only one and not varying as between different individuals. **B CHAPSI UMERSI v. KESHAVJI DAMJI**, 23 Bom. L. R. 133 **960**

**s. 9**, applicability of, to land acquired under the Land Acquisition Act. See **LAND ACQUISITION ACT (I of 1894)**, ss. 16, 31, 47 **571**  
**Broker**, when entitled to commission—*Brokerage, contract to pay, whether immoral or opposed to public policy—Contract Act (IX of 1872), s. 23.*

A broker is ordinarily entitled to his brokerage when he has succeeded in bringing about a sale; he is also entitled to his brokerage if he so far succeeds as to bring about an agreement to sell and the sale then falls through because the intending purchaser backs out.

A contract to pay brokerage is neither immoral nor opposed to public policy. **L KISHEN CHAND v. KHUDA BAKSH** **727**

**Buddhist Law, Burmese—Succession—**  
*Step-father and step-children—Share of step-child in property jointly acquired by mother and step-*

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*father and property inherited by father during marriage with mother.*

As regards the jointly acquired property of the marriage between the mother and step-father of a child, where there are no children of that marriage and no children of the step-father by any other marriage, the share of the step-child is one-fourth. The same rule applies to property inherited by the step-father during his marriage with the mother of the step-child.

The fact that the step-father has married another wife does not deprive a step-child of his share in the property.

A step-child, however, has no interest in property acquired by the step-father jointly with a later wife. **U B MA NYEIN v. MA THA GAUNG**, 3 U. B. R. (1920) 237 **7**

**Burma Towns Act (III of 1907), ss. 7 (1) (k), (l), 9 (2)**—*Headman, duties of, whether include conveyance of dak—Refusal to assist headman—Offence.*

It is no part of the ordinary duty of a ward headman to provide coolies to take out a Deputy Commissioner's letters from his headquarters.

Therefore, where a person residing within a ward is requested by the headman to convey letters to the Deputy Commissioner's camp and he fails to do so, he is not guilty of an offence under section 9 (2) of the Burma Towns Act. **U B EMPEROR v. NGA PO SIN**, 3 U. B. R. (1920) 234; 22 Cr. L. J. 207 **63**

**Calcutta High Court Original Side Rules, Ch. XIII, r. 49**—*Originating summons—Indenture of lease, construction of—Procedure.*

By an indenture of lease certain premises were demised to plaintiff for five years on certain terms and conditions, one of which was that plaintiff would not assign the premises without the consent of the defendant, but that such consent should not be unreasonably withheld provided plaintiff remained responsible under the lease. Plaintiff applied to defendant for his consent to assign his interest for the residue of the term mentioned to a Limited Company, but defendant refused. Plaintiff then applied to the High Court on an originating summons for the determination of the question whether, upon the true construction of the indenture, he was entitled to assign the remainder of the term under the lease without the consent of the defendant. Defendant objected to the determination of the question on the ground that the plaintiff should proceed by means of a regular suit:

Held, that, under Chapter XIII, rule 9 of the Rules of the High Court, the procedure adopted by the plaintiff was correct, and that, on a proper construction of the indenture, plaintiff was entitled to assign the remainder of the term of the lease without the consent of the defendant. **C DUCASSE v. COHEN**, 24 C. W. N. 1007; 43 C. 176 **105**

**Central Provinces Land Alienation Act (II of 1916), s. 16 (1)**, scope and meaning of.

The plain meaning of section 16 of the Central Provinces Land Alienation Act is that a sale shall not be held in execution of a decree or order if that decree or order is passed or made after a certain



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date, but that it can be held if the decree or order is prior to that date, whether the application for execution is prior or subsequent to that date.

The word "made" used in the section qualifies the words "decree or order" and not the word "execution." **N INDAL BAPU v. MOHAMMAD ALI** 545

**Chota Nagpur Tenancy Act (VI E. C. of 1908), ss. 217, 227, 228—**

*Rent suit—Decree ex parte—Application to set aside decree, dismissal of—Application for restoration, dismissal of—Appeal, whether lies—Revision—High Court, interference by.*

A rent suit was tried by a Deputy Collector exercising the powers of a Deputy Commissioner under the Chota Nagpur Tenancy Act and was decreed *ex parte*. The defendant's application to set aside the *ex parte* decree was dismissed in default, and a further application for restoration of the previous application was also dismissed. He then filed an appeal to the Deputy Commissioner who set aside the *ex parte* decree and remanded the suit for re-trial:

*Held*, (1) that there was no provision in the Chota Nagpur Tenancy Act for restoration of an application to set aside an *ex parte* decree which had been dismissed for default, and that, therefore, the second application made by the defendant to the Deputy Collector was incompetent;

(2) that no appeal lay to the Deputy Commissioner against the order dismissing that application;

(3) that the Deputy Commissioner's order setting aside the *ex parte* decree was, therefore, without jurisdiction;

(4) that the Deputy Commissioner having acted without jurisdiction, his order could not be revised by the Revenue Authorities under section 217 of the Chota Nagpur Tenancy Act;

(5) that, therefore, the High Court had jurisdiction to revise the order, which, being without jurisdiction, must be set aside. **PAT MUNSHI LAL CHODHRY v. NIDHI RAM DUTTA**, 3 U. P. L. R. (PAT.) 13 175

**Civil Procedure Code (Act XIV of 1882), s. 315—Civil Procedure Code (Act V of 1908), O. XXI, r. 93—Auction-sale held under Act of 1882—Declaration of absence of saleable interest in judgment-debtor after enactment of new Code—Right of purchaser to refund of purchase-money.**

A purchaser at a Court sale held while Act XIV of 1882 was in force has the right to claim refund of the purchase-money by suit where it is afterwards declared that the judgment-debtor had no saleable interest in the property even though the declaration is made after the enactment of the new Civil Procedure Code of 1908. **VI ALAM ISHAK SAHIB v. VENGU CHETTY**, (1920) M. W. N. 73; 12 L. W. 639 66

**Civil Procedure Code (Act V of 1908), ss. 2, 97—Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 2, 13—Is party plaintiff agriculturist, whether plaintiff or defendant—Appeal, whether lies.**

A finding that a party is an agriculturist is not by itself an adjudication which can be embodied in a decree and is not appealable, though it may result in

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the plaint being returned for presentation in the proper Court. Therefore, a Judge should never accede to an application to draw up in the form of a decree a finding on the question whether a party is an agriculturist or not. **B DATTATRAYA PURSHOTAM PARNEKAR v. RADHABAI BALKRISHNA TRIMBAK**, 23 Bom. L. R. 92; 45 B. 627 885

**S. 2 (2), O. I, r. 8, O. XXII, r. 4—Representative suit—Some plaintiffs suing on behalf of all—Suit decreed—Appeal—Death of respondents, other than representatives—Failure to bring legal representatives on record—Appeal, whether abates—Order declaring abatement, whether decree—Appeal, whether lies**

Where a suit is brought by certain persons in a representative capacity under Order I, rule 8 of the Civil Procedure Code, the persons on whose behalf the suit is brought are not parties to it, and if, during the pendency of an appeal in such a suit, the suit having been decreed, some of these persons die, it is not necessary to bring their legal representatives on the record, and failure to do so does not involve the abatement of the appeal.

An order declaring the abatement of an appeal on the ground that the legal representatives of certain deceased respondents have not been brought on the record is a decree and is appealable as such. **L UDMI v. HIRA**, 1 L. 582 111

**SS. 4, 98. See LETTERS PATENT (BOM.), CL. 15 822**

**S. 9, O. XIV, r. (5)—Declaration of right to be carried in procession, suit for, whether maintainable—Civil Court, whether competent to decide purely religious disputes—Issues—Issue inconsistent with plaintiff's case.**

Plaintiff sued for a declaration that he, as Jagadguru, was entitled to be carried in procession through the public streets in a cross-palanquin on certain occasions, and for an injunction restraining the defendant from obstructing him in the exercise of that right:

*Held*, that the suit was not maintainable.

To decide disputes as to precedence or privilege between purely religious functionaries is no part of the business of the Civil Courts.

An issue, which is inconsistent with the case made out by the plaintiff, ought not to be admitted. **B ANDANISWAMI v. TOTADSWAMI**, 23 Bom. L. R. 75; 45 B. 590 907

**S. 11—Res judicata—Previous suit, finding in—Finding, whether necessary for basis of decree—Insertion of finding in decree, effect of—Ejectment, suit for—Finding that parties were mortgagor and mortgagee, whether operates as res judicata in subsequent suit for redemption.**

In order that a finding on a particular issue in a previous suit may operate as *res judicata* in a subsequent suit, it is not necessary that that finding should form the basis of the decree in that suit, but the insertion of the finding in the decree or its omission therefrom, as also its bearing on the general result of the suit, naturally form elements in considering whether the matter has been directly and substantially in issue in the previous suit.

In a previous suit the plaintiff sued the defendant in ejectment as trespassers and the latter pleaded

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that neither the plaintiff nor his predecessors-in-title were owners of the property and that the defendants were usufructuary mortgagees from some third persons who were the real owners. Both the Trial and Appellate Courts found against the defendants' plea but dismissed the plaintiff's suit on the finding that the mortgage to defendants was by the plaintiff's predecessors and an action in ejectment was not maintainable. In the present suit for redemption of the mortgage the defendants controverted the plaintiff's title, pleading that the finding in the prior suit that they were mortgagees from the plaintiff's predecessor was not *res judicata*:

*Held*, that though the finding was not the basis of the decree, as the question of title was directly and substantially in issue, the finding operated as *res judicata* in the present suit. **M MUTHU PILLAI v. VEDA VYSA CHARIAR**, 12 L. W. 277 **397**

— **s. 11**—*Res judicata*—Suit against defendant in representative capacity—Defendant asserting personal rights—Suit decreed—Subsequent suit by defendant in personal capacity for same rights—Suit, whether maintainable.

It was sued as trustee and manager of an idol, in respect of the income of certain property of the endowment, he did not defend the suit in his fiduciary character but asserted his own personal rights to the property and was unsuccessful. He then brought the present suit and his claim was precisely the same as his defence in the previous suit:

*Held*, that the suit was not maintainable and was barred under section 11 of the Civil Procedure Code, **A RAM KARAN v. RAM NARAINJI** **74**

— **ss. 11, 105, O. IX, r. 13**—*Ex parte decree, application to set aside—Order dismissing application—Appeal from decree—Jurisdiction of Appellate Court to decide on merits of order refusing to set aside ex parte decree.*

Where an application to set aside an *ex parte* decree has been rejected under Order IX, rule 13, Civil Procedure Code, it is not open to the defendant to have the question re-agitated in the appeal from the decree itself, and such a right is not given by section 105 of the Code. **M BADIYEL CHINNA ABETHU v. VATTIPALLI KESAVAYYA**, 12 L. W. 507; (1920) M. W. N. 780; 31 M. L. J. 697; 29 M. L. T. 63 **215**

— **s. 11, O. VII, rr. 11, 13**—*Rejection of plaint—Finding on question of law or fact given after a full trial on merits—Subsequent suit for same subject-matter on same cause of action—Res judicata*

Where a Court passes an order rejecting a plaint after a full trial on the merits and recording a finding adversely to the plaintiff, a subsequent suit for the same subject-matter and based on the same cause of action will be barred as *res judicata*.

Under a *razinama* P. and D. had to pay in equal shares maintenance to M. annually. P. paid the whole of the maintenance for two years and brought a suit to recover from D. his share. The Appellate Court held that as the *razinama* did not contain any term giving P. the right to sue D. for contribution when the latter failed to pay his share, P. had no legal right to recover and rejected the plaint as disclosing no cause of action. P. then brought the present suit on the same cause of action and for the same subject-matter:

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*Held*, that the finding in the previous suit operated as *res judicata* to bar the present suit. **M SANTHANATHAMMAL v. ISAKI SUPPAN ASARI**, (1920) M. W. N. 616; 12 L. W. 457 **694**

— **s. 11, O. IX, rr. 8, 9**, *effect of, as res judicata—Declaration, suit for, dismissal of—Possession, suit for, whether maintainable—Cause of action.*

Where a suit is dismissed for default under rule 8 of Order IX of the Civil Procedure Code, rule 9 of that Order has not the effect of *res judicata* on a subsequent suit, because there was no adjudication on any of the issues in the former suit: the rule merely bars a second suit on the same cause of action.

Where a suit for a declaration that an alienation in favour of the defendant was invalid was dismissed for default and the plaintiff subsequently brought a suit for partition and separate possession of his share:

*Held*, that the causes of action for the two suits were different though the title alleged was the same and the second suit was not barred by reason of the dismissal of the first suit under Order IX, rule 9, Civil Procedure Code. **M ASIA BIVI v. SEHU MOHAMED ROWTHER**, 39 M. L. J. 42; 12 L. W. 431 **201**

— **s. 11, Expl. IV**, *applicability of.*

Before any argument can be advanced on the language employed in Explanation (IV) of section 11 of the Civil Procedure Code, it must be established to the satisfaction of the Court that the matter which is sought to be concluded on the principle of *res judicata* not only might have been made a ground of defence or attack in such former suit, but further that it ought to have been so made.

Where the evidence in support of one ground is such as might be destructive of the other ground, the two grounds need not be set up in the same suit. **PAT RAMAN CHOUBEY v. BACHA MISIR**, 2 P. L. T. 285 **393**

— **s. 11, Expl. IV, O. II, r. 2**—*Mortgages, several—Successive suits by mortgagee, whether competent—Causes of action, distinct—Procedure.*

Where two distinct mortgages are successively executed by the same debtor in respect of the same property and in favour of the same creditor, the causes of action on the two mortgages are distinct, and, although it is open to the mortgagee in bringing a suit upon the first mortgage to include the claim on the second mortgage, that course is not obligatory upon him. A subsequent suit, therefore, on the second mortgage is not barred either under Explanation IV to section 11 or under Order II, rule 2 of the Civil Procedure Code.

There is nothing in the Code of Civil Procedure or in the Transfer of Property Act to prevent the holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit, subject, however, to this reservation that he cannot sell the property twice over, nor sell it under the second decree subject to the first. **C NILU ROY v. ASIRBAD MANDAL**, 38 C. L. J. 252; 15 C. W. N. 123 **809**

## Civil Procedure Code—contd.

— **ss. 20, 115**—*Jurisdiction—Sale of goods—Suit for damages—Place of suing—Interlocutory order—Revision, whether lies.*

Plaintiff residing at *M* ordered certain goods from defendant who carried on business at *S*. Plaintiff sued defendant at *M* for damages on the allegation that the goods supplied were short in quantity and inferior in quality. Defendant objected that the cause of action having arisen at *S*; the Court at *M* had no jurisdiction to hear the suit. This objection was overruled. On revision:

*Held*, (1) that the cause of action arose at *S*, and that, therefore, the Court at *M* had no jurisdiction to hear the suit:

(2) that the High Court had jurisdiction in revision to set aside an interlocutory order, and that that jurisdiction ought to be exercised in this case. **L** HAR PARSHAD-DALIP SINGH v. SEWA RAM-JADO RAI

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— **s. 35.** See AMENDMENT OF DECREE 345

— **s. 47**—*Execution of decree—Claim proceedings—Objections dismissed for default—Decree fully satisfied—Declaratory suit, whether maintainable.*

Two out of four representatives of a judgment-debtor filed objections to the sale of a house in execution of the decree. These objections were dismissed for default and the decree having been fully satisfied the file was consigned to the record-room. Subsequently, all the representatives of the judgment-debtor brought a suit for a declaration that the house belonged to them and was not liable to sale in execution of the decree:

*Held*, that section 47 of the Civil Procedure Code was no bar to the suit inasmuch as,—

(a) the decree having been fully satisfied the execution Court had become *functus officio*.

(b) the objections had been filed only by two out of the four plaintiffs. **L** NIZAM DIN v. BHAGAT

RAM

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— **s. 48**—*Evasion of arrest, whether fraudulent prevention of execution—Limitation, fresh starting period of.*

The wilful evasion by a judgment-debtor of arrest under a warrant taken out by the decree-holder, in order to avoid payment of the decree-amount, amounts to fraud within the meaning of section 48 of the Civil Procedure Code so as to give a fresh starting period of limitation, and is a fraudulent prevention of the execution of decree within the meaning of clause (2) of that section. **M** AYYAVU v. SOMA SUNDARAM CHETTIAR, 12 L. W. 710; (1920) M. W. N. 788

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— **s. 48**—*Execution of decree—Amendment of decree—Limitation, commencement of.*

Where a decree is amended, the date of amendment is the date of the decree within the meaning of section 48 of the Civil Procedure Code. **PAT** BALDEO SHUKUL v. YUSUF

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— **s. 64**—*Mortgage—Attachment subsequent to mortgage—Sale—Mortgage, whether enforceable against auction-purchaser.*

On 9th June 1912 certain property was attached in execution of a decree by *K*. On 14th February 1913, *L*, another decree-holder, applied for execution by rateable distribution. On the 25th March 1913, the property was sold. On 2nd April 1913 *K* and the

## Civil Procedure Code—contd.

judgment-debtor applied to have the sale set aside on the ground that *K*'s decree had been satisfied out of Court, but the application was disallowed. The auction-purchaser having failed to complete the deposit of the purchase-money, the sale was set aside on the 24th May 1913. On the 26th May 1913 the judgment-debtors mortgaged the property to *B*. On 20th June 1913 *L* attached the property and it was sold to *P*, who, on 12th February 1914, sold it to the present defendant. *B* brought the present suit to enforce his mortgage against *P*, who asserted that, as against him the mortgage was void:

*Held*, that as *P*'s right was a right enforceable under *L*'s attachment of the 20th June 1913, and as this attachment was subsequent to the mortgage to *B*, the mortgage was enforceable against him. **A** BOHRA BHUPAL v. KUNDAN LAL, 19 A. L. J. 221; 3 U. P. L. R. (A.) 25

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— **s. 73**—*Money deposited in Court to credit of judgment-debtor—Subsequent attachment—Rateable distribution.*

Where money is deposited in Court to the credit of a judgment-debtor before any decree-holder applies in execution to have it paid in satisfaction of his decree, it is liable to rateable distribution among decree-holders who apply for execution either before or after the receipt of the money by the Court. **M** VISVANADHAN CHETTI v. ARUNACHALAM CHETTI, 39 M. L. J. 608; 12 L. W. 744; 28 M. L. T. 412; (1921) M. W. N. 14; 44 M. 100

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— **ss. 73, 115**—*Rateable distribution, order disallowing—Revision, whether lies.*

The High Court will not interfere on revision with orders allowing or disallowing claims to rateable distribution, save in exceptional circumstances. **L** BHAGAT RAM-KALYAN DAS v. MANGAT RAM-SHIBRU RAM

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— **s. 92**—*Collector, duty of—Failure of Collector to consider matters indicated in section—Sanction, validity of.*

Although it is desirable that a Collector, before granting sanction for a suit under section 92 of the Civil Procedure Code, should consider whether the trust is a public trust, whether there are *prima facie* grounds for holding that there has been a breach of such trust and whether the persons suing are persons who have an interest in the trust, yet his failure to consider these matters, does not in any way invalidate a sanction granted by him. **L** MUHAMMAD SHAFI v. ABDUL RAHIM

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— **s. 92**—*Suit by pujari of temple to establish right to share in offerings, nature of—Scheme framed—Suit, whether maintainable—Procedure, proper.*

A suit by a hereditary pujari of a temple to establish his right to a certain share in the offerings made to the deity, which are *prima facie* temple property, falls under clause (c) of sub-section (1) of section 92 of the Civil Procedure Code. Where a scheme has already been framed in respect of the temple properties, such a suit is not maintainable, and the proper procedure is, to apply to the Court, which framed the scheme, to give directions as to the application of this particular fund. **B** SAKHARAM DASI GANPULE v. GANI RAGHU GUPTA, 23 Bom. L. R. 125, 45 B. 651

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— **s. 100 (c)**—*Defective procedure, what amounts to—Defendant not appearing before Commissioner, whether can object to Commissioner's report.*

The procedure of a Court is substantially defective within the meaning of clause (c) of section 100 of the Civil Procedure Code, if (a) it rejects the report of a Commissioner without affording him an opportunity to meet objections raised by a defendant who neither appeared nor placed the objections before him for consideration; (b) if it permits documentary evidence to be considered piecemeal by two different Commissioners, and (c) if it places reliance upon a sketch map when it is possible to prepare a scientific map.

A defendant who fails to appear before a Commissioner cannot ordinarily object to his report. **C KAMINI KESHORE SEN v. PARBARTYA TIPPERAH RAJ**

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— **s. 102, O. XLIII, r. 1 (w), O. XLVII, r. 7**—*Small Cause suit of value below Rs. 500—Decree passed on review—Appeal, whether lies.*

The appeal allowed under Order XLIII, rule 1 (w) of the Civil Procedure Code is an appeal from the order granting the application for review and not an appeal from the final decree passed in the suit, such an appeal must be limited to the grounds mentioned in rule 7 of Order XLVII of the Code.

It would be absurd to allow a second appeal on the merits against a decree passed in a small cause suit of value less than Rs. 500 merely because the decree is one which has been passed on review. **L KANSHI RAM v. KARAM NARAIN**

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— **ss. 104, 117, 120, 121, 122, 128, 129, O. XLI, r. 10, O. XLIX, r. 3**—*Letters Patent (Cal), cl. 15—Letters Patent Appeal from decree on Original Side—Rules applicable—Failure to furnish security, effect of—O. XLI, r. 10, whether mandatory.*

The Code of Civil Procedure, 1908, is framed on the scheme of providing generally for the mode in which the High Courts are to exercise their jurisdiction, whatever it may be, while specifically excepting the powers relating to the exercise of Original Civil Jurisdiction, to which the Code is not to apply. It confers a general rule-making power saving only what is excepted in the body of the Code.

The Orders and rules made under the Code apply to the High Courts, unless the body of the Code contains something inconsistent with them. They are applicable to the jurisdiction exercisable under the Letters Patent, except that they do not restrict the express Letters Patent Appeal.

There is a distinction between rules which take away existing rights of appeal and rules which recognise those rights but regulate the procedure of the Court in which such appeals are pending. This distinction has been overlooked in *Sabhapathi Chetti v. Narayansami Chetti*, 25 M. 555; 11 M. L. J. 346 and in *Sesha Ayyar v. Nagarathna Lala*, 27 M. 121 at p. 123.

Order XLI, rule 10, applies to appeals brought under the Letters Patent. The words of that rule, directing the Court to reject an appeal when an order for security for costs is made and is not complied with during the period fixed, are mandatory and not

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permissive. **P C SABITRI THAKURAIN v. SAVI**, 40 M. L. J. 208; (1921) M. W. N. 169; 19 A. L. J. 281; 48 I. A. 76; 33 C. L. J. 307; 25 C. W. N. 57; 23 Bom. L. R. 681

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— **s. 104 (1) (f), Sch. II, paras. 19, 21**—*Arbitration by intervention of Court—Award—Appeal against order filing award, whether lies.*

Section 104 (1) (f) of the Civil Procedure Code provides for an appeal against an order filing or refusing to file an award in an arbitration without the intervention of the Court, and applies to an award filed under paragraph 21 of Schedule II to the Code. No appeal lies against an order filing an award made in pursuance of an order of reference made by the Court and filed under paragraph 19 of the Second Schedule to the Code. **L TEHLA MAL v. DHANA MAL**

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— **s. 105 (2), O. XLI, rr. 23, 25, 26**—*Appeal, second—Remand by Single Judge under r. 23—Remand order, no appeal against—Order, correctness of, whether can be questioned at later stage—Remand under r. 25—Appeal coming before different Judge or Bench—Order, whether binding.*

Where in a second appeal a party submits to an order of remand made by a Single Judge of a High Court, under Order XLI, rule 23, Civil Procedure Code, from which an appeal lies he cannot dispute its correctness at a later stage of the appeal.

Where, however, a Judge of a High Court has remitted issues under Order XLI, rule 25, of the Civil Procedure Code, and the appeal subsequently comes up for disposal before another Judge, or Bench of the Court differently constituted, the Bench which is seized of the appeal, and on which the law casts the burden of finally disposing of the same is not bound by the order remitting the issues, and may consider whether the order was a proper one, and, if it comes to the conclusion that it is not, it can ignore the findings on the remanded issues and any evidence which may have been taken after the order remitting the said issues. **A MASIHUNISSA v. KANIZ SUGHRA**, 19 A. L. J. 139; 8 U. P. L. R. (A.) 30

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— **s. 109**—*Appeal to Privy Council—Certificate must show clearly upon what ground it is based.*

Where a certificate is granted under section 109 (a) of the Code of Civil Procedure, it should appear on its face that the discretion conferred by that section has in fact been exercised. **P C RADHAKRISHNA AYYAR v. SWAMINATHA AYYAR**, 19 A. L. J. 161; 47 M. L. J. 229; 13 L. W. 321; (1921) M. W. N. 119; 33 C. L. J. 277; 25 C. W. N. 633; 44 M. 293; 23 Bom. L. R. 718

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— **s. 109**—*Final order, what is—Order deciding competency of person to apply for Probate, whether final.*

An order is final within the meaning of section 109 of the Civil Procedure Code if it finally disposes of the rights of the parties.

An order which merely decides that an incorporated body is a juridical person legally competent to discharge the functions of an executor and as such to apply for Probate, but which leaves outstanding the question whether, being competent to apply, it

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is entitled to grant of Probate is not a final order within the meaning of section 109 of the Civil Procedure Code. **O SRI KRISHNA DAS v. BENARES HINDU UNIVERSITY**, 23 O. C. 324 **208**

— **s. 109**—Partition suit—Preliminary decree—Dismissal of suit for plaintiff's default—Order setting aside dismissal, whether final order.

An order of the High Court setting aside an order of a Subordinate Court dismissing a partition suit for the plaintiff's default after a preliminary decree in the suit has been passed is a final order within the meaning of section 109 of the Civil Procedure Code. **PAT LACHMI NARAIN v. BAL MOKUND**, 2 P. L. T. 155; 6 P. L. J. 116 **479**

— **s. 103, O. XLI, r. 23**—Remand, order of, whether final order—Appeal to Privy Council, whether permissible.

An order of remand is ordinarily not capable of being the subject of an appeal to His Majesty in Council, being interlocutory and not final within the meaning of section 109 of the Civil Procedure Code. It can only be regarded as a final order and capable of appeal, if it has the effect of finally deciding some cardinal point in the suit.

An order of remand which merely decides that a suit is maintainable in the form in which it is brought, is not a final order. **L MEHR CHAND v. LABHU RAM**, 2 L. 106 **522**

— **s. 110**—Appeal to His Majesty in Council—Partition suit—Value of subject-matter, how to be determined.

Where a decree in a partition suit affects not only the share of the plaintiff in certain property but also the shares of those of the defendants who would be entitled to share in the property if the plaintiff's suit were decreed, the value of the subject-matter of the suit, within the meaning of section 110 of the Civil Procedure Code, is the value of the property in dispute and not the value of the share claimed by the plaintiff in the property. **PAT KULDIP NARAIN SINGH v. RAGHUNANDAN SINGH** **844**

— **s. 110**—Defendant who has taken no interest in suit, whether entitled to appeal to Privy Council.

A defendant who leaves the entire conduct of the case in the hands of his co-defendants and fails to take any interest in the proceedings is not entitled to prefer a separate appeal to His Majesty in Council. **PAT NIBARAN CHANDRA v. PRATAP UDAI NATH SAHI DEO**, 2 P. L. T. 173 (1921) Pat. 129 **500**

— **s. 110**—Value of subject-matter of suit, what is—Amount due at date of decree—Principal and interest taken together in calculating amount.

The amount or value of the subject-matter of the suit must, within the meaning of section 110 of the Civil Procedure Code, be taken to be the amount or value which the plaintiff either obtained or, had he been successful, would have obtained in his suit at the date when the decree was passed. **PAT MATHURA PRASAD SINGH v. RAM PRASAD TEWARY**, 2 P. L. T. 840 **523**

— **ss. 110, 122, 123**, applicability of—Patna High Court, rules of, *ultra vires*.

The provisions of sections 122 and 123 of the Civil Procedure Code have no application to the Patna High Court, and the fact that the same were by the High Court were not submitted to any Rule Com-

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mittee and that no Rule Committee is in existence in Patna would not make those rules *ultra vires*. **PAT RAJENDRA KISHORE v. KAMAKHYA NARAIN SINGH**, 5 P. L. J. 719; 2 P. L. T. 112; (1921) Pat. 97 **255**

— **s. 114, O. IX, r. 9, O. XLI, r. 19, O. XLVII**—Appeal, dismissal of, in default—Order restoring appeal, propriety of, whether can be questioned—Procedure—Sufficient cause, what is.

The propriety of an *ex parte* order setting aside an order dismissing an appeal for default, may be questioned at the hearing of the appeal, and is open to re-consideration at the instance of the party aggrieved.

Where an appeal is dismissed owing to the default of the appellant in depositing the sum required to defray the cost of serving notices, the order of dismissal should not be set aside except for just and reasonable cause sufficient to meet the provisions of Order IX, rule 9 or Order XLI, rule 19 of the Civil Procedure Code. The fact that the default was due to the misconduct, or neglect of duty on the part of the agent of the appellant, even though a *pardah-nashin* lady, would not be sufficient cause. **S JANAT v. KAMILSHAH**, 114 S. L. R. 239 **948**

— **s. 115**. See CIVIL PROCEDURE CODE, s. 195 **800**

— **s. 115**—Estoppel, omission to consider question of—Material irregularity

The omission by an Appellate Court to consider the question of estoppel amounts to a material irregularity, justifying interference in revision. **L TEJ BHAN v. WALI DAD** **716**

— **s. 115**—Revision—Material irregularity.

Applied to set aside an execution sale on the ground of fraudulent suppression of process and other irregularities, the Court rejected the application merely upon the deposition of the applicant and without considering all other evidence which he was prepared to give as regards the suppression of processes and other irregularities of which he complained:

Held, that the Court acted with material irregularity in the exercise of its jurisdiction. **C BHUSHAN-MANI DAS v. PRAFULLA KRISHNA DEB**, 48 C. 119 **801**

— **s. 115, O. XXIII, r. 1**—Withdrawal of suit not permitted by Trial Court—Permission granted by Appellate Court—Revision—Discretion, use of judicial—High Court, whether will interfere. The High Court will not interfere in revision in a case in which the lower Court has exercised a judicial discretion in a proper manner.

Plaintiff applied to the Trial Court for permission to withdraw his suit with liberty to bring a fresh suit; the application was disallowed and the suit eventually dismissed. On appeal, the application was renewed, and was allowed on the ground, among others, that there was a formal defect in the frame of the suit.

Held, that as there was an undoubted exercise of judicial discretion by the Appellate Court the High Court would not interfere. **A RAJAN v. MUHAMMAD HAMIDULLAH KHAN**, 2 U. P. L. R. (A) 408; 19 A. L. J. 47 **899**

— **s. 115, Sch. II, para. 15**—Arbitration—Order of reference—Objection to validity of reference—Revision—Material irregularity.

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After an order of reference to arbitration, it is too late for either party to object to the form of the proceedings anterior to the reference or to the form of the issues.

Where after the submission of an award the Court reverses the order of reference to arbitration and sets aside the award on the sole ground of some supposed defect in the order of reference, it acts with material irregularity in the exercise of its jurisdiction within the meaning of section 115 of the Civil Procedure Code. **A KANHIA LAL v. JAGANNATH PERSHAD-HANUMAN PERSHAD**, 19 A. L. J. 33; 43 A. 305. **857**

**ss. 141, 151—Execution proceedings—**  
*Procedure applicable—Application for execution, dismissal of, for default—Court, whether has power to restore application—Inherent power.*

The provisions of section 141 of the Civil Procedure Code are not applicable to an application for execution.

Proceedings for execution of a decree fall, however, within the ambit of section 151 of the Civil Procedure Code, and, if a decree-holder whose application for execution has been dismissed for default, can satisfy the Court that it should exercise its inherent jurisdiction *ex debito justitiæ* to restore the application there is nothing in the law to debar the Court from exercising that inherent power. **L BHOLU v. RAM LAL**, 2 L. 66. **720**

**s. 145, O. XXI, r. 43—Execution of decree—Attachment—Property entrusted to stranger—Bond with sureties—Failure to produce property—Decree-holder, remedy of.**

Where in execution of a decree attached property is made over to a person for safe custody and production in Court on his executing a bond with sureties, it is not open to the decree-holder, on failure of the production of the property, to enforce the bond against the sureties; his remedy is to get the bond assigned by the Judge to himself and sue upon it. **M RAJAH OF VENKATAGIRI v. SUPRA KRISHNA REDDI**, 12 L. W. 329; 39 M. L. J. 472; (1920) M. W. N. 754. **134**

**s. 143—Extension of time for payment of deficit Court-fee, when to be allowed.**

In order to enable a party to take advantage of the provisions of section 149 of the Civil Procedure Code, permission to deposit the deficit Court-fee must be given by the Court after considering the circumstances of the case and the reason for not filing the entire Court-fee in the first instance. **PAT FARZAND ALI v. ABDUL HAMID**. **493**

**ss. 151, 152, O. XXXIV, r. 6—**  
*Mortgage-decree—Personal decree against persons not mortgagors—Inherent power of Court to set aside decree.*

A Court has inherent power to set aside an *ex parte* decree, passed by oversight under Order XXXIV, rule 6, of the Civil Procedure Code, as against a person who is not the mortgagor. **PAT HANUMAN LAL v. RAM PEARI KOER**, 2 P. L. T. 251. **368**

**s. 151, O. XLI, r. 19—Limitation Act (IX of 1908), s. 6, Sch. I, Art. 168—Appeal dismissed for default—Application for restoration—Limitation—Minor appellant—Inherent power of Court, exercise of.**

**Civil Procedure Code—contd.**

A minor appellant, whose appeal has been dismissed in default, cannot take advantage of section 6 of the Limitation Act for making an application for restoration of the appeal.

Order XLI, rule 19 of the Civil Procedure Code does not exhaust the powers of an Appellate Court to re-admit an appeal dismissed for default.

In a proper case, it is open to the Court to make an order re-admitting an appeal dismissed for default in the exercise of its inherent powers for the ends of justice. This power should, however, be sparingly used and only when a clear case is made out, but the power is exercisable without any reference to the period of limitation provided for an application to re-admit an appeal or any other proceeding.

Where the next friend of a minor appellant is of unsound mind, the absence of the minor at the date of the hearing of the appeal cannot be treated as default.

An order dismissing the minor's appeal for default in these circumstances would be set aside in the exercise of the inherent powers of the Courts. **B SONBAI BABURAO v. SHIVAJIRAO KRISHNARAO**, 28 Bom. L. R. 110; 45 B. 648. **919**

**O. I, r. 8—Suit by one inhabitant of village for declaration of right of way on behalf of himself and other inhabitants—Leave of Court not obtained, nor proclamation issued—Suit, whether maintainable—Easement—Right of driving cattle over another's land, whether can be acquired by prescription.**

Where a plaintiff sues for a declaration for himself and other inhabitants of a village of their right to take their cattle to a certain grazing ground through the jungle of another village, he is not entitled to the declaration, unless the leave of the Court has been obtained and a proclamation issued, as required by Order I, rule 8 of the Civil Procedure Code.

A right to drive cattle promiscuously across the lands of another is not an easement capable of being acquired, no matter for what length of time the right may have been enjoyed. **A LAL BHADUR v. KAMESHWAR DAYAL**, 19 A. L. J. 126; 43 A. 345. **990**

**O. I, r. 10—Partition, suit for, of moveables and immoveables—Suit, withdrawal of, in respect of moveables, effect of—Court, power of, to transpose parties.**

Where in a suit for partition of immovable and moveable property a preliminary decree is passed in respect of the immovable property and the plaintiff withdraws his claim with regard to the moveables, such withdrawal has not the effect of bringing the suit to an end, and the Court has power to transpose parties under Order I, rule 10 of the Civil Procedure Code and to continue the suit. **M SURAMPALLI RAMAMURTHI v. SURAMPALI REDDY**, 12 L. W. 563. **144**

**O. I, r. 10 (2). See MADRAS ESTATES LAND ACT, s. 5; 316**

**O. II, r. 2, applicability of—Test—“Cause of action”, meaning of.**

There is nothing in Order II, rule 2 of the Civil Procedure Code to compel a plaintiff to include in



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one and the same action different causes of action even though they arise from the same transaction.

The test is this: If the plaintiff, on the allegations made in the plaint, is entitled to make a claim which he does not put forward in his suit he shall not be allowed in a subsequent suit to put forward that claim. To allow him to do that would be to permit him to split his cause of action; but if, on the allegations made in the plaint, he was not entitled to put forward a claim, there is nothing in Order II, rule 2, which prohibits him from putting forward that claim in a subsequent litigation.

The expression 'cause of action' means every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court.

The expression refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour.

**Pat HARDEO SINGH v. BHAWANI SAHAI, (1921) PAT. 126**

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— **O. II, r. 2**—Suit to recover immoveable property—Subsequent suit for mesne profits, whether barred.

Inasmuch as a claim for mesne profits is based on a cause of action distinct from a claim for the recovery of immoveable property, Order II, rule 2 of the Civil Procedure Code will not operate to bar a suit for mesne profits brought subsequently to a suit for possession. **A MIYAN KHAN v. SARFARAZ KHAN**

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— **O. V, r. 1, O. IX, r. 3**—Date fixed for plaintiff to appear and find out date of hearing—Failure of plaintiff to appear—Suit, whether can be dismissed for default.

Where no date has as yet been fixed for the appearance of the defendant within the meaning of Order V, rule 1 of the Civil Procedure Code, the Court has no power to dismiss the suit for default under Order IX, rule 3 of the Code.

The failure of a plaintiff to appear on a date fixed for him to attend and find out what date has been fixed for the appearance of the defendant does not empower the Court to dismiss the suit for default. In such a case the Court should, notwithstanding the default of the plaintiff, fix a date for the appearance of the defendant and if, on the date so fixed, the plaintiff does not appear it can dismiss the suit under Order IX, rule 3. **L INDAR SINGH v. SHERU, 22 P. W. R. 1921**

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— **O. VI, rr. 17, 18**—Amendment of plaint—Plaintiff, failure of, to amend, effect of—Suit, whether can be dismissed.

Order VI, rule 17 of the Civil Procedure Code only provides that the Court may allow an amendment, and if the party to whom the permission is given does not avail himself of it, the only consequence is that, under Order VI, rule 18, he cannot amend his pleading afterwards unless the time allowed for amendment is extended by the Court.

Therefore, where a plaintiff fails to amend his plaint when directed to do so, the Court has no power, merely on this account, to dismiss the suit. **L TOMLINSON v. GORAN**

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— **O. VII, r. 6**, scope of—Limitation, ground of exemption from law of, stated in plaint—

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Another ground, whether can be subsequently relied on.

The provisions of Order VII, rule 6, of the Civil Procedure Code should be construed in a reasonable and liberal spirit and where the plaint in a suit does not state the ground of exemption from the law of limitation, the Court should, save in very exceptional circumstances, allow the plaintiff to amend his plaint by adding the ground of exemption.

Where a ground of exemption from the law of limitation is stated in the plaint, the requirements of Order VII, rule 6, are satisfied, but this does not preclude the plaintiff from taking another ground to get over the bar of limitation, if he believes that the latter is the true ground. **L PARMESHRI DAS v. FAKIRIA, 2 L. 13**

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— **O. VII, rr. 14, 18**—Scope and object of rules—Document not produced along with plaint, whether can be relied on subsequently.

The object of rule 14 of Order VII of the Civil Procedure Code is to shut out suspicious documents and to afford as little opportunity as possible for the production of false and fabricated documents in Court, but where it is made clear to the Court that, in spite of the document not having been filed or entered in the list along with the plaint, the document cannot be said to have been fabricated on the face of it, there is no reason why the party should be debarred from using such a document in Court. **Pat SUKAN SAHU v. JHARI MAHTO**

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— **O. VIII, r. 2**. See **APPEAL, SECOND**

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— **O. VIII, r. 5**—Discretion of Court, when to be exercised.

The discretion under rule 5, Order VIII of the Civil Procedure Code, should usually be exercised by the Court of first instance in those cases where it suspects on *prima facie* grounds that an admission was made collusively or in order to evade a rule of public policy. Where an allegation of fact in a plaint is not denied specifically or by necessary implication it must be deemed to have been admitted, and in such a case an Appellate Court would be using its discretion wrongly in requiring proof of that allegation. **M VENKATA REDDI v. MUTHU PAMBULU NAICK, 39 M. L. J. 463**

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— **O. IX, r. 4**—Failure to pay process-fees for attendance of one of several defendants, effect of—Dismissal of suit, whether justified.

The default of a plaintiff to pay process-fees on the date fixed for the payment in respect of one of the defendants can be no justification for dismissal of the suit as against those defendants who have been served and have filed written statements.

The provisions of Order IX, rule 4, of the Civil Procedure Code are applicable to a date fixed for the hearing of the suit and not to a date fixed for the payment of process-fees. **Pat RAMANAND SINGH v. CHANDRAMA SINGH, 2 P. L. T. 256**

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— **O. IX, r. 8**—Pre-emption suit—Plaintiff, failure of, to appear—Defendant, admission by, of plaintiff's right to pre-empt, effect of—Procedure.

Plaintiff sued to pre-empt certain land on payment of Rs. 1,500. On the date of hearing the plaintiff failed to appear, the defendant appeared and admitted the plaintiff's right to pre-empt, but stated that the

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price paid for the land was Rs. 12,000. The Court passed a decree in favour of plaintiff on payment of Rs 12,000:

*Held*, that the defendant's admission did not amount to an admission of any part of the plaintiff's claim within the meaning of Order IX, rule 8, of the Civil Procedure Code, and that, therefore, the proper course for the Court was to dismiss the suit for default. **L. MEHR DAIM V. SHAHAMAD** 724

———— **O. IX, r. 13**—*Ex parte decree, application to set aside, dismissal of—Suit to set aside decree, maintainability of—Fraud.*

A. obtained an *ex parte* decree upon a hand-note against R., and, in execution thereof, R.'s property was attached and sold. Before the sale, R. applied under Order IX, rule 13 of the Civil Procedure Code to set aside the decree on the ground that the summons had not been duly served upon him; the Court found that service of the summons had been satisfactorily proved, and dismissed the application. R. then brought the present suit to set aside the decree on the ground of fraud in connection with the service of summons, and that the decree was obtained by perjured evidence:

*Held*, that the suit was not maintainable as the question of the non-service of summons having been agitated between the same parties and decided by a Court of competent jurisdiction, the matter could not be re-opened between the same parties in a subsequent suit, and that as the hand-note had been produced and proved by A., and accepted as genuine by the Court, it was not competent to R. to re-open by a subsequent transaction the very question which was decided in the original suit. **PAT JANGAL CHAUDHARY V. LALJIT PASBAN**, 1 P. L. T. 735; 6 P. L. J. 1; (1921) PAT. 3; 8 U. P. L. R. (PAT.) 124

———— **O. XIV, r. 1 (5)**—*Issues, framing of—Court, duty of.*

It is the duty of the Court to frame proper issues arising from the pleadings in a case.

It is the duty of a litigant to produce evidence in respect of issues framed by the Court but he cannot be expected to produce evidence with regard to points not covered by the issues. **L. KASTURI MAL V. LAJJA RAM** 751

———— **O. XVI, r. 1**—*Witnesses, application to summon—Court, duty of—Court, whether can refuse to summon witnesses.*

It is the duty of a Court to summon the witnesses for whose attendance an application is duly made by a party. A Court cannot reject such an application on the ground that it has been made too late. **L. MUHAMMAD HAYAT V. GHULAM MUHAMMAD** 656

———— **O. XX, r. 12**—*Suit for possession and mesne profits—Decree for possession—Mesne profits, claim in respect of, in excess of pecuniary jurisdiction of Court, effect of—Appeal, forum of—Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), s. 21 (2)—Defendants conspiring to keep plaintiff out of possession—Liability of defendants*

Under Order XX, rule 12, of the Civil Procedure Code, a Court which is competent to pass a decree for possession is also competent to make an enquiry into the mesne profits *pendente lite* and to pass a decree for the mesne profits, even where the sum

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claimed by the decree-holder and the sum actually found due to him as the result of the enquiry are far in excess of the pecuniary jurisdiction of the Court.

Where, in such a case, the decree is passed by a Munsif's Court, an appeal lies from it, whatever the amount of the mesne profits decreed, to the Court of the District Judge under section 21 (2) of the Bengal, N. W. P. and Assam Civil Courts Act.

Where it is found that the defendants had conspired to keep the plaintiff out of the possession of land, a joint decree for mesne profits can be passed against them. **PAT DINANATH SAHAI V. MAYAWATI KUER**, 6 P. L. J. 54; 2 P. L. T. 143; (1921) PAT. 69 346

———— **O. XXI, applicability of—"Sale," effect of—Ownership, when passes—Equity of redemption.**

The provisions of Order XXI of the Civil Procedure Code apply to sales ordered under Order XXXIV of that Code, and where such a sale is ordered, the mere 'sale' has not the effect of divesting a person whose property has been sold of the ownership of his property, because, in many cases, the sale is liable to be revoked. It is only when the sale becomes 'absolute' upon an order confirming it that it has the effect of divesting the person whose property is sold of his title to it and of vesting it in the purchaser. Where, therefore, the mortgagor makes the deposit under rule 89 of Order XXI, his equity of redemption subsists, and the deposit has the effect of redeeming the mortgaged property. **O. JAI KISHORI V. MOHAMMAD ALI MOHAMMAD KHAN**, 7 O. L. J 620 560

———— **O. XXI, r. 2 (1).** See LIMITATION Act, s. 20 935

———— **O. XXI, r. 3**—*Death of plaintiff—Legal representatives of deceased brought on record—Defendant, failure of, to object.*

Where on the death of a plaintiff certain persons are brought on the record as his legal representatives without any objection by the defendant, the latter is estopped from subsequently asserting that the persons impleaded are not the legal representatives of the deceased. **L. TEJ BHAN V. WALI DAD** 716

———— **O. XXI, r. 18.** See CONTRACT ACT, s. 23 127

———— **O. XXI, r. 46**—*Money deposited by third party as due to judgment-debtor—Payment out to decree-holder—Deposit operating as discharge—Suit to recover money paid to decree-holder, whether maintainable.*

M. held a decree against L. and in execution thereof applied for the attachment of any debt due by P. to L., this attachment was made under Order XXI, rule 46 of the Civil Procedure Code, and an order was passed directing P. to pay a certain sum of money into Court. P. objected but admitted that, upon a settlement of accounts between himself and L., the sum demanded would be found due by him to L. The executing Court directed payment of the amount by a certain date, and ultimately ordered the attachment and sale of P.'s house unless the money was paid; P., under this pressure, paid the money into Court unconditionally, and it was divided between M. and H., another decree-holder against L. P. thereupon brought the

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present suit to recover from *M.* and *H.* the amount he had deposited:

*Held*, that as *P.* had made the deposit under an admission that he was in fact indebted to *L.* at least to that extent, and obtained a valid discharge *pro tanto* of his debt to *L.*, he had no claim in equity to recover from *M.* and *H.* **A MAHADEO PRASAD v. DIRGIBAI SINGH**, 19 A. L. J. 41; 43 A. 272

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— **O. XXI, r. 54—Attachment—Formalities, failure to comply with, effect of—Appeal, second—Intent to delay or defeat, creditors, whether question of fact.**

The omission to affix a copy of an attachment order on a conspicuous part of the Court-house, or to post it in the office of the Collector or to affix it on some conspicuous part of the land attached, is a fatal defect which invalidates an attachment of land.

A finding that a transfer was not intended to defeat, defraud or delay the creditors of the transferor is a finding of fact. **L ATTAR SINGH v. GHULAM MUHAMMAD**

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— **O. XXI, r. 58—Claim proceedings—Limitation, question of, whether can arise.**

In a proceeding under Order XXI, rule 58 of the Civil Procedure Code, the Court has no jurisdiction whatever to deal with the point whether the execution is barred by time. **PAT JALALUDDIN v. MANIRAM**, 2 P. L. T. 275

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— **O. XXI, rr. 58, 60, 61—Claim petition—No finding as to possession and interest of claimant, effect of.**

Certain property was attached in execution of a decree. *N.* claimed an interest in, and possession of, the property. The Court disallowed the claim, holding that *N.* had some interest but not the entire interest, without finding what the nature of *N.*'s interest was in the property or whether the judgment-debtor or *N.* was in possession:

*Held*, that, under Order XXI, rules 60 and 61, of the Code of Civil Procedure, the order was illegal, and was liable to be set aside in revision by the High Court. **PAT NAINU v. BHUPENDRA NATH RAKHIT**

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— **O. XXI, r. 63—Attachment—Claim based on mortgage disallowed—Suit for declaration of right dismissed—Subsequent suit to enforce mortgage, whether maintainable.**

Where property is attached in execution of a decree, and a claim to the property by a third party based on a mortgage is disallowed, and a suit by him for declaration of his mortgage rights and that these would not be affected by the attachment is dismissed, the order disallowing his claim is conclusive under Order XXI, rule 63, of the Civil Procedure Code, and he is debarred from re-agitating his rights by means of a regular suit to enforce the mortgage. **M SINGARIAH CHETTY v. CHINNABAI**, 12 L. W. 725; 28 M. L. T. 420; 40 M. L. J. 7; (1921) M. W. N. 33; 44 M. 268

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— **O. XXI, r. 63—Execution of decree—Claim proceedings—Regular suit for possession.**

Where an executing Court can enquire into a question and does so and decides the question against an objector, then if the objector brings a suit to contest the correctness of the order of the executing Court, the onus of proof is on him.

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however, there is no decision of the executing Court adverse to the objector, this rule does not apply.

**L KASTURI MAL v. LAJJA RAM**

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— **O. XXI, r. 89, applicability of—Mortgage-decree.**

Order XXI, rule 89 of the Civil Procedure Code applies to sales held in execution of mortgage-decrees, and is applicable to mortgage-sales on the Original Side of the Calcutta High Court. **C VIRJIBUN DASS MOOLJI v. BISSESSWAR LAL HARGOBIND**, 24 C. W. N. 1032; 48 C. 69

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— **O. XXI, r. 90. See BENGAL TENANCY Act, s. 158 (b)**

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— **O. XXI, r. 90—Execution of decree—Sale, application to set aside—Limitation, terminus a quo.**

The starting point of limitation for an application to set aside an execution sale on the ground of fraud is, the date when the applicant had knowledge not merely of the factum of the sale, but a clear and definite knowledge of the facts which constitute the fraud, and it is for the other side to show that the applicant had such knowledge at a time from which, taken as a starting point, the application is barred. **C BHUSHANMANI DAS v. PRAFULLA KRISHNA DEB**, 48 C. 119

801

— **O. XXI, r. 93. See CIVIL PROCEDURE CODE, 1882, s. 315**

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— **O. XXI, rr. 97, 99—Decree for possession—Decree-holder resisted in obtaining possession—Sub-tenant of judgment-debtor, claiming possession—Decree-holder, remedy of.**

*G.* obtained from *E.* a lease of certain premises, one of the conditions of the lease being that the lessee could not sub-let without the consent of the lessor. Contrary to these terms, *G.* sub-let the premises to *W.* whereupon *E.* brought a suit for possession against *G.* and obtained a decree. In attempting to obtain possession *E.* was resisted by *W.* and he thereupon applied under Order XXI, rule 97 of the Civil Procedure Code, complaining of the resistance. *W.* contended that he was in possession on his own account and that the decree could not be enforced against him in a summary procedure under Order XXI:

*Held*, that as *W.*'s tenancy began before the suit for possession was instituted, *E.*'s remedy was by a suit against him.

An action for possession based upon forfeiture of a term should, for practical reasons, be brought against all persons in possession, including constructive possession, at the date of the suit. **C EZRA v. GUBBAY**, 47 C. 907

969

— **O. XXI, r. 103—Suit under r. 103, scope of—Enquiry, nature of—Right to present possession—Title, a declaration of.**

The suit referred to in O. XXI, r. 103, Civil Procedure Code, by which a party instituted, is a suit to establish the right which he claims to the present possession of the property, and this right may be established without showing that the plaintiff was in actual possession at the date of the suit. **M THAKUR v. KAILASH**, (1920) M. W. N. 695; 12 L. W. 598; 40 M. L. J. 60; 28 M. L. T. 112; 44 M. 7

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— **O. XXII, r. 3**—*Execution of decree—Decree in favour of two partners—Death of one partner, effect of.*

Where in a suit by two partners, a decree is passed for the recovery of a sum of money, the mere fact that one of the partners was dead at the date of the decree does not render the decree incapable of execution. The effect of the death of one of the partners is, that, under Order XXII, rule 3, of the Civil Procedure Code, the suit abates so far as he is concerned. **A SARJU PRASAD v. RAM SARUP**, 19 A. L. J. 266; 3 U. P. L. R. (A.) 46 **755**

— **O. XXII, r. 4**—*Joint tort-feasors, suit against—Defendant, death of—Legal representatives not impleaded, effect of—Suit, whether abates.*

In a suit for damages arising out of a tort the plaintiff is not required to implead as a defendant every person who is liable for the tort.

The only effect of suing some only out of a number of joint tort-feasors is that the judgment recovered against them bars a suit against the others.

Therefore, where in such a suit one of the defendants dies and his legal representatives are not brought on the record, the suit does not abate as a whole and a decree obtained in the suit is a good decree against those defendants who were living parties to it. **PAT GAJO SINGH v. AMRIT NARAIN SINGH**, 2 P. L. T. 234 **722**

— **O. XXIII, r. 3**—*Compromise effected by parties—Fact certified to Court by Pleaders of parties—Party, right of, to object to compromise.*

Where the parties to a suit themselves effect a compromise, and the fact of the compromise is conveyed to the Court by means of a petition presented by the Pleaders appearing on both sides, it is not open to the parties to question the compromise on the ground that the Pleaders had no authority to compromise.

**M PANBAYAM CHETTY v. KANDASWAMI IYER**, 12 L. W. 662 **22**

— **O. XXXII, r. 7**—*Compromise—Minor—Express approval of Court, whether necessary.*

The sanction of the Court to a compromise on behalf of minors cannot be inferred merely from the facts that the petition of compromise gave notice to the Court that the interests of the minors were intended to be affected by the compromise, and that the Court passed a decree in accordance with the compromise.

The attention of the Court must expressly be drawn to the fact that the minors' interests are affected by the compromise and the approval of the Court must be obtained.

It is only when leave is asked to settle the case on behalf of the minors that the vigilance of the Court is attracted and the Court is called upon to examine the terms of the settlement for the purpose of protecting the interests of the minors. **PAT RANGULAM SAHU v. DURGA PERSHAD**, 2 P. L. T. 325; 6 P. L. J. 110; (1921) PAT, 236 **980**

— **O. XXXIII, r. 4**—*Application for permission to sue in forma pauperis—Defendant, right of, to cross-examine applicant.*

When a plaintiff applies for permission to sue in forma pauperis, and is examined under Order XXXIII, rule 4 of the Civil Procedure Code, the opposite-party is entitled to cross-examine the applicant on the merits of his claim to test the

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statements he makes in his examination. **C RADHA RAMAN SAHA v. SITANATH** **738**

— **O. XXXIV**—*Mortgage, redemption, right of, extinction of.*

The provisions of Order XXXIV of the Code of Civil Procedure do not contemplate an order by the Court for the extinction of the right to redeem, where the suit by a mortgagee or by a mortgagor is not founded upon a mortgage by conditional sale. **O JAI KISHORI v. MOHAMMAD ALI MOHAMMAD KHAN**, 7 O. L. J. 620 **560**

— **O. XXXVII**—*Suit on promissory note—Application for leave to defend—Court doubting sincerity of defence—Procedure.*

Where in a suit on a promissory note instituted under Order XXXVII of the Civil Procedure Code, the defendant applies for leave to appear and defend, but the Court doubts the sincerity of the defence as disclosed in the affidavits filed with the application, the proper procedure is to grant leave to defend on condition of the defendant paying into Court the amount claimed. **M CHAKRAPANY CHETTIAR v. KANALAVALLI ANNAL**, 12 L. W. 712 **639**

— **O. XL, r. 1**—*Trust—Property in possession of Trustee—Trustee, poverty of—Receiver, appointment of, when justified—Trustee nominating person as Receiver, whether debarred from contesting appointment on appeal.*

Where a person is in possession of trust property as manager on behalf of the trust, the mere fact that he is a poor man from whom probably a decree for mesne profits, in the event of such a decree being passed, might prove difficult of realisation, is not an adequate reason for displacing him by the appointment of a Receiver, especially where there is no allegation of waste or misappropriation.

Where in connection with an application for the appointment of a Receiver of trust property by dispossessing the manager of the trustees, the latter's objection to such an appointment is disallowed and the Court proceeds to appoint a Receiver, the mere fact that he suggested the name of a person to be so appointed, would not preclude him from questioning the appointment on appeal. **A MOHAMMAD ASKARI v. NISAR HUSAIN**, 19 A. L. J. 50; 43 A. 311 **901**

— **O. XLI, rr. 3, 11**—*Appeal dismissed as barred by time—Order, whether appealable.*

If a memorandum of appeal is drawn up in proper form it cannot be rejected under rule 3 of Order XLI of the Civil Procedure Code, but if the appeal is barred by limitation it has to be dismissed under rule 11 of that Order. The rejection of an appeal on the ground of limitation, therefore, amounts to a dismissal thereof, and such order of rejection is appealable. **PAT FARZAND ALI v. ABDUL HAMID** **493**

— **O. XLI, r. 4**—*Decree against several defendants on common ground—Appeal by one—Appellate Court, jurisdiction of, to vary decree in favour of all.*

Where a decree proceeds against several defendants on a common ground, an Appellate Court has jurisdiction under Order XLI, rule 4 of the Civil Procedure Code, upon the appeal of one defendant only

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to vary the decree in favour of all the defendants.

**C** RAM SUNDAR DAS v. SHAJIDUR RAHAMAN 460

— **O. XLI, r. 5**—Mortgage decree—Stay of execution—Procedure.

The execution of a mortgage-decree to be realized first from the mortgaged property and the balance, if any, from the judgment-debtor and his other property, cannot be stayed simply because a claim by a prior mortgagee is pending. The proper course is to sell the hypothecated property and, after retaining out of the sale-proceeds the amount sufficient to meet the said claim, to pay the balance to the decree-holder. **L** UDE RAM v. BENI PERSAD, 57 P. W. R. 1920 378

— **O. XLI, r. 5**—Stay of execution—

Appellate Court, power of—Court which can stay execution.

Under rule 5 of Order XLI of the Civil Procedure Code an Appellate Court has no jurisdiction to grant a stay of execution of a decree of a subordinate Court unless it has seisin of an appeal against such decree. Where no appeal has been preferred, the Court which passed the decree alone has power to grant a stay, on sufficient cause being shown, during the time provided by law for presenting an appeal. **A** PARSHOTAM SARAN v. HARGOOLAL, 18 A. L. J. 1121; 2 U. P. L. R. (A.) 424; 43 A. 198 131

— **O. XLI, r. 10 (2), O. XLIII, r. 1**

(w), **O. XLVII, rr. 1, 4, 7**—Appeal—

Appellate Court, power of, to set aside order rejecting appeal for failure to furnish security for costs—Appeal, whether lies—Revision—High Court, interference by—Review, order granting—Appeal, grounds for.

An order setting aside an order rejecting an appeal for failure of the appellant to furnish security for the costs of the respondent is not appealable and where such order is made in the interests of justice, the High Court will not interfere in revision.

The right of appeal given by Order XLIII, rule 1 (w) of the Civil Procedure Code against an order granting an application for review under Order XLVII, rule 4 of the Code is subject to the conditions laid by rule 7 of the latter Order. Therefore, an appeal which does not come within the four corners of that rule is not entertainable. **A** SUNDAR N. HABIB CHICK, 18 A. L. J. 838; 2 U. P. L. R. (A.) 283 81

— **O. XLI, r. 23, O. XLIII, r. 1 (u)**

—Decision of main question by Appellate Court—

Remand for findings on minor issues—Decision, whether on preliminary point—Order of remand, whether appealable.

Where an Appellate Court decides the main point in a suit and remands the case for disposal on the remaining issues, its decision is not a decision on a preliminary point and the order of remand is outside the scope of Order XLI, rule 23, of the Civil Procedure Code, and consequently not appealable under Order XLIII, rule 1 (u). **M** PONANGI VENKATASUBBARAYUDU v. ZEMINDAR OF NUZVID, 12 L. W. 667 609

— **O. XLI, r. 33**—Appellate Court, power of, to set aside decree which has not been appealed against.

It is not competent to an Appellate Court, acting under rule 33 of Order XLI of the Civil Procedure Code, to interfere with the decree obtained by the appellant in so far as it has not been challenged

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by the respondent by way of appeal or cross-objections. **L** RAM LAL-JOHARI MAL v. DIP CHAND 705

— **O. XLIII, r. 1 (u)**—Remand, order of, whether appealable in cases where no second appeal from decree.

There is no second appeal from an order remanding a case, in those cases in which there is no second appeal from the decree of the Appellate Court. **A** SANT PRASAD v. BHAVANI PRASAD, 2 U. P. L. R. (A.) 416; 19 A. L. J. 72 831

— **O. XLV, r. 3**—Appeal to Privy Council

—Leave to appeal

When a certificate is issued under Order XLV of the Civil Procedure Code it is of the utmost importance that it should show clearly on its face upon which of the two grounds mentioned in rule 3 of the Order it is based, viz., whether it fulfils the requirements of section 110 of the Code as regards amount or value and nature, or is otherwise a fit one for appeal to His Majesty in Council under section 109 (c) of the Code. **P** C RADHAKRISHNA AYYAR v. SWAMINATHA AYYAR, 19 A. L. J. 161; 40 M. L. J. 229; 13 L. W. 321; (1921) M. W. N. 119; 33 C. L. J. 277; 25 C. W. N. 630; 44 M. 293; 23 Bom L. R. 718 85

— **O. XLV, r. 4**—Consolidation of appeals

—“Same judgment,” meaning of—Suits decided by same judgment in Trial Court, but by different judgments in High Court, whether can be consolidated.

The word “judgment” in rule 4 of Order XLV of the Civil Procedure Code, refers to the judgment appealed against, that is, the judgment of the High Court and not the judgment of the Trial Court.

The proposition that, because certain suits were originally in the Court of first instance decided in one judgment, therefore, whatever may have happened to them subsequently and whether decided eventually in the High Court by the same judgment or by a number of judgments, there should, in such cases, be power to consolidate for the purpose of appeal to His Majesty in Council is to give a meaning to Order XLV, rule 4, which it was never intended to bear. The requirement of the rule is that the judgment which their Lordships of the Privy Council have to consider and from which an appeal is brought should be the same judgment in the consolidated appeals and not that they should have in the same case or in the same appeal to consider the effect of several separate judgments of the High Court. **P**AT DEIKO NANDAN PRASAD v. NARSINGH RAUT, 2 P. L. T. 157; 6 P. L. J. 97; (1921) PAT. 145 517

— **Sch. II, paras. 14, 20**—Arbitration

—Award—Order refusing to file award, nature of

—Arbitrator omitting to decide matter which parties have settled—Misconduct.

An order rejecting an application to file an award is not a decision that the award is in law a bad award.

Where, after a reference to arbitration and before the making of an award, the parties interested arrive at an agreement as to one of the matters in controversy, and the arbitrator omits to decide that matter, it is not a part of the award the agreement of

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the parties, the omission does not amount to such misconduct on the part of the arbitrator as would necessarily make the whole award bad. **A HARAKH RAM JANI v. LAKSHMI RAM JANI**, 2 U. P. L. R. (A.) 310; 18 A. L. J. 960; 43 A. 108 **626**

—**Sch. II, para. 18—Agreement to refer dispute to arbitration—Stay of suit—Discretion of Court—Burden of proof.**

When a Court is apprised that a suit has been instituted in contravention of an arbitration agreement the Court has a discretion to stay the suit, and the burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be so referred, and not on the defendant to show that no such reason exists. **L GANESH DAS-ISHARDAS v. DURGA DAT-JAGAN NATH**, 2 L. 19 **776**

—**Sch. III, para. 11—Execution of decree—Decree transferred to Collector—Powers of Collector, termination of—Judgment-debtor, competency of, to transfer property.**

A decree was transferred to the Collector for execution, and a portion of the property of the judgment-debtor was sold, the price realised being more than sufficient to satisfy the decree; before the sale was confirmed the judgment-debtor transferred by deed of sale the remaining portion of the property to the plaintiff who brought the present suit on the basis of the sale-deed in his favour:

*Held*, that the judgment-debtor was incompetent to make the transfer, as until the sale by the Collector was confirmed, his powers and duties under Schedule III, paragraph 11 of the Civil Procedure Code had not ceased, and until then the property was under his management. **N MAHADEO v. KRISHNAJI**, 16 N. L. R. 194 **310**

**Common land—Co-owners—Exclusive user by one co-owner—Rights of other co-owners.**

When a joint owner of land, without obtaining the permission of his co-owners, builds upon such land such buildings should not be demolished at the instance of such co-owners unless they prove that the action of their joint owner in building upon joint land has caused them a material and substantial injury such as cannot be remedied by partition of the joint land. **L KALKA SINGH v. KAHNA** **531**

**Companies Act (VI of 1882), s. 150**

—*Payment-order, whether can be made in respect of debt which has been sold to third person—Court, duty of—Payment-order, made without jurisdiction, whether can be disregarded*

The duty of a Court in liquidation proceedings is to realise the assets of the Company and to discharge its liabilities so far as possible. It is no part of its duty, however, to help third persons who have purchased debts due to the Company to realise those debts

Therefore, once a debt has been sold to a third person the Court cannot make a payment-order in regard to it under section 150 of the Companies Act.

A decree which is a nullity may be disregarded without any proceeding taken to set it aside. Similarly, a payment-order which is a nullity may be disregarded by a Court whose assistance is sought for its execution. **L SALIG RAM v. OFFICIAL LIQUIDATOR, INDIAN EXCHANGE BANK, LTD.** **506**

**Companies Act (VII of 1913), s. 38**

—*Jurisdiction under section, scope of—Company, application to remove name from Register of Members of—Mortgagee of Company, whether can intervene in opposition.*

Although persons are not entitled to an order *ex debito justicie*, the jurisdiction under section 38 of the Companies Act is unlimited with a discretion in the Court in the circumstances of each case.

Where a holder of shares in a Company applies to have his name removed from the Register of Members of the Company, a mortgagee of the uncalled share capital of the Company is a person vitally interested in the proceedings, and is entitled to intervene to oppose the application.

**C RAMESH CHANDRA MITTER v. JOGINI MOHAN CHATTERJI**, 47 O. 901 **946**

—**s. 232—Attachment of property of Company—Winding-up, application for, subsequent to attachment—Sale of property thereafter, effect of—Sale, adjournment of—Fresh proclamation of sale, absence of, whether vitiates sale—Appeal by Liquidator—Sanction of Court, whether necessary—Procedure.**

Where, long previously to the presenting of an application for winding-up a Company, the immovable property belonging to the Company was attached in execution of a decree, and was ultimately sold after a winding-up order had been passed and the Official Liquidator applied to have the sale set aside on the ground that, under section 232 of the Companies Act, the sale of the property was a putting into force of an execution within the meaning of that section:

*Held*, that, for the purposes of section 232 of the Companies Act, the execution was put in force on the date the property was attached, and as that date was long anterior to the date of the application for winding-up, the sale was not invalid.

Where property is repeatedly proclaimed and put up for sale, and no bidders are forthcoming, the fact that the sale is adjourned to, and held on, a subsequent date without issuing a fresh proclamation, although irregular, does not, in the absence of substantial loss suffered by the judgment-debtor in consequence of this procedure, vitiate the sale.

A Liquidator appointed in a winding-up by the Court ought not to appeal in any case without the permission of the winding-up Court, and if he does so, he runs considerable risk, in the event of failure, of having to pay the costs out of his own pocket. **A OFFICIAL LIQUIDATOR, KAYASTH TRADING AND BANKING CORPORATION v. SATNARAIN SINGH**, 19 A. L. J. 262 **763**

**Compromise by trustee in good faith, whether lawful.**

A compromise by a trustee in good faith of a suit relating to trust property is lawful and the Court will not, in such a case, enquire whether the compromise is or is not beneficial to the trust. **M PAMBAYAM CHETTY v. KANDASWAMI IYER**, 12 L. W. 562 **22**

—, *conditions of, parties whether can resile from.*

Where a dispute is settled and the terms and conditions of the settlement are recorded in a compromise, it is not open to any of the parties to resile from those conditions. **O RAMPAT v. DURGA BHARTI**, 7 O. L. J. 547; 28 O. O. 303 **440**



**Compromise—conold.**

——— *Vakalatnama authorising Vakil to compromise—Compromise by Vakil, binding effect of.*

Where by a *vakalatnama* the plaintiffs jointly agree to be bound by all acts of their Pleader in the course of their suit, and they further expressly specify, amongst the acts which the said Pleader might perform on their behalf, the presentation to the Court of petitions relinquishing the claim, compromising the suit and withdrawing from the suit, and the Pleader presents a compromise, and expresses, on behalf of his clients, agreement to its terms, the plaintiffs cannot question his act and are bound thereby. **A HUKUM SINGH v. TUNDA SINGH.** 2 U. P. L. R. (A.) 405; 19 A. L. J. 63 **912**

**Concurrent finding, what constitutes.**

To constitute a concurrent finding, it is sufficient that a majority of the Court of Appeal should concur in the view of the facts taken by the Original Court. Such a concurrent finding is not vitiated as such because the minority of the Court of Appeal does not come to the same conclusion in fact. **P. C. HABIBUR RAHMAN v. ALTAF ALI**, 40 M. L. J. 510; 38 C. L. J. 479; 19 A. L. J. 414; 23 Bom. L. R. 636. (1921) M. W. N. 266 **837**

**Confession by co-accused, whether corroborate each other.**

The confession of one co-accused cannot be said to be corroborated by the confession of another accused as against an accused person who has not confessed at all; but the confession of one co-accused may furnish the corroboration of the confession of another accused as against the latter and vice versa. **L GANGA RAM v. EMPEROR**, 22 Cr. L. J. 290 **786**

**———, made through fear or under inducement, inadmissibility of.**

A statement made to a Magistrate by an accused person through fear (consisting of a threat by the Police to put his womenfolk to trouble) is inadmissible. Similarly, a statement made as the result of an inducement by the Police, which caused the person making the statement to believe that he would be offered a free pardon, should be rejected. **C EMPEROR v. ANANT KUMAR BANERJI**, 32 O. L. 204; 22 Cr. L. J. 225 **417**

**———, retracted, value of—Conviction, legality of.**

Although a retracted confession is always open to some suspicion, yet if the Court is satisfied that it was voluntarily made and is true, it is bound, in the absence of coercion by the Police, to act on that belief so far as the person making it is concerned. **Pat BIHARI ADRAKI v. EMPEROR**, 22 Cr. L. J. 293 **789**

**———, retracted, value of—Value of confession as against co-accused.**

Though, as a matter of law, a conviction may be based upon a retracted confession if the Court can come to the unhesitating conclusion that the confession is voluntary, yet, as a matter of prudence, no conviction should be based upon such a confession. Whatever value may be attached to the retracted confession of an accused person as against himself, the value to be attached to such a confession as

**Confession—conold.**

against a co-accused is exceedingly weak. **Pat MAKSUD ALI v. EMPEROR**, 22 Cr. L. J. 200; 3 U. P. L. R. (Pat.) 18 **56**

**———, when can be used against co-accused.**

The test as to whether the confession of an accused person can be used as against his co-accused is, whether the person making such confession could have been convicted on that confession of the crime with which he and his co-accused were charged. **L CHUNI LAL v. EMPEROR**, 22 Cr. L. J. 260 **660**

**Consent-decree—Relief against forfeiture, principle of, applicability of—Consent-decree providing for payment of money on certain date—Time for payment, whether can be extended.**

Where a consent-decree gives effect to an agreement which embodies a right to forfeiture, the Court, in the exercise of its equitable jurisdiction, is competent to grant such relief against forfeiture, as it might have granted if there had been no consent-decree and a suit had been instituted to enforce the compromise.

Where a consent-decree provides for the payment of money on a prescribed date, time is not of the essence of the contract, and the Court is competent to grant an extension of time for making the payment. **C KANDARPA NAG v. BANWARI LAL NAG**, 33 C. L. J. 244 **864**

**Contract, breach of—Promisee, right of, to sue—Contract, renunciation of, before performance—Damages, measure of.**

The breach of a contract may take place before the time fixed for the performance of the contract has arrived, as, where the promisor repudiates the contract, in which event the promisee may elect to sue for breach of the contract without waiting for the time fixed for performance.

The damages for breach of contract by renunciation thereof before performance is due, are measured by what the injured party would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself. **C MANINDRA CHANDRA NANDY v. ASWINI KUMAR ACHARYA**, 22 C. L. J. 168; 25 C. W. N. 287 **337**

**Contract Act (IX of 1872), s. 23. See BROKER**

**S. 23—Judgment-debtor taking assignment of decree in name of agent—Execution by agent against other judgment-debtors and realisation of moneys—Suit against agent for recovery of moneys realised, maintainability of—Civil Procedure Code (Act V of 1908), O. XXI, r. 16.**

Plaintiff, who was one of several judgment-debtors, got an assignment of the decree in the name of his agent, who was to be paid a certain commission for executing the decree against the other judgment-debtors. The agent realised moneys in execution but refused to pay them over to his principal. In a suit by the latter for recovery of the amounts:

1<sup>st</sup> Aid, that the suit was maintainable and did not fall within the mischief of section 23 of the Contract Act. **M PALANIAPPA CHETTIAR v. CHOCKALINGAM CHETTIAR**, 12 L. W. 600; (1920) M. W. N. 776; 39 M. L. J. 602; 19 M. L. T. 53; 44 M. 234 **127**

**S. 25—Limitation Act (IX of 1908), s. 19—Agent's liability, whether promise to pay New**

**Contract Act—contd.**

*contract, what constitutes—Debt due by joint family—Acknowledgments of several liability by different branches of family, whether create new contracts.*

There is a distinction between an acknowledgment which is sufficient for the purposes of section 19 of the Limitation Act and the promise which is required by section 25 of the Contract Act. An acknowledgment no doubt implies a promise to pay, but in order to create a new contract, as required by section 25 of the Contract Act, it is necessary that the promise to pay should be expressed.

Where a debt due by a joint Hindu family was divided into three equal portions and each of the three branches of the family acknowledged a several liability to pay one portion of the debt:

*Held*, that this limitation of liability was in itself sufficient consideration to support a new contract which might be implied from the terms of the acknowledgment apart altogether from the provisions of section 25 of the Contract Act. **PAT RAM BHADUR SINGH v. DAMODAR PERSHAD SINGH**, 6 P. L. J. 121; 2 P. L. T. 508 **514**

— **S. 30—Contract—Wager—Common intention—Burden of proof—Transaction with broker—Presumption.**

Where a person enters into a transaction with a broker, who is entitled to commission and any losses incurred which he has paid, there is a presumption against the transaction being a wagering one. To constitute a contract by way of wager within section 30 of the Contract Act, a common intention between the party contracting and the broker to wager is essential, and the burden lies upon the party contracting to show that the transaction was a wager. **S DWARKOMAL v. HARCHUMAL**, 14 S. L. R. 227 **944**

— **S. 64—Minor, alienation by—Alienation set aside—Minor, whether bound to restore benefit.**

Where an alienation is set aside at the instance of the alienor on the ground that he was a minor at the date of the alienation, he is not bound, except in cases of fraud, to restore to the alienee the benefit which he might have received as consideration for the alienation. **L KEHR SINGH v. ASA SINGH** **519**

— **S. 69, applicability of—Judi, payment of, by Inamdar—Sum paid, whether recoverable from occupancy tenants.**

Section 69 of the Contract Act only applies when a person is interested in the payment of money which any other is bound by law to pay, and, therefore, if he pays it, he is entitled to be reimbursed by the other.

Judi is payable by an Inamdar to Government, and where he has been so remiss as to lose his right of levying assessment on occupancy tenants, he cannot recover the sum paid by him as judi from them under section 69 of the Contract Act, inasmuch as the tenants are not bound by law to pay judi. **B BHIMABAI PADAPPA DESAI v. SWAMIRAO SHRINIWAS PARWATI**, 23 Bom. L. R. 107; 45 B. 638 **892**

— **S. 70—Joint estate in tenancy—Decree for rent—Decree satisfied by one co-tenant—Contribution—Liability of other co-tenants.**

H. and R. were tenants of an estate in the proportion of  $\frac{2}{3}$  and  $\frac{1}{3}$ : to save the estate R. satisfied a rent decree by paying the amount due for the entire estate, and brought the present suit against H. to recover

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from him his share of the amount awarded by the decree:

*Held*, that as the payment by R. was not a voluntary payment and as H. had benefited by the payment, he was bound to reimburse R. on the principle laid down in section 70 of the Contract Act. **C HARI PRASAD ROY v. RAMA PRASAD BAI** **414**

— **S. 72, applicability of.**

Section 72 of the Contract Act, which lays down that a person to whom money has been paid by mistake or under coercion must re-pay or return it, implies that the money was not really due to the person to whom it was paid. **A MAHADEO PRASAD v. DIRGIBAI SINGH**, 19 A. L. J. 41; 43 A. 272 **881**

— **ss. 115, 209—Principal and agent—**

*Death of principal—Agent, authority of, whether revoked—Party entering into contract with agent with knowledge of death of principal, whether can subsequently question agent's authority—Estoppel.*

The agent of a business man has authority, even after the death of his principal, to enter into transactions which are necessary or reasonable for the protection and preservation of the interest of the heirs of the deceased, and such authority continues till it is revoked by the heirs. A person who enters into a contract with an agent after the death of his principal, with knowledge of that fact, is estopped from subsequently impugning the transaction on the ground of the want of authority of the agent. **L MOOSAJEE AHMAD & COMPANY v. ADMINISTRATOR-GENERAL, BENGAL** **739**

— **S. 133—Surety—Several defendant.—**

*Surety for decree against all—Suit continued against one defendant only—Surety, whether exonerated.*

Where a person becomes surety for several defendants and contracts to be liable for any decree which may be passed against them, but the plaintiff with the leave of the Court, proceeds against one defendant alone, the exoneration of the remaining defendants has the effect of discharging the surety. **M SISTLA SITARAMASWAMY SASTRI v. BONTU BASAVAYYA**, 12 L. W. 536 **114**

**Costs, award of—Calcutta High Court Rules, Ch XXXVI, r. 93—"Ordinary cause"—"Important cause."**

Where a plaintiff brings a grossly exaggerated claim and obtains a decree for less than one-fifth of the sum claimed by him, he is entitled to costs as in an "ordinary cause."

Where costs are awarded as in an "important cause," reasons should be recorded for this course. **C MANINDRA CHANDRA NANDY v. ASWINI KUMAR ACHARYA**, 32 O. L. J. 164; 25 C. W. N. 237 **331**

— *Defendant sued in representative capacity—Order making defendant personally liable for costs—Discretion of Court—Appellate Court, interference by.*

The Courts have a discretion to make such orders as to costs as they think fit and, unless that discretion is exercised unreasonably, an Appellate Court should not interfere.

Where a defendant, who is sued in a representative capacity, raises unnecessary defences, the Court has power to make him personally liable for the costs of the plaintiff. **L JHANWAR DAS v. BODH RAJ** **362**

**Court Fees Act (VII of 1870), s. 7**

(v) (c)—*Suit for possession of "religious land"—Court-fee payable—Valuation, method of.*

In a suit for possession of land the plaint must be stamped according to the value of the subject-matter, and where the subject-matter is land which pays no revenue and has produced no profits during the year next before the date of presenting the plaint, the value must be deemed to be the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood, and the same principle is applicable where the land in suit is "religious" land.

The mere fact that the land is "religious" does not render it incapable of valuation with reference to the value of similar land in the neighbourhood. **U B MAUNG MEIK v. KUMARA**, 3 U. B. R. (1920) 236. **5**

— **s. 7 (v) (x)**—*Suit for possession of land on payment of balance of consideration—Court-fee payable.*

Plaintiff alleged that defendant had sold certain land to him and had received part of the sale consideration. Plaintiff now sued for possession of the land and also prayed that defendant be ordered to execute a deed of sale and have it registered on receipt of the balance of the price :

*Held*, that the suit was one for possession of land, the prayer as to the execution of the sale-deed being merely ancillary, and that Court-fees were payable in accordance with clause (v) of section 7 of the Court Fees Act. **L GOPAL DAS v. PARMANAND** **512**

— **ss. 10 (ii), 12, 17**—*Suit for specific performance and possession—Court-fee payable—Court-fee, deficiency of, order for payment of, form of.*

Inasmuch as in a suit for specific performance of a contract of sale, and for possession of the property agreed to be sold, the relief for specific performance is the main relief and is not ancillary to the claim for possession, a separate Court-fee is, under section 17 of the Court Fees Act, payable on such relief both in the Original Court and the Court of Appeal.

Where in an appeal by the defendant it is discovered that there is a deficiency in the amount of Court-fees paid both on the plaint and the memorandum of appeal, the proper order is to direct the parties to make good the deficiency, and to direct that, in the event of non-compliance with such order, the suit or appeal or both do stand dismissed under section 10 (ii) read with section 12 of the Court Fees Act. **O RAM NIDH v. BALKARAN SINGH**, 23 O. C. 388 **654**

**Criminal Procedure Code (Act V of 1898), s. 35**—*Conviction for several offences at one trial—Separate sentences, whether can be passed.*

Where a person commits house-trespass and attempts to murder an occupant of the house he may be convicted of both these offences, but a separate sentence for each offence is not justified. **L BARKAT v. EMPEROR**, 22 Cr. L. J. 195 **54**

— **s. 106**—*Security, power of Court of Appeal or Revision to demand, in case tried by Second or Third Class Magistrate.*

The fact that a case is tried by a Second or Third Class Magistrate, does not deprive a Court of Appeal or Revision of the power to demand security under section 106, of the Criminal Procedure Code. **O LACHMI NARAIN v. EMPEROR**, 22 Cr. L. J. 276 **676**

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— **s. 106 (3)**—*Appellate Court, power of, to make order for security, irrespective of powers of Trial Court.*

Under sub-section (3) of section 106 of the Criminal Procedure Code, an Appellate Court has power to make an order for security, even though the original Trial Court, from whose decision the appeal was heard, had no such power under sub-section (1) of that section. **A TILAK RAI v. EMPEROR**, 19 A. L. J. 123; 22 Cr. L. J. 310 **998**

— **ss. 109, 145, 439**—*Magistrate, discretion of—Revision—High Court, whether will interfere.*

Where in exercise of his discretion a Magistrate elects to proceed under section 107, and not under section 145, of the Criminal Procedure Code, the High Court is not entitled to interfere in revision with the exercise of his discretion. **C AMULYA CHARAN SARKAR v. AMRITA LAL MUKHERJEE**, 24 O. W. N. 1075; 22 Cr. L. J. 224 **336**

— **s. 110**—*Charge, substantive, failure of—Accused, whether liable to be bound over in security—Suspicion, whether justification for order to give security.*

Where a substantive charge is made against a person, and that charge breaks down, it is improper for the Court to make use of section 110 of the Criminal Procedure Code and bind him over in security.

The mere fact that a person is suspected of particular crimes is no justification for demanding security from him. Evidence that a person had been suspected and named in a large number of cases extending over a considerable interval may, however, be very useful corroboration of general evidence of bad reputation.

Conversely, in a doubtful case the fact that a person has never been suspected of any offence may weaken the general evidence of reputation which is given against him. **O RAJA RAM v. EMPEROR**, 23 O. C. 371; 22 Cr. L. J. 273 **673**

— **s. 110**—*General repute, evidence of, whether sufficient to justify taking security.*

Where in a case under section 110 of the Criminal Procedure Code the prosecution witnesses testify merely to the reputation of the accused, and know nothing about him beyond that reputation, and are entirely ignorant of the circumstances of, or of the business carried on by, the accused, an order requiring him to furnish security is not justified. **A KALLU v. EMPEROR**, 19 A. L. J. 39; 22 Cr. L. J. 314 **1002**

— **s. 110**, *proceedings under, when to be taken.*

Proceedings under section 110 of the Criminal Procedure Code, are not intended to enable the Police to get a person sent to Jail where sufficient evidence is not forthcoming to prosecute him for any specific offence. Such proceedings should be taken with great care and caution. **L HARNAM DAS v. EMPEROR**, 22 Cr. L. J. 263 **669**

— **ss. 110, 112**—*Security proceedings—Notice to show cause, whether necessary—Failure to issue notice, effect of—Revision—Application admitted on certain grounds—Procedure.*

Two persons were arrested under section 55 of the Criminal Procedure Code on the ground that



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they were reputed habitual thieves and house-breakers and were placed before a Magistrate who fixed a date for evidence, with the object of issuing a notice under section 112 of the Code and detained the accused in custody without issuing any notice. On the date fixed the Magistrate recorded the evidence given by the Police and treated it as given, in the hearing under section 110, and, without giving the accused the slightest warning or opportunity of obtaining legal assistance, called upon them to conduct their case:

*Held*, that the procedure of the Magistrate was wholly irregular and vitiated the proceedings.

Before a hearing under section 110 of the Criminal Procedure Code can by law take place, it is incumbent on the Magistrate, under section 112, to make an order setting forth the substance of the information which he has received, the amount of the bond to be executed, the period for which it is to be executed and the number, character and class of sureties, if any, required. Merely informing an accused person that he is a suspected thief is not sufficient, as, however substantial that expression may be as an offensive description of an individual, it gives the person alleged to be that character not the slightest intimation as to the grounds on which it is based.

Where a party applies for revision and obtains an order issuing notice to show cause, he should at the hearing confine himself to the grounds upon which that order was made. **A RAJBANSI v. EMPEROR**, 18 A. L. J. 678; 42 A. 646; 22 Cr. L. J. 223. **420**

— **ss. 133, 137**—Magistrate, whether can drop proceedings without taking evidence.

The provisions of section 137 of the Code of Criminal Procedure are imperative. Before a Magistrate can make an order under clause (2) of that section dropping a proceeding started under section 133 of the Code, he must take evidence in the matter as directed by clause (1) of section 137. **C SHEW KHELAON RAM KALWAR v. NAYAN BEPARI**, 22 Cr. L. J. 239. **431**

— **s. 145**. See GOVERNMENT OF INDIA ACT, s. 107. **325**

— **s. 145**—Possession, decree for, by Civil Court—Adverse party in possession—Criminal Court, order by, in favour of such party to continue in possession—High Court, whether will interfere.

Although a Criminal Court is bound to respect the decree of a Civil Court and delivery of possession and cannot go behind the decree, yet when, in a proceeding under section 145 of the Criminal Procedure Code, it is shown by evidence that, notwithstanding such a decree, the party affected adversely thereby has continued in possession, and the Criminal Court has declared that that party should continue in possession until evicted in due course of law, the High Court will not interfere. **PAT MANINDRA KISHORE JHA v. CLAIRSMITH**, 22 Cr. L. J. 239. **430**

— **s. 145**—Proceedings initiated on Police report—Jurisdiction.

A Magistrate does not act without jurisdiction when he initiates proceedings under section 145 of the Criminal Procedure Code upon a Police report that there is a dispute likely to cause a breach of the

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peace. **PAT ISRI PRASAD CHAUDHRI v. WARASAT HUSSAIN**, 1 P. L. T. 738; 22 Cr. L. J. 205. **61**

— **ss. 164, 195, 236**—Penal Code (Act XLV of 1860), s. 193—Proceeding under s. 164, whether judicial proceeding—Statement recorded under s. 164 and statement in judicial proceeding, whether can be made basis of alternative charge for perjury—Sanction of both Courts, whether necessary.

A statement recorded by a Magistrate in the course of a Police investigation under section 164 of the Criminal Procedure Code, is not evidence in a stage of a judicial proceeding within the meaning of Explanation (2) to section 193 of the Penal Code.

Per *Curiam*, (*Shah, J., contra*).—Such a statement can, however, be linked with a statement which is evidence in a stage of the judicial proceeding following on the investigation so that the two can be treated as a series of acts on which an alternative charge can be framed under section 236 of the Criminal Procedure Code of intentionally giving false evidence.

Per *Macleod, C. J., and Shah, J.*—In the case of an alternative charge under section 193, Penal Code, based upon two statements made before two different Courts, the sanction of both the Courts or of Courts to which these two Courts may be subordinate for such an alternative charge is necessary. **B PURSHOTTAM ISHVAR AMIN v. EMPEROR**, 23 Bom. L. R. 1; 22 Cr. L. J. 241. **593**

— **ss. 164, 533**—Confession, defective record of—Procedure.

Where it does not appear from the record that the Magistrate recording a confession gave due warning to the accused, the confession is defective but the defect can be cured under section 533 of the Criminal Procedure Code, if the Court on taking the evidence of the Magistrate is satisfied that the warning required by law was actually given. **PAT MAKSUD ALI v. EMPEROR**, 22 Cr. L. J. 200; 3 U. P. L. (PAT.) 18. **56**

— **ss. 179, 181 (2)**—Jurisdiction of Criminal Court—Misappropriation by servant—Money collected in one district—Shop in another district—Servant, duty of, to account at shop.

M. owned a cloth shop at Mirzapur. S. was employed as a servant of the shop and his duty was to collect money due to his master and deposit it in the shop at Mirzapur: he was sent to two villages in the Allahabad District to collect money, which he did collect, but misappropriated. M. instituted criminal proceedings against S. at Mirzapur, and the question was whether the Courts at Mirzapur had jurisdiction to entertain the complaint:

*Held*, that as S. had to account to his master at Mirzapur, the Courts there had jurisdiction. **A SHEO SHANKAR v. MOHAN SARUP**, 19 A. L. J. 69; 22 Cr. L. J. 308. **996**

— **ss. 190 (1) (c), 191**—Magistrate taking cognizance of case under s. 190 (1) (c)—Failure to comply with procedure laid down in s. 191, effect of.

Where a Magistrate takes cognizance of a case under section 190 (c) of the Criminal Procedure Code, but omits to inform the accused before any evidence is taken that the latter is entitled to have

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the case tried by some other Court, the proceedings before the Magistrate are illegal. **A RAM BATAN v. EMPEROR**, 19 A. L. J. 138; 22 Cr. L. J. 319

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— **s. 195**—*Civil Procedure Code (Act V of 1908), s. 115—Order in appeal rejecting application for sanction to prosecute—Material irregularity—Perjury—Sanction, when ought not to be given.*

An order upon an appeal against an order sanctioning the prosecution of the appellant, contained the words: "The application is rejected", amounts to a refusal to consider the question, and is a material irregularity within the meaning of section 115 of the Civil Procedure Code.

Sanction to prosecute for giving false evidence is not justified where there is no documentary evidence, and the question is of oath against oath. **A ABDUL AZIZ v. BOHRA TARA CHAND**, 19 A. L. J. 291; 22 Cr. L. J. 304

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— **s. 195 (6)**—*Limitation Act (IX of 1908), Sch. I, Art. 154—Sanction to prosecute—Application to Appellate Court, whether appeal—Limitation, whether applicable.*

Although an application to an Appellate Court under clause (6) of section 195 of the Criminal Procedure Code is akin to an appeal and is treated as an appeal, it is not an appeal for the purposes of the Limitation Act. **L. PUNNA LAL v. JAMITA MAL**, 1 L. 602; 22 Cr. L. J. 177

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— **s. 195 (6)**—*Sanction to prosecute—Application to superior Court—Court, power of, to make enquiry.*

An application under section 195 (6), Criminal Procedure Code, to a superior Court to revoke a sanction granted by a Subordinate Court is not an appeal and should not be dealt with as such.

There is nothing, however, in the Criminal Procedure Code which would prevent a Court, acting under section 195 (6) of the Code, from making a preliminary inquiry before deciding whether it should revoke the sanction which has been granted by a Subordinate Court. **L. FRANCIS DARAH v. MUHAMMAD BAKHSH**, 22 Cr. L. J. 298

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— **ss. 234, 235**—*Penal Code (Act XLV of 1860), ss. 409, 477A—Charge under s. 409—Court, competency of, to try with this charge three charges under s. 477A.*

Where a person is charged, under section 409, Penal Code, with criminal breach of trust committed in one year in respect of a lump sum of money, the Court is competent, by virtue of the provisions of sections 234 and 235, Criminal Procedure Code, to try with this charge three charges for an offence under section 477 A, Penal Code, committed within the period of one year and forming part of the same transaction as the offence under section 409. **PAT GAJADHAR LAL v. EMPEROR**, 22 Cr. L. J. 230

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— **ss. 259, 433**—*Procedure—Charge framed—Complainant, absence of—Appellate, order of, legality of—Revision—High Court, power of*

No section of the Criminal Procedure Code allows a Court to pass an order of acquittal after a charge has been framed, except upon a finding on the merits of not guilty.

Where a charge has been framed it is the duty of the Trial Court to proceed with the trial in the

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absence of the complainant and to convict or acquit on the merits.

The High Court has no power to convert an acquittal into a conviction, but it has power to direct the Trial Court to conclude the trial in the manner provided by law. **L. NARAIN DAS v. MEWA SINGH**, 22 Cr. L. J. 312; 3 U. P. L. R. (L.) 39

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— **s. 262**—*Summary trial of warrant cases—Procedure.*

In summary trials under Chapter XXII of the Code of Criminal Procedure, the procedure prescribed for warrant cases should be followed in warrant cases, and in such a case the accused is entitled to have process issued for compelling the attendance of the prosecution witnesses for cross-examination. **C. NEPAL BAGDI v. EMPEROR**, 22 Cr. L. J. 271

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— **s. 284**—*Assessors, choosing of—Objection, whether can be taken.*

Section 284 of the Criminal Procedure Code empowers a Sessions Judge to choose such assessors as he thinks fit from the persons summoned to act as such and there is no express provision for objecting to the selection of an assessor. But there is no reason why an objection of presumed or actual partiality should not be allowed, particularly when it is urged at the time of the selection of the assessor. **PAT SHIVADHIN SINGH v. EMPEROR**, 22 Cr. L. J. 262

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— **ss. 287, 310**—*Evidence Act (I of 1872), s. 54—Previous conviction, evidence of, when may be tendered—Prosecution witnesses, re-call of, for cross-examination—Discretion, improper exercise of.*

Where the statement of an accused person to a Committing Magistrate contains an admission as to his previous conviction, that portion of his evidence should not be read at the close of the prosecution evidence at his trial in the Court of Session, before the assessors have given their opinion, as, to do so is to contravene the principle of section 310 of the Criminal Procedure Code and is sufficient to vitiate the trial.

It is illegal, during the course of the trial of an accused person for a substantive offence, to record evidence of a previous conviction. Such evidence amounts to evidence of bad character and is expressly forbidden by section 54 of the Evidence Act, unless and until the accused offers evidence of good character.

The refusal of a Judge to re-call prosecution witnesses for cross-examination, amounts to an improper exercise of discretion, sufficient to vitiate the trial. **PAT TEKA AHIR v. EMPEROR**, 5 P. L. J. 706; 22 Cr. L. J. 219

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— **s. 337**—*Pardon, whether can be tendered after charge is framed.*

There is nothing in section 337 of the Criminal Procedure Code, to prevent a pardon being tendered to a person after a charge has been framed against him. **L. MANGU v. EMPEROR**, 22 Cr. L. J. 255

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— **s. 342**—*Accused, examination of, before evidence for prosecution completed, effect of.*

The examination of an accused person before all the witnesses for the prosecution have been examined is illegal, as it contravenes the provisions of section 342 of the Criminal Procedure Code, and the

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illegality is sufficient to vitiate the trial. **Pat** RAMESHWAR SINGH v. EMPEROR, 22 CR. L. J. 259 659

**s. 342—Examination of accused person—**

*Written statement, whether sufficient—Procedure.*

A written statement of defence cannot be allowed to take the place of the examination of an accused person at the close of the case for the prosecution as required by section 342 of the Criminal Procedure Code.

Where however, a Magistrate asked an accused person whether he had anything to say in addition to his written statement :

*Held*, that although it would have been better for the Magistrate to have put definite questions to the accused, the procedure actually adopted by him was not so illegal as to vitiate the whole trial. **L** HARNAMA v EMPEROR, 22 CR. L. J. 276; 3 U. P. L. R. (L.) 31 676

**s. 345—Compromise filed in Court, effect**

*of—Further proceedings, whether can be taken.*

Where the parties to a criminal proceeding file a written compromise in Court under section 345 of the Code of Criminal Procedure, such compromise amounts to an acquittal of the accused, and no further proceedings can be taken against him at the instance of the complainant in respect of the subject matter of the compromise. **C** HEM CHANDRA DUITA v. GIRENDRA CHANDRA CHAUDHURY, 33 C. L. J. 226; 23 CR. L. J. 301 797

**s. 403—Acquittal under section 147, Penal**

*Code, whether bars trial under section 186—Writ of attachment, execution of, after returnable date—Resistance to execution, whether offence.*

The acquittal of an accused person in a case under section 147 of the Penal Code, is no bar to his trial for an offence under section 186 of the Code.

The execution of a writ of attachment after expiry of the date fixed for its return is illegal, and resistance to such execution is not an offence under section 186 of the Penal Code. **Pat** TANUK LAL MANDAR v. EMPEROR, (1920) PAT 285, 1 P. L. T. 654; 22 CR. L. J. 222 334

**ss. 413, 423, 435, 438—Appeal-**

*able sentences against some accused—Appeal—Sessions Judge, whether can deal with case of all accused—Procedure.*

When dealing with the appeal of accused persons who have received appealable sentences, a Sessions Judge is competent to deal with the applications made by the co-accused who have received non-appealable sentences. **Pat** BISWANATH SINGH v. EMPEROR, 22 CR. L. J. 297; 3 U. P. L. R. (PAT.) 44 793

**s. 437—Further enquiry, order for, when to be made.**

Where the whole of the available prosecution evidence has been recorded, an order for further enquiry means simply a second trial on the same evidence.

The mere fact that the District Magistrate places a different value on the evidence from that placed by the Trial Court is not a good ground for directing further enquiry under section 437 of the Criminal Procedure Code. **L** DANI v. EMPEROR, 22 CR. L. J. 189; 3 U. P. L. R. (L.) 11 55

**s. 439 (5)—Revision—Appeal competent**

*—Revision, whether entertainable.*

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Where it is open to an accused person to appeal and he does not do so, clause (5) of section 409 of the Criminal Procedure Code bars the entertainment of an application for revision. **S** HARBHAGWANDAS METHARAM v. EMPEROR, 14 S. L. R. 173; 22 CR. L. J. 313 1001

**476—Criminal proceedings initiated by**

*Civil Court—Appeal on same facts pending in High Court—Criminal proceedings, whether should be adjourned.*

Where criminal proceedings are initiated by a Civil Court under section 476 of the Criminal Procedure Code, the fact that an appeal upon the same facts is pending in the High Court cannot be regarded as a valid reason in law for the adjournment of the criminal proceedings till the decision of the civil appeal. **A** RAJ KUNWAR SINGH v. EMPEROR, 18 A. L. J. 1011; 22 CR. L. J. 236; 43 A. 180 428

**s. 476—Order directing prosecution—**

*Notice, necessity of.*

In a suit upon a hand-note executed by R. for himself and his brother L., R. appeared and resisted the claim and the plaintiff gave up his claim against him. L. did not appear and the Court, finding the claim true, passed an *ex parte* decree against him. After this, upon an application by R. it was found that the paper on which the note was written was issued on a date subsequent to the date of the note, whereupon R. applied for sanction to prosecute the plaintiff: the Court granted the application without notice to the plaintiff and at the same time called upon him to show cause why the *ex parte* decree should not be vacated. Plaintiff moved the High Court to quash the order directing his prosecution :

*Held*, that, in the face of the finding that the claim on the hand-note was true, the order directing the prosecution of the plaintiff without deciding the genuineness or otherwise of the document in the presence of the plaintiff and R., the order was wholly illegal and without jurisdiction, and that, although no notice is essential in a proceeding under section 476 of the Criminal Procedure Code, yet, in the circumstances of the present case, notice was necessary, and the order having been passed without notice, it was wholly invalid. **Pat** RAKHAL MOHAN ROY v. EMPEROR, 22 CR. L. J. 233 425

**s. 476—Penal Code (Act XLV of 1860),**

*ss 183, 186—Warrant of attachment signed "By order" by Serishtadar—Warrant addressed to Nazir—Nazir, power of, to delegate it to peon—Procedure, legality of.*

A warrant for the attachment of property in execution of a decree was signed by the Serishtadar of the Court "By order" and was addressed to the Bailiff Nazir of the Court, the warrant was delegated to a peon and the accused resisted him in executing the warrant: the Court directed the prosecution of the accused, under section 476, Criminal Procedure Code, for offences under sections 183 and 183 of the Penal Code, and that order was attacked in revision on the ground that the warrant was neither legally made and signed, nor legally made over to the peon :

*Held*, that there was no illegality in the warrant, as the words "By order" showed that the Court had authorised the Serishtadar to sign it, and the Nazir



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had power to delegate it to a peon. **PAT WALI MOHAMMAD v. EMPEROR**, 8 U. P. L. R. (PAT.) 41; 22 Cr. L. J. 800 **796**

— **s. 526—Application for transfer—Error of judgment, whether ground for directing transfer.**

Mere errors of judgment, as,—refusing to summon a prosecution witness for cross-examination and insisting on his being summoned as a witness for the defence, or disallowing objections as to the fitness of a person to serve as an assessor, or permitting the prosecution to examine a witness in chief on the substantive case of the prosecution after the defence has disclosed its case in the cross-examination of the witness,—are insufficient, in the absence of prejudice in the Judge, to direct a transfer of the case for trial by some other Court; in such circumstances as the foregoing, however, the accused is entitled to a trial *de novo*. **PAT SHIV. ADHIN SINGH v. EMPEROR**, 22 Cr. L. J. 262 **652**

— **s. 526—Application for transfer—Trying Magistrate subordinate to District Magistrate, whether ground for transfer.**

The mere fact that a Magistrate, in whose Court a case is pending trial, is in his executive capacity subordinate to the District Magistrate who has taken a strong view with regard to the merits of the case, is, by itself, not a sufficient ground for transferring the case, under section 526 of the Criminal Procedure Code, to some other Magistrate outside the district. **PAT CHANDI MISSIR v. SHYAMA CHARAN GHOSH**, 22 Cr. L. J. 257 **657**

— **s. 528—Transfer, order of, by competent Magistrate—Cancellation of order by superior Magistrate without notice to party who obtained original order, legality of.**

When a complainant has obtained from a competent Magistrate an order of transfer of a case made after hearing both the parties, a Magistrate of superior jurisdiction should not cancel the order and re-transfer the case to the original Magistrate without hearing the complainant in support of the order of transfer. **M MANIKRAM PILLAI, In re**, 12 L. W. 633; (1920) M. W. N. 767; 22 Cr. L. J. 199 **55**

**Criminal Tribes Act (III of 1911),**

**s. 23—Second and third convictions, what are.**

The second conviction contemplated by clause (a) of sub-section (1) of section 23 of the Criminal Tribes Act need not be the second conviction after the Act, nor is it necessary that it should be the second in fact. Taking the conviction or convictions prior to the Act as one group constituting one conviction, the first one after the Act would be the second conviction for the purpose of the section though, in point of fact, it may be one more in a series of convictions prior to the Act. Similarly, a third conviction within the meaning of clause (b) of the same sub-section must be at least the second after the Act. **B EMPEROR v. TUKA NANA RAMOSHI**, 23 Bom. L. R. 347; 22 Cr. L. J. 817 **1005**

**Custom, proof of—Wajib-ul-arz, value of—Plaintiff setting up custom, effect of—Judgment in rem, admissibility of, in evidence.**

**Stuart, A. J. C.**—Where a *wajib-ul-arz* contains a record merely of the *wajib-ul-arz* of the parties it cannot be regarded as evidence of a

**Custom—cont'd.**

binding custom at variance with the personal law of the parties.

When a plaintiff, in order to succeed, has to establish the existence of a particular custom and fails to establish it, it is not open to the Court to do otherwise than dismiss the suit.

A judgment which is neither *res judicata*, nor a judgment *in rem*, is admissible in evidence as showing that a particular claim was previously asserted and rejected.

**Kanhaiya Lal, A. J. C.**—The existence of a custom in allied branches of a common origin lends strong antecedent probability to the prevalence of such a custom in another branch of the family of the same group. **O MUHAMMAD ALI KHAN v. GHAZANFAR ALI KHAN**, 7 O. L. J. 474 **147**

— **Adoption, what constitutes—Suit to set aside gift—Appeal by donor, whether competent.**

Where one person makes a gift in favour of another alleging that the latter is his adopted son, a declaration to that effect made at the time of mutation and repeated subsequently in the course of a suit brought by the collaterals of the donor to contest the validity of the gift is sufficient proof of adoption.

Where in such a suit a decree is passed declaring the invalidity of the gift, the donor alone is competent to prefer an appeal against the decree. **L TOTA v. MURHA** **448**

— **Alienation—Ancestral and self-acquired properties not distinguishable—Rule applicable.**

Where it is found that some of the property in suit is ancestral but that the whole of it is not, and it is impossible to distinguish which portion is ancestral, the whole of the property in suit must be held to be self-acquired. **L LEHNUN v. GUPTU** **520**

— **by a male proprietor—Necessity, proof of, nature of—Just debt, what is.**

It is only in the case of an alienation by a woman that the alienee has to show that the alienor's income was insufficient to provide the money required. Where the alienor is a man, all that has to be considered is whether the purpose for which the alienation was effected was a necessary purpose.

A just debt need not be one incurred for necessary purposes.

It is not necessary for an alienee, who is also the antecedent creditor, to prove that all the previous debts were incurred for necessity. It is only where the previous debts, besides not being for necessity, are unreasonable or prove reckless extravagance or waste, or a design to injure the reversioner's interests, that a distinction arises between the case of an alienation in favour of the antecedent creditor, who is *prima facie* fixed with knowledge of the nature of the debts, and an alienation in favour of a third person who cannot be presumed to have such knowledge. **L KANHI RAM v. MAJIA BAKSHI** **714**

— **Harrals of Shahpur District, custom of, proof of.**

**Amir, Ahmad of the Shahpur District** male proprietors have an abstracted power of alienation. **L BAKSHI v. MAJIA BAKSHI** **526**

— **Necessity—Re-marriage, whether necessary—Decree, form of.**

**Custom—concl'd.**

Where a sale is held to be partly for necessity it should not be converted into a mortgage for the sum proved to have been paid for necessity, the sale should be allowed to stand subject to the proviso that when succession opens out the heirs of the last male owner would be entitled to recover the land on payment of the sum found to have been paid for necessity.

*Semble*:—The re-marriage of a proprietor who has a son alive is not such a necessity as would justify the sale of ancestral land. **L MOHAMMAD DIN v. THAKUR SINGH** 461

**Gift, completed, whether can be revoked.**

Defendant, who was the occupancy holder of a square of land, agreed to gift it to the plaintiff provided the latter paid the money required for the acquisition of proprietary rights. Plaintiff was put in possession of the square in pursuance of the gift, but when the proprietary rights had been acquired the defendant refused to be bound by the gift on the ground that the plaintiff had not paid the money agreed to be paid by him :

*Held*, that the gift in favour of the plaintiff having been acted upon, his mere failure to pay the money agreed to be paid by him could not entitle the defendant to revoke the gift. **L BARKAT BIBI v. KARAM BIBI** 450

**Pre-emption—Agricultural land—**

*Hindus of Surat—Custom contrary to personal law, when to be enforced.*

By a long established custom Hindus in Surat have adopted the Muhammadan Law of pre-emption with regard to houses, but it is doubtful whether they have adopted any law which gives a right of pre-emption with regard to agricultural lands.

It is not advisable to extend any customary law which is in conflict with the personal law of the parties, unless there is evidence that such alien law has been adopted. **B JAGJIVAN HARIBHAI v. KALIDAS MULJI**, 28 Bom L. R. 81; 45 B. 604 901

**Wajib-ul-arz, entry in, construction of—Karabatmand karibi, who is.**

Where a *wajib-ul-arz* gives the right of pre-emption to a *karabatmand karibi*, a person, who is eleven degrees removed from the vendor, cannot pre-empt, inasmuch as he does not fall within the category of *karabatmand karibi*. **A TALIB HUSAIN KHAN v. DUKKHU KHAN**, 19 A. L. J. 108 992

**Riwaj-i-am, entry in, applicability of**

—Succession to acquired property—Jats of Jhelum District—Sisters versus remote collaterals—Custom and personal law—Suit based on custom—Custom not established—Procedure.

Unless there is a provision to the contrary, the rules laid down in the *riwaj-i-am* must be taken to refer to ancestral and not to self-acquired property.

Among Muhammadan Jats of the Jhelum District there is no custom governing the succession to the acquired property of the last male-holder when the contest is between his sisters and collaterals in the ninth degree.

Where no custom is established in a case the personal law of the parties should be applied, notwithstanding that the parties themselves relied upon custom. **L FATIMA BIBI v. SHAH NAWAZ**, 2 L. 48 509

**Decree, validity of, whether can be questioned in execution proceedings.**

The validity of a decree cannot be questioned in proceedings in execution thereof, even though the Court in passing the decree has contravened some provision of the law. **CHEM CHANDRA CHOWDHURY v. CHANDRA MOHAN NAMODAS**, 24 C. W. N. 1070 204

**Definitions:—**

**Acknowledgment of liability.** See LIMITATION ACT, s. 19 189

**Agricultural land.** See PUNJAB PRE-EMPTION ACT, s. 13 (o.) 580

**Appellate Court.** See LIMITATION ACT, SCH. I, ART. 181 (2) 267

**Attestation.** See TRANSFER OF PROPERTY ACT, s. 59 736

**Authorised distribution.** See NORTHERN INDIA CANAL AND DRAINAGE ACT, s. 70 (4) 59

**Cause of action.** See CIVIL PROCEDURE CODE, O. II, R. 2 496

**Cut down.** See MADRAS ESTATES LAND ACT, s. 12 90

**Easement of necessity** 504

**Final order.** See CIVIL PROCEDURE CODE, s. 109 203

**Good faith.** See LIMITATION ACT, s. 5 744

**Having held land as a raiyat.** See MADRAS ESTATES LAND ACT, s. 6 192

**Income.** See INCOME TAX ACT, s. 5 (iv) 357

**Itmam** 984

**Just debt.** See CUSTOM—ALIENATION 714

**Karabatmand karibi.** See CUSTOM—PRE-EMPTION 992

**Occupier } See BENGAL MUNICIPAL ACT, s. 85 498**  
**Owner } s. 85**

**Payment of debt.** See PRESIDENCY TOWNS INSOLVENCY ACT, s. 21 943

**Persons who would have succeeded according to the provisions of the Act.** See OUDH ESTATES ACT, s. 8 548

**Pre-emptor.** See PUNJAB PRE-EMPTION ACT, s. 16 371

**Reasonable time.** See LIMITATION ACT, SCH. I, ART. 181 817

**Rent Court decree.** See PROVINCIAL INSOLVENCY ACT, s. 10 (1) (n) 758

**Same judgment.** See CIVIL PROCEDURE CODE, O. XLV, R. 4 517

**Sons.** See HINDU LAW—MITAKSHARA 251

**Standard rent.** See BOMBAY RENT (WAR RESTRICTIONS) ACT, s. 2 960

**Successors.**

See OUDH RENT ACT, s. 107H 641  
See OUDH TALUKDARS 937

**Sufficient cause.** See CIVIL PROCEDURE CODE, s. 114 918

**Timber.** See LANDLORD AND TENANT 521

**Use.** See MADRAS ESTATES LAND ACT, s. 12 90

**Vest.** See LAND ACQUISITION ACT, s. 16 571

**Without detriment to father's estate.** See HINDU LAW—MITAKSHARA 379

**Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 2, 13.** See CIVIL PROCEDURE CODE, s. 2 **885**

— **s. 22**—Application to execute award. See ARBITRATION ACT, s. 15 **942**

**Divorce Act (IV of 1869), s. 19**—*Divorce—Cruelty—Syphilis, when amounts to cruelty—Marriage, breach of promise of—Syphilis, whether good defence to action—Medical examination, refusal to submit to, effect of.*

In order to sustain a plea of cruelty in an action for divorce on the ground that one of the parties to the marriage is suffering with syphilis, it must be shown that the disease has been actually communicated to the complainant, and that the complainant was not only ignorant of the existence of the disease at the time of its communication, but that it was knowingly and wilfully communicated.

The existence of syphilis at the time a contract to marry is entered into, or the incurring of the disease after such contract is entered into, furnishes a good defence in an action for breach of promise of the contract to marry, even though the disease was acquired after the making of the contract but through no wrongful act of the defendant.

Where a person is alleged to be suffering from a loathsome disease, and refuses to attend for medical inspection, the Court may properly draw an unfavourable inference. **C BIRENDRA KUMAR BISWAS v. HEMLATA BISWAS**, 24 C. W. N. 914; 33 C. L. J. 97 **362**

**Easements Act (V of 1882), s. 15**—*Right of way, interruption of—Suit to establish right—Limitation.*

Where a person has enjoyed a right of way for over 20 years over another person's land, and that right is interrupted, the benefit of the previous enjoyment will be destroyed unless he comes within two years of the interruption and gets a decree declaring his right. **M NACHIPARAYAN v. NARAYANA GOUNDAN**, 39 M. L. J. 574; 12 L. W. 713 **171**

**Easement of necessity, meaning and limits of.**

When the necessity for an easement of necessity terminates, the easement also terminates.

An easement of necessity is an easement which, under particular circumstances, the law creates by virtue of the doctrine of implied grant to meet the necessity of a particular case. It is an easement which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one without which that tenement cannot be used at all. Such an easement lasts only so long as the necessity exists; for a grant arising out of the implication of necessity cannot be carried further than the necessity of the case requires.

A right of way limited by the necessity which creates it, ceases if, at any subsequent period, the party entitled can approach the place to which it led by passing over his own land. **C ABHOYA CHANDRA GHOSH v. RAJ KUMAR GUPTA** **504**

**Ejectment—Occupancy holding, whether liable, purchaser of, whether liable to ejectment.**

The purchaser of a non-tenanted occupancy holding who is recorded in the revenue records as a possession merely, does not become a tenant, and is liable to ejectment. **C BROJO GOSWAMI v. RAJANI KANTA GUPTA** **473**

**Election—Evidence, whether can be allowed to vary recorded voting paper showing election to be void—Number of votes recorded exceeding maximum, effect of.**

No evidence should be allowed to vary the recorded voting paper which, on the face of it, shows an election to be invalid and void.

The principle that when the number of votes recorded exceeds the maximum that can be given an election must be invalid and void, is a perfectly sound one, and one that cannot be controverted in the case of any elective body, especially when there are no rules providing for any such contingencies. **C NAGENDRA NATH SEN v. J. VAS**, 32 C. L. J. 124 **547**

**Evidence Act (I of 1872), s. 24**—*Confession obtained by inducement—Magistrate, duty of.*

As soon as an accused person, whose confession is being recorded, informs the Magistrate that he is making the confession under inducement, it becomes useless to record the confession, and such a confession, if recorded, is inadmissible in evidence and ought not to be allowed to go to the Jury. It makes no difference whether there actually was any inducement or not. **B DINANATH SUNDRAJI RAYTE v. EMPEROR**, 23 Bom. L. R. 338; 22 Cr. L. J. 318 **1006**

— **s. 54.** See CRIMINAL PROCEDURE CODE, s. 287 **331**

— **s. 68**—*Transfer of Property Act (IV of 1882), s. 59—Mortgage—Creation of charge—Proof of attestation.*

In order to prove the creation of a valid charge by a mortgage-deed which, under section 59 of the Transfer of Property Act, requires to be attested by two witnesses, the evidence of one of the attesting witnesses is, under section 68 of the Evidence Act, sufficient to prove the execution of the mortgage and the document may be accepted by the Court as *prima facie* sufficiently proved to be a valid mortgage, but this *prima facie* proof may be rebutted by proof on the other side that the other witness or witnesses who has or have apparently attested the document did not really see its execution. **M VENKATA REDDI v. MOTHU PAMBULU NAICK**, 39 M. L. J. 463 **554**

— **s. 80, applicability of—Depositions more than 60 years old—Oral evidence to identify deponent, absence of, effect of—Copies, signature of—Presiding Officer wanting on, effect of.**

The mere fact that there is no oral evidence to identify the deponent of a deposition made more than 60 years ago, is not sufficient to render the provisions of section 80 of the Evidence Act inapplicable thereto, nor would the absence of the signature of the Presiding Officer to a copy of such deposition preclude the presumption that the copy is a true copy. **Q SARABJIT v. MATA DIN**, 7 O. L. J. 542 **437**

— **ss. 90, 167**—*Document more than thirty years old—Presumption as to signature of executant, effect of.*

In a suit for a declaration that the plaintiff was the owner of a plot of land and for ejectment of the defendant therefrom, the plaintiff relied upon a deed of gift which was unregistered and the signature purporting to be that of the executant, but in the place reserved for the



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signature there existed a line which, it was alleged, was his mark, though it was not described as such in the deed, and the question was whether a presumption could be raised as to the genuineness of the deed as to render it admissible in evidence :

*Held*, that in a deed of this nature a presumption as to its genuineness ought to be made cautiously, and the most a Court could do was to presume that the signature was in the handwriting of the scribe, but it could not be presumed that the scribe had authority from the executant to sign his name on the document, and that, in these circumstances, the deed was inadmissible, and the fact that the deed was referred to in another deed, equally inadmissible, was of no avail. **A LOKMAN DAS V. GANGA SAHAI** 96

———— **S. 91—Hundi, suit on—Hundi inadmissible in evidence—Plaintiff, whether can fall back on original cause of action.**

The language of section 91 of the Evidence Act is uncompromising, and whenever the terms of a contract are reduced to writing, and that writing is, for any reason, inadmissible in evidence, the promisee must lose his remedy.

Where a *hundi* is executed in consideration of a loan and it is found that the *hundi* being insufficiently stamped is inadmissible in evidence, the debtor cannot fall back upon the original transaction and sue the debtor on the basis of the loan. **L GURDAS MAL SINGH V. ISHAR DAS**, 3 U. P. L. R. (L.) 15 107

———— **S. 92—Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Adjustment of decree—Oral evidence to prove adjustment, admissibility of.**

Inasmuch as Order XXI, rule 2 of the Civil Procedure Code contemplates the taking of evidence to prove the adjustment of a decree, section 92 of the Evidence Act is no bar to the admissibility of oral evidence to prove an agreement by way of adjustment of a decree. **N RANGLAL V. CHUNNILAL**, 16 N. L. R. 204 316

———— **S. 116—Landlord and tenant—Estoppel—Lessee, whether can evict landlord after expiry of lease.**

A tenant who has been let into possession by his landlord cannot deny the landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to him.

A lessee, however, whose lease has expired cannot evict the landlord who is legally in possession of the property even if the landlord had been let into possession by the *quondam* lessee. **L MUHAMMAD MUMTAZ HUSSAIN V. NAURANG AHMAD** 502

**Excess Profits Duty Act (X of 1919), Sch. II, cl. (1), proviso—Accumulated profits, when can be treated as capital—Specific Relief Act (I of 1877), s. 45—Income Tax Act (VII of 1918), s. 51—Chief Revenue Authority, whether bound to make reference.**

Accumulated profits cannot be treated as capital under the proviso to clause (1) of Schedule II to the Excess Profits Duty Act, unless they are actually employed in the business. Profits intended to be employed in the business cannot be treated as capital.

Whether or not they are employed in the business, is a question of fact which the Chief Revenue

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Authority is entitled to decide on the materials before it

It is not clearly incumbent on the Chief Revenue Authority, within the meaning of section 45 of the Specific Relief Act, to make a reference to the High Court under section 51 of the Income Tax Act. **B BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, LIMITED, In the matter of**, 23 Bom. L. R. 139 964

**Execution of decree—Application against judgment-debtor, whether saves limitation as against surety—Limitation applicable. See LIMITATION ACT (IX of 1908), Sch. I, Arts. 181, 182 265**

———— **Attachment, wrongful, of property—Damages, suit for, by rightful owner, whether maintainable.**

Inasmuch as a decree-holder is responsible for the attachment of moveable property seized in execution of his decree as the property of his judgment-debtor, a suit by the rightful owner of such property is maintainable against him for wrongful attachment. The mere fact that there is a subsequent order that the property should not be released and returned to the rightful owner, pending the decision of a suit by the decree-holder that the property was liable to attachment, would afford no protection against a claim for damages. **C BHUSHAN CHANDRA PAL V. NARENDRA NATH KOOR**, 32 C. L. J. 236 280

———— **Sale—Property of person connected with suit sold—Procedure.**

Where in execution of a decree the property of a person unconnected with the suit is brought to sale and he is ousted and possession given to the auction-purchaser, such person is entitled to be re-placed in the position in which he was when ousted.

The mere fact that the auction-purchaser's remedy has, in the meantime, become barred by time makes no difference. **A RAM CHARAN SAHU V. GOGA** 120

**Ex parte decree, whether final—Pre-emption decree—Order refusing to extend time for payment—Appeal, whether lies.**

An *ex parte* decree is final, till it is set aside by either the first Court or the Court of Appeal.

No appeal lies against an order refusing to extend the time fixed for payment of the decretal amount under a decree for pre-emption. **L ABBAS KHAN V. NUR KHAN** 496

**Fishery, right of, proof of—Public navigable river—Burden of proof.**

Where in a suit for a declaration of right to a *khal* and for recovery of possession by eviction of the defendant, the latter asserts that the disputed *khal* is a public navigable river, wherein he has a right to fish, either on the basis of prescription or by immemorial custom, it is necessary to determine, in the first instance, whether it is or is not a public navigable river, and it is for the plaintiff to prove that there was a grant of the bed of the river to the Zemindar at the time of the Permanent Settlement, or that, although the channel was a public navigable river, there was in reality a grant of several fishery in favour of the Zemindar. **C BHAGIRATH MALO V. ANNANDA PROSUNNA MUKHAPADHYA**, 33 C. L. J. 229 778

**Gift, deed of—Attestation—Proof, nature of.**

In order to prove a deed of gift the production of a witness who identified the donor and also the attesting witnesses when the deed was being registered, and who was known personally to the Sub-Registrar, together with an entry in favour of the donee in the village records in succession to the donor, is a sufficient compliance with the provisions of the law. **U P B R PARTAR BAHADUR SINGH v. RAM DAS**, 2 U. P. L. R. (B. R.) 100

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**Government of India Act, 1915 (5 & 6 Geo. V, c. 61), s. 107—Criminal**

*Procedure Code (Act V of 1898), ss. 145, 435 (3)—High Court, inherent power of, to give directions for disposal of property attached in Criminal proceedings—Proceedings under s. 145, Criminal Procedure Code—High Court, power of, to set aside proceeding.*

A High Court is competent, in the exercise of the power of superintendence vested in it under section 107 of the Government of India Act, 1915, to set aside proceedings instituted without jurisdiction by a Subordinate Court under section 145 of the Criminal Procedure Code; such power of superintendence can be exercised notwithstanding section 435 (3) of the Criminal Procedure Code.

The High Court may make consequential or incidental orders in the exercise of its power of superintendence over Subordinate Courts, which may be invoked, if occasion should arise, to reach and remedy all forms of judicial high-handedness.

Owing to a dispute between a landlord and his tenants as to the right of the former to lac growing on trees, the District Magistrate apprehended a breach of the peace and initiated proceedings under section 145 of the Criminal Procedure Code, and by a subsequent order attached the trees with the lac thereon; the lac was collected and some of it sold, the sale-proceeds being deposited in the Treasury and the unsold lac stored away: the High Court set aside the proceedings as being without jurisdiction, and issued a rule calling upon the District Magistrate and the tenants to show cause why the sale-proceeds of the lac and the unsold lac should not be made over to the landlord, or why such order should not be passed as to the Court might seem proper:

*Held*, (1) that the High Court had inherent power to give directions as to the disposal of property attached in a criminal proceeding initiated without jurisdiction as might be necessary in the interests of justice;

(2) that in the present case the proper order was to keep the sale-proceeds of the lac and the unsold lac in the custody of the Subordinate Judge of the District pending the decision of a suit to be instituted by the landlord for declaration of his right to the lac, and that, in default of such suit being instituted, the net sale-proceeds of the lac be distributed rateably among the tenants. **C ALI MUHAMMAD MANDAL v. PIGGOT**, 32 C. L. J. 270; 22 Cr. L. J. 218

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**High Court, Original Side—Judge, whether bound by previous decision of Judge on Original Side.**

A Judge on the Original Side of the High Court is ordinarily bound to consider with respect the decision of another Judge on the Original Side produced before him, but if he is convinced that the decision is erroneous, he is not under any obligation

**High Court—conclld.**

to follow it against his own judgment. **C VIRJIBUN DASS MOOLJI v. BISSESSWAR LAL HARGOBIND**, 24 C. W. N. 1032; 48 C. 69

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**Hindu Law—Adoption** by minor widow, validity of—Right of widow to dispute and claim against adoption—Estoppel—Suit by widow for herself and for co-widow impleaded as defendant—Decree for whole property, whether can be passed.

An adoption by a minor widow who has not attained sufficient maturity of understanding to appreciate the nature of her act is invalid.

In such a case there is no personal estoppel preventing the widow from disputing the validity of the adoption and recovering her husband's properties from the adoptee unless the latter's position has been prejudiced.

Where a widow sued for the recovery of her husband's properties both for herself and her co-widow, impleading the latter as a defendant, the Court can pass a decree for the entire property if the co-widow assents to such a course during the trial. **M RAMACHARI v. SARASWATI AMMAL**, 12 L. W. 544; (1920) M. W. N. 721

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Orphan given by elder brother—Factum valet, doctrine of, applicability of.

The doctrine of *factum valet* is inapplicable to the case of an adoption of an orphan son when given by an elder brother, as such an adoption is invalid under the Hindu Law. **M BANDARU MARAYYA v. BANDARU RAMALAKSHMI**, 39 M. L. J. 495; (1920) M. W. N. 108; 12 L. W. 613; 28 M. L. T. 428; 44 M. 260

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**Antecedent debt—Necessity, proof of, whether necessary—Pious obligation of sons, extent of—Separation, whether affects obligation—Secured and unsecured debts, distinction between.**

It is only when legal necessity cannot be established that the question of antecedent debt becomes material.

A pious obligation which arises only on the death of an ancestor and an antecedent debt which may support an alienation while the ancestor is alive, are distinct grounds on which justification for an alienation may be pleaded.

There is no authority for the proposition that the pious obligation of a son or grandson to pay his ancestor's debts depends on whether the two were joint or separate in estate. The doctrine is founded on religious considerations to which the question of jointness or separation is entirely irrelevant.

Where a Hindu is under a pious obligation to pay a debt and pays it off by incurring another debt, the latter in turn becomes an antecedent debt binding on his sons.

Where the ancestor is dead, the pious obligation to pay his debts is not concerned with the question whether the debts are secured or unsecured, but only with the question whether they are lawful debts not incurred for an illegal or immoral purpose. **O RAM SARAN v. MANGAL SINGH**, 28 O. O. 327; 2 U. P. L. R. (C. C.) 191; 8 O. L. J. 87

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**Dayabhaga School—Joint family—Property acquired by one member—Self-acquired property—Burden of proof.**

Under the Dayabhaga School of Hindu Law where one of the members of a joint family acquires property in his own name during the lifetime of his

**Hindu Law—contd.**

father, the burden of proving that the property was not the self-acquired property of that member, but in reality belonged to the father, lies on the party making the assertion. **C NIBARAN CHANDRA SEN v. SASHI BHUSAN SEN** 729

**Dayabhaga School—Succession—**

*Succession certificate—Daughter, widowed, whether to be preferred to grandsons*

A childless widowed daughter of a deceased Hindu is not to be preferred to the sons of another daughter in the matter of obtaining a certificate for the collection of debts due to the deceased, notwithstanding that, under the Hindu Widow's Re-marriage Act, there is a probability of the widow re-marrying. **A PRAMILA DEVI v. CHANDER SHEKHAR CHATTERJI**, 19 A. L. J. 272 777

**Joint family—Alienation—Antecedent**

*debt, mortgage-debt, whether is—Personal obligation to pay, effect of.*

A mortgage-debt is not as such an antecedent debt which would justify an alienation of joint family property, but where there is a subsisting personal obligation to pay the debt so incurred, it might, in virtue of this personal obligation, be treated as an antecedent debt. **O RAM DEVI v. SURAJ BAKSHI**, 23 O. C. 204; 7 O. L. J. 609; 2 U. P. L. R. (J. C.) 166 177

**Ancestral trade—Debts contracted**

*by managing member—Minor members, liability of.*

Under Hindu Law a joint family which carries on a trade handed down from its ancestors becomes a trading family, and the shares of the minor coparceners in the property of such a family are liable for debts contracted by the managing member for the purposes of the family trade or for purposes incidental to it. **L DAYAL SINGH v. BAHAL SINGH** 610

**Antecedent debt, nature of—Alienation—Transaction, when should be upheld.**

In order to render a debt antecedent there must not only be priority in time but real dissociation in fact from the mortgage sought to be enforced. Where, therefore, a person borrows money on a mortgage a little more than a fortnight after a prior mortgage there is not that dissociation which would render the latter a debt which was properly antecedent.

In order to validate an alienation either by sale or mortgage, two elements are necessary, namely, first, that the purpose for which the money was obtained is a purpose necessary by the law, and, second, that there is a pressure on the estate, sufficient to render the alienation necessary.

Where, if only that amount had been borrowed which the Court finds for legal necessity or antecedent debt, it would still have been necessary to execute the mortgage in suit, the transaction should be upheld. If not, it should be set aside on condition of the creditor being re-paid with interest the amount which he has validly advanced. **O UMRAO SINGH v. GAYA PRASAD**, 23 O. C. 374 647

**Claim against family property—**

*Claim referred by some members to arbitration—Arbitration, whether binding on family property.*

Where a person makes a claim against the property of a joint family, and the claim is referred to

**Hindu Law—contd.**

arbitration by some members only of the family and a settlement is effected by them with the claimant, the arbitration and settlement are not binding on the family property. **M BHUMIREDDI SURANNA v. BHUMIREDDI APPADU**, 12 L. W. 668; (1921) M. W. N. 28 615

**Joint family—Compromise entered into by manager, whether binding on other members.**

A deed of compromise affecting immoveable property binds not only the parties who actually sign it, but it also binds the other parties to the suit who stand by and do not object to it for a long time.

The manager of a joint Hindu family is entitled to represent the co-parcenary in all suits and proceedings affecting its interests, to make contracts, to refer to arbitration, to compromise any claim or dispute affecting it, and generally to do all such acts as he may consider necessary or to its benefit. **L MITHA MAL v. SHIV RAM** 484

**Compromise of doubtful claim by father, whether binding on sons.**

The minor sons of a Hindu father are bound by a bona fide compromise of a doubtful claim entered into by their father as manager of the joint family. **L SHAMBHU NATH v. DWARKA DAS** 524

**Debts incurred by father—Son, liability of**

In Hindu Law in order to render a son liable for his father's debts, the creditor must prove the existence of a debt due by the father, the mere existence of a decree against the father is not evidence against the son who was not a party to the suit in which the decree was obtained. **L KASTURI MAL v. LAJJA RAM** 751

**Family consisting of two branches—**

*Loan by member of one branch, whether binding on family.*

Where two branches of a family taken together constitute a joint family, each one of them is liable for a debt binding on the joint family, and the presumption is that the member of the family who incurs a debt had authority to do so for joint family necessity. **PAT INDER CHAND v. BIDYADHAR PANDEY**, 5 P. L. J. 744; 2 P. L. T. 111; (1921) PAT. 107 282

**Father, as manager, right of, to alienate family property—Necessity—Burden of proof.**

A father, as manager of a joint Hindu family, has not a general right to dispose of joint family property by way of sale or mortgage. Even though the money raised is used by him in some business by which he expects to make more money. Where a mortgage of family property by a father is sought to be enforced, the burden lies heavily on the person seeking to enforce it, of proving the existence of legal necessity for the transaction. **A GANGA PRASAD v. RAM SARUP** 68

**Manager, loan taken by, for benefit of family—Necessity—Presumption—Loan, previous, for necessity—Subsequent mortgage to re-pay loan, whether can be impeached.**

Where the managing member of a Hindu joint family borrows money, and the loan has the effect of saving the family property and of removing the fear of disturbance likely to be caused in the family business,



**Hindu Law—contd.**

and there is nothing to indicate that the lender acted otherwise than in good faith, the existence of necessity may be presumed.

Where a previous loan by the manager of a Hindu joint family upon a promissory note is good and binding on the family, a subsequent mortgage in lieu of it cannot be impeached. **O BALAK RAM v. RAM SUNDAR**, 7 O. L. J. 530; 2 U. P. L. R. (J. C.) 168 **410**

——— **Joint family—Mortgage—Necessity, proof of—Mortgagee in possession for 25 years without objection, effect of—Acquiescence.**

In a suit on a mortgage it was proved that the mortgage had been executed by the ancestors of the defendants to pay off a previous bond and that the mortgagee had been in possession of the mortgaged land for twenty-five years without objection by the defendants;

*Held*, that the conduct of the defendants amounted to acquiescence and that no further proof of necessity was, under the circumstances, required. **PAT RAM CHOWDHRY v. TILAK CHOWDHRY** **387**

——— **Mortgage of family property, when binding on family—Burden of proof.**

A mortgage of family property with the object of raising funds for the purchase of zemindari shares in a village, such purchase being for the benefit of the family and not detrimental to its interests, is binding on all the members who belong to the family. In such a case it is not necessary for the mortgagee to prove that the money raised by the mortgage was actually applied towards the purchase of the zemindari. It is enough if he proves that a representation was made to him that the zemindari was to be purchased and that after reasonable enquiry he believed the representation to be true.

Where a mortgage-deed of family property contains a recital of a previous mortgage and the object of the subsequent mortgage is to pay off the previous mortgage, the validity of which is admitted, both the previous and subsequent mortgages are binding on the family. **A TULA RAM v. TULSHI RAM**, 18 A. L. J. 699; 42 A. 559 **3**

——— **Property inherited by reversioner, nature of—Mortgage by father, when binding on sons—Pious obligation, nature of—Contingent obligation, whether can be repudiated.**

Under the Hindu Law property acquired by a reversioner by inheritance from a collateral is not joint family property, and in respect of such property the inheritor possesses an absolute power of disposal, and his sons and grandsons do not acquire any right in that property by birth so as to enable them to impeach a transfer thereof.

A mortgage by a Hindu father cannot validly affect the joint family estate unless it is made for family necessity or for the family benefit, or to pay an antecedent debt, either binding on the family by reason of its having been taken for family purposes, or binding in consequence of the pious obligation on the sons, where it exists, to pay the same if not tainted with immorality.

Although, during the lifetime of a father there is no pious obligation on his sons to pay his debts, there is

**Hindu Law—contd.**

nevertheless a contingent obligation on him to pay which he cannot repudiate unless he shows that the debt was taken for immoral purposes: so that if the joint family property has passed out of the family to pay off such an antecedent debt either under a conveyance executed by the father or under a sale held in execution of a decree for the father's debt, the son cannot recover back the property unless he can show that the obligation arising out of the antecedent debt was of a character which he was not in any contingency liable to discharge. **O BHARAT SINGH v. SANSUTI SINGH**, 7 O. L. J. 459; 23 O. C. 244 **137**

——— **Joint family—Separation of one member—Presumption—Re-union—Burden of proof.**

When one co-parcener in a Hindu family separates from the others there is no presumption that the latter remain united, and an agreement among them to remain united or to re-unite must be proved like any other fact by the person who alleges it. **L NIT KANTH v JAI GOPAL** **696**

——— **Separation—Presumption—Burden of proof.**

Where in the case of a joint Hindu family one party admits separation prior to the institution of the suit, the onus is still on the party who relies upon separation prior to the date of a certain transaction to establish that the separation did take place before the date of that transaction. **PAT GOBIND PRASAD v. CHATTURBHUI** **482**

——— **Maintenance—Suit by widow—Decree, proper—Contest between defendants, whether should be decided.**

In a suit by a Hindu widow for maintenance against several persons in possession of the estate of her deceased husband, the proper decree to make is to direct payment of the amount of the maintenance by any one or more defendants in possession of the estate to the extent of the estate in his or her possession, on particular dates to be specified by the Court.

In such a suit it is not necessary to decide a contest between the defendants *inter se* as to who is legally entitled to the estate. **A SARASUTI TEWARIN v. NANDAN**, 18 A. L. J. 828; 2 U. P. L. R. (A.) 280 **99**

——— **Mitakshara—Impartible estate, nature of—Succession to such estates, rule of.**

The fact that a Raj is impartible does not make it separate or self-acquired property. It may in fact be self-acquired or it may be family property of a joint undivided family. If the latter, succession will be regulated according to the rule which obtains in an undivided joint family, so far as the selection of the person entitled to succeed is concerned, i. e., he will be designated by survivorship, although then, according to the custom of impartibility, he will hold the Raj without the others sharing it. **P C BAIJNATH PRASAD SINGH v. TEJ BALI SINGH**, 19 A. L. J. 317; 33 O. L. J. 388; 40 M. L. J. 887; (1921) M. W. N. 300; 25 U. W. N. 563; 2 P. L. T. 257; 23 Bom. L. R. 654; 43 A. L. J. 35; 29 M. L. T. 358 **534**

——— **Joint family—Self-acquisitions—Partible and impartible property—Gains of sons, when impartible—Without detriment to joint estate, meaning of—Burden of proof.**

**Hindu Law—contd.**

In a joint Hindu family the rule is that the acquisitions of the members are joint property and partible. Gains of science made without any detriment to the father's estate are, however, excepted.

It was originally sufficient to make such gains partible, that the earner had been maintained out of family funds during his education. This was later on narrowed down, first to the receipt of the education itself at the family expense, and later still education generally was narrowed to specialised education, which is now the basis of the rule.

The burden of proving that the science was acquired without detriment to the family estate is on the acquirer.

It is not necessary to make gains of science partible that they should result directly from the use of joint family funds. Nor does their partibility depend on *causa proxima*, nor is it negatived by the intervention of the personal element of the individual co-parcener's character.

Once it is found that an unseparated member was originally equipped for the calling in which he made his gains by a special training at the expense of the patrimony, his personal earnings and acquisitions remain partible throughout his life. On the other hand, he can sever from the family at will on the footing of bringing his accumulations into hotchpot and without any liability as to future earnings.

In the present case the earnings of an Indian Civil Servant were held to be partible property and as such liable for the family debts. **P C AMAR NATH v. FIRM OF HUKAM CHAND-NATHU MAL**, 19 A. L. J. 249; 40 M. L. J. 377; 2 P. L. T. 208; 2 L. 40; 33 C. L. J. 355; 29 M. L. T. 258; (1921) M. W. N. 175; 25 C. W. N. 534; 3 U. P. L. R. (P.C.) 12; 23 Bom. L. R. 671.

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**Mitakshara—Succession—Adopted**

*son, whether can succeed collaterally—Sister, whether heir—Paternal uncle's daughter's son, whether bandhu.*

Where the adoption of a person has not been in the Dattaka form, he cannot, under the Mitakshara, succeed collaterally in the family of his adoptive father.

Under the Mitakshara, a sister has no right of succession to the estate of her deceased brother.

Under the Hindu law, a paternal uncle's daughter's son is a *bandhu*. **L. TIRATH RAM v. KAHAN DEVI**, 1 L. 588.

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**Succession—Bandhus, rule of**

*succession as between different classes of—Mother's paternal aunt's son, whether to be preferred to mother's sister's grandson—"Sons", whether include grandsons*

In the Mitakshara system *bandhus* are of three kinds: related to the person himself, *atma bandhus*, to his father, *pitri bandhus*, or to his mother, *matri bandhus*. The right of succession among these three classes is governed by the propinquity of the class, no *pitri bandhu* succeeds until the class of *atma bandhus* is exhausted and no *matri bandhu* succeeds until the classes of *atma bandhus* and *pitri bandhus* are exhausted.

**Hindu Law—contd.**

The rule is not dependent on individual propinquity or on the efficacy of offerings to a deceased person. A *bandhu* must, in order to be heritable in a female line, fall within the fifth degree from the common male ancestor, and must be so related to the deceased person that they were mutually *sapindas* of one another; but if these conditions are satisfied the rule takes effect. For instance, a mother's sister's grandson, being an *atma bandhu*, would succeed in preference to a mother's paternal aunt's son being a *matri bandhu*.

The word "sons" in Mistakshara, II, (1) 6 includes "grandsons" **P C ADIT NARAYAN SINGH v. MAHABIR PRASAD TIWARI** 40 M. L. J. 270; (1921) M. W. N. 15; 19 A. L. J. 203; 2 P. L. T. 97; 33 C. L. J. 263; 29 M. L. T. 240, 6 P. L. J. 140 23 Bom. L. R. 632; 25 C. W. N. 842; 14 L. W. 23.

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**Partition—Partition-deed—Gift—Defeasance clause, validity of.**

The principle that an estate once vested cannot be divested is not recognised as a general rule of Hindu Law, even of the Hindu Law of Succession. Therefore, a defeasance clause in a partition-deed of an estate that, if a particular event shall happen,—in this case a default in making certain payments,—the interest of the defaulter shall pass to another person, is not repugnant to any principle of Hindu Law. **M KRISHNASWAMI AIYAR v. APPAVIER**, 39 M. L. J. 492; (1920) M. W. N. 631; 12 L. W. 519; 18 M. L. T. 430.

802

**Religious endowment—Mahant,**

*position and powers of—Pronami, whether personal property of Mahant—Residence of Mahant—Cost of up-keep, whether to be borne by endowment.*

The *pronami* offered by the faithful to the Mahant of a Hindu religious endowment is the personal property of the Mahant and is no part of the income of the endowment.

There is a fundamental distinction between the offerings made to the deity and the offerings made to the Mahant personally. If offerings are made to the deity, they belong to the endowment and must be applied by the Mahant for the purposes of the endowment; on the other hand, if offerings are made by the faithful to the Mahant personally, they do not become merged in the income of the endowment.

Whether a particular offering is made to the deity or to the Mahant personally, depends upon the intention of the faithful devotee and no inflexible rule can be formulated, nor can any general test be prescribed, for determining whether on a particular occasion the offering was made to the deity or to the Mahant personally.

Where by a consent order the *pronami*, or personal offering to the Mahant of a religious endowment, is not to be treated as part of the income of the endowment, that order is binding on the parties so long as it stands.

The dwelling-house of a Mahant, being part and parcel of a religious endowment, must be maintained in suitable condition as the proper residence of the spiritual head of the endowment, out of the income of the endowment. **C KUMUD BAN v. TRIPIRA CHARAN** 464.

464

**Reversioner, presumptive, position of—Estoppel against claim to property alienated when**

## Hindu Law—contd

A mortgage of trust property by the *Mahant* of a Hindu shrine effected after the creditor had satisfied himself as to the existence and nature of valid necessity for the loan, is enforceable against the property mortgaged.

The creditor is not bound to show that the money was actually applied for the purpose for which it was borrowed. ○ **DURGA BHARTI v. NAGESHWAR NATH**, 23 O. C. 520 544

— **Widow,** *alienation by—Necessity—*  
*Burden of proof,*

Where a widow purports to alienate a portion of her husband's property in order to meet expenses of litigation incurred for the protection of the estate against a hostile attack, necessity is not established unless it is proved that at the time the money was actually advanced there was no money in the coffer sufficient for the protection of the estate, and it is for the creditor to establish that there were no funds in the hands of the widow sufficient for the protection of the estate against the hostile attack.

**Pat NARAIN SINGH v. SARJUG SINGH** 486  
———, alienation by —Necessity, proof of—

Independent advice, whether necessary—Expenses incurred in proper management, whether binding on prisoners

When a debt is incurred by a Hindu widow who is a *pardanashin* lady, and the necessity for the loan is established and it is further established that the creditor made due enquiries about the necessity, it is not necessary for the creditor to show that the lady, in entering into the transaction, had independent advice.

A Hindu widow is entitled to incur expenses necessary to the well being of the estate and to borrow money for this purpose and such debts are binding on the reversioners. **Pat** RADHA KISHUN **v** JAG SAHU, 3 U P. L. R. (Pat.) 14 **173**

position of—Alienation by widow, whether void or voidable—Election by reversionary heir to treat alienation as nullity, what constitutes—Steps to avoid alienation, whether must be taken before suit.

A Hindu widow is not a tenant for life, but is the owner of her husband's property, subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. Her alienation is not, therefore, absolutely void, but is *prima facie* voidable at the election of the reversionary heir. The institution of a suit by the reversionary heir for possession shows his election to treat the alienation as a nullity, and in such a suit it is not necessary for him to ask for a declaration that the alienation is inoperative, nor is it essential that he should take steps, before the institution of the suit to avoid the alienation.

**C. SUTIN MOHAN BANERJEE v. RAJ KRISHNA GHOSH,**  
33 C. L. J. 193; 25 C. W. N. 420

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—, transfer by, without written instrument—Reversioner, suit by, for declaratory relief, whether maintainable—Declaration, whether should

By the effect of a mere transfer of possession on the part of a Hindu widow without a written instrument, a reversioner should not be given a declaratory decree in a suit for possession, unless there is cogent evidence that the conduct of the widow amounts to an estoppel.

A presumptive reversioner, whose interest in an estate is nothing better than a *spes successionis* cannot deal with such an interest so as to pass any title to a transferee, but if he joins in an alienation of the estate and has the full benefit of the transaction, he is estopped, when the reversion falls to him, from claiming the same property on the ground that at the time of the alienation he could not pass any title in the property. **M SHUNMUGHA VELAYUDHAM CHETTY v KOYAPPA CHETTIAR**, (1920, M. W. N. 6:9

635

— **Succession**—Step-son, whether can  
succeed.

Under the Mayuka and Mitakshara systems of Hindu Law succession to *stridhan* is confined to the issue of the female who has the *stridhan*, consequently a step-son has no legal claim to *stridhan* property.

26 J

Stridhan—Son and grandson—  
Stridhan, non-technical, succession to—Succession,  
rule of, obtaining in Bombay applicable to Sind.

Where a Hindu female succeeds by inheritance to the estate of her father, she takes an absolute estate, and on her death, the estate devolves on her son in preference to a grandson of a pre-deceased son.

The non-technical *stridhan* of a Hindu female governed by the Vyavahara Mayukha descends to her son in preference to her son's son.

Where a rule of succession among Hindus has been declared to be of general authority in the Bombay Presidency, it should be held to be the rule also in Sind except where an invariable and ancient special usage is alleged and proved by him who avers it. **S DOWLATRAM v. NARAIN DAS**, 14 S. L. R. 221

929

**Surrender**—Widow, surrender by, in favour of co-widow, whether accelerates succession.

Where a widow surrenders her interest in her husband's estate in favour of a co-widow, such surrender has not the effect of accelerating the succession of the male reversioners.

**M** MUTHIALU CHENGAPPA C. BURADA GUNTA, 39 M.  
L. J. 567; 12 L. W. 666; 28 M. L. T. 272; 43 M. 857;  
(1921) M. W. N. 29

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**Survivorship**—Exclusion of co-  
parcener—Excluded co-parcener, right of, to succeed  
by survivorship—Survivorship, rule of, incidents of.

A member of an undivided family, who has been excluded from the enjoyment of the joint property for the statutory period, is not entitled, on the death of any undivided co-parcener having no direct heirs to represent him, to succeed with the other co-parceners by right of survivorship to the share of such deceased co-parcener, because the right of survivorship is incident to the right of joint possession and enjoyment of the property, and the others who are jointly entitled cannot exist separately when the right of joint possession and enjoyment has been lost. *41 Ind. 100* ; *100 N. H. 100* ; *100 M. W. 76* ; *40 M. L. J. 83* ; *3 L. W. 407* ; *41 M. 12*.

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**Temple**—*A place where God dwells; a sanctuary.*



**Hindu Law—concl.**

panying the transfer clearly constitute an injury and it is necessary to perpetuate testimony in favour of such reversioner. The reversioner has no such marketable title which can be depreciated by such acts. **N UJARIA v. BOSHANLAL**, 16 N. L. R. 202

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— **Will, construction of—Donee, estate taken by—Gift over, validity of.**

The Will of a Hindu testator contained the following clause.—“My wife will be the owner of this house. She will be at liberty to alienate it or dispose it of according to her wishes. None of my descendants will have any concern with it during her lifetime. If my wife does not give or alienate it to any person, it will remain the joint property of my grandsons”:

*Held*, (1) that the widow obtained an absolute estate in the house under the Will;

(2) that the gift over in favour of the grandsons was null and void.

In interpreting a Will the whole of it must be read, its language must receive its literal construction, its wording must be construed in its plain ordinary meaning in its plain and obvious sense, no portion of it should be treated as redundant and contradictory and the ambitions and wishes of the testator with respect to the devolution of his property must be taken into consideration.

The word ‘*malik*’ implies ‘absolute ownership’ unless there is anything in the context or surrounding circumstances to qualify such meaning, and it is not so qualified by the fact that the donee is a widow.

If an estate is given in terms which confer an absolute estate to a named donee, and, then further interests are given merely after or on the termination of that donee’s interest, and not in defeasance of it, his absolute interest is not cut down and the further interests fail.

When an absolute interest has been given to the first taker, followed by a gift over of what may not be required by him, the gift over, though couched in the most direct and precise words, is void for uncertainty. **L MOHAN LAL v. NIRANJAN DAS** 619

**Hundi, invalid—Endorser, whether estopped from denying validity—Paper Currency Act (II of 1910), s. 26.**

Inasmuch as by virtue of section 26 of the Paper Currency Act, a hundi made payable to bearer on demand is invalid, the endorser of such a hundi is not estopped from denying its validity on this ground as against his endorsee. **VI ALAGAPPA CHETTY v. ALAGAPPA CHETTIAR**, 39 M. L. J. 573; 44 M. 187

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— **suit on—Hundi not properly stamped—Plaintiff, whether can succeed on proof of original consideration.**

When a cause of action for money is once complete in itself, whether for goods sold, or for money lent or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note under such circumstances as to make the debtor liable upon it to some third person. **PAT RAM NARAIN SAHU v. LACHMI PRASAD SAHU**, 2 P. L. T. 328

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**Inam—Enfranchisement of Inam grants, effect of—Minerals, right to, whether passes—Madras Enfranchised Inams Act (IV of 1862)—Madras Inam Act (VIII of 1879)—Title-deeds granted by Inam Commissioner, effect of—Grant, construction of.**

An inam grant may be no more than an assignment of revenue, and even where it is or includes a grant of land, what interest in the land passes must depend on the language of the instrument and the circumstances of the case.

Without apt words such a grant does not pass the right to minerals.

Title-deeds issued by the Inam Commissioner in Madras can confer no higher title than was originally granted; they cannot vest in the Inamdars a subject-matter not already belonging to them.

The fact that the Madras Government in its standing orders at one time disclaimed the mineral rights in enfranchised inam lands does not preclude the Secretary of State from claiming those rights.

**P C SECRETARY OF STATE FOR INDIA v. SRINIVASA CHARIAR**, 40 M. L. J. 262; (1921) M. W. N. 111; 29 M. L. T. 181; 19 A. L. J. 241; 83 O. L. J. 280; 13 L. W. 592; 44 M. 42; 25 O. W. N. 818

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**Income Tax Act (VII of 1918), ss. 5**

(iv), 11—*Royalties, whether profits of business—Amount paid as cesses, whether to be deducted in assessing income—Income, meaning of.*

The owner of a coal mine receiving royalty upon coal is not a person earning profits from a business. His income falls under section 5 (vi), Income Tax Act, as an income derived from other sources and should be computed in accordance with the provisions of section 11 of the Act. In assessing such income no deduction can be made in respect of the amount paid as cesses.

The term “income” may be described as the annual or periodical yield in money or reducible to a money-value arising from the use of real or personal property or from labour or services rendered; but in some cases, *e.g.*, income derived from house property, the yield must be taken as the *bona fide* annual value, and not necessarily as the actual yield. **PAT JYOTI PRASAD SINGH DEO**, *In the matter of*, 6 P. L. J. 67; 2 P. L. T. 189; (1921) PAT. 81

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— **s. 51. See EXCESS PROFITS DUTY ACT, SCH. II, CL. (1).**

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**Indemnity-bond—Covenant to pay—Sale of specific property in case of failure to pay—Mortgage, whether created—Priority, over intermediate mortgages.**

An indemnity-bond executed by a vendor of immoveable property in favour of the vendee which covenants for the payment of compensation to the latter if he is deprived of possession, and which provides for the sale of certain specific property to secure the payment of compensation, is sufficient for the creation of a mortgage in respect of the property so specified, and such mortgage has priority over intermediate mortgages created at a time when there was no debt owing by the vendor to the vendee.

**M NARAYANASAMY RAO v. RAMASAMY NAICKER**, 12 L. W. 674

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**Insolvency—Bankrupt, undischarged, after-acquired property of, title to—Stranger, right of, to dispute.**

It is not open to a stranger to dispute, as against an undischarged bankrupt, his title to after-acquir-

**Insolvency**—concl'd.

ed property, without alleging and proving that the Official Assignee has intervened. **C** DASARATHY SINHA v. MAHAMULYA ASH, 47 C. 981 **977**

——— *Property alleged by creditor to belong to insolvent—Possession taken by Receiver—Suit by actual owner against creditor for damages, whether maintainable.*

At the instance of a creditor of an insolvent certain property which the creditor alleged belonged to the insolvent was taken possession of by the Receiver, but upon an objection by the real owner, the property was restored to him. The owner of the property then brought the present suit against the creditor for damages for wrongful seizure:

*Held*, that the suit was maintainable, and that it was not necessary to sue the Receiver. **A** BINDA PERSHAD v. RAM CHANDER, 19 A. L. J. 277; 8 U. P. L. R. (A.) 42 **821**

**Interest, excessive rate of, whether recoverable.**

A mere finding that the rate of interest in a mortgage-bond is excessive is not sufficient reason for refusing the plaintiff interest at the rate embodied in the contract. **C** DINESH CHANDRA SHAHA v. SAFER ALI MANDAL **693**

——— *Rate stipulated in mortgage-bond excessive—Hardship, whether ground for disallowing rate.*

In the absence of any evidence to show that a money-lender has unduly taken advantage of his position, mere hardship would not justify a Court in disallowing the rate of interest stipulated in a mortgage-bond, even when the transaction appears to be undoubtedly improvident. **C** MADHU MANGAL SADHU v. GOUR SUNDAR SWARNAKAR **733**

**Interest Act (XXXII of 1839), s. 1—**

*Contract for payment for work within reasonable time after inspection and approval—Tender of bill on completion of work—Interest, claim for, from date of tender.*

Under the terms of a building contract it was stipulated that defendant was to pay plaintiff for work done by the latter within a reasonable time after inspection and approval by the defendant. The plaintiff tendered his bill immediately on completion of the work and claimed interest from the date of tender:

*Held*, (1) that interest could not be claimed under the Interest Act as there was no provision for the payment of a sum certain or for the payment of such sum on a certain day;

(2) that the claim for interest was not covered by the proviso to the Act. **M** RAJAH OF PITTAPUR v. BALLAPRAGADA PALLAMRAJU, 12 L. W. 567; (1920) M. W. N. 717; 40 M. L. J. 18 **353**

——— **S. 1—Civil Procedure Code (Act V of 1908), s. 34—Unliquidated damages, suit for—Interest, pendente lite, whether can be claimed.**

In a suit for the recovery of money representing the depreciation in the value of goods supplied interest cannot be claimed during the pendency of the suit, as the amount claimed is not a "debt" nor a "sum certain" within the meaning of section 1 of the Interest Act, but is unliquidated damages, and interest does not run on such damages. **C** J. W. CREWDSON v. GANESH DAS HARI BUX, 32 C. L. J. 230 **28d**

**Itmam**, what it imports—Taluk, meaning of—Tenure, transferability of—Marfatdari receipts, whether proof of non-transferability—Grant of tenure for indefinite period, nature of.

As applied to a tenure in the permanently settled parts of Chittagong, the word "itmam" primarily imports a permanent, heritable and transferable tenure.

A taluq is *prima facie* a permanent tenure and is transferable.

The fact that rent receipts are granted "marfatdari" in the name of an original grantee is not conclusive to show that the tenure is not transferable.

A grant made to a man for an indefinite period enures, generally speaking, for his lifetime, and passes no interest to his heirs, unless there are some words showing an intention to grant an hereditary interest. **C** JOGESH CHANDRA ROY v. MAKBUL ALI, 47 C. 979; 25 C. W. N. 867 **984**

**Judgments** in previous suits not inter partes, admissibility of—Evidence Act (I of 1872), s. 13.

Where a party sets up a particular right judgments not inter partes in previous cases in which a similar right was asserted, are admissible in evidence under section 13 of the Evidence Act **U P B R KALLU MISIR v. BHAGWATI SINGH**, 2 U. P. L. R. (B. R.) 81 **142**

**Jurisdiction**—Decree passed without jurisdiction, whether nullity—Accounts, suit for—Preliminary decree—Suit, transfer of, to higher Court—Court, whether can ignore preliminary decree.

A decree passed without jurisdiction is not a nullity but may be set aside by appeal or revision; till it is so set aside, it is good, whatever the defect of jurisdiction may have been.

Plaintiff asked for a rendition of accounts and valued his suit at Rs 137. The Munsif dismissed the suit. On appeal the District Judge passed a preliminary decree and remanded the suit to the Munsif for taking accounts. The latter, finding that a sum beyond his pecuniary jurisdiction was disclosed by the accounts as being due to the plaintiff, transferred the case to the Subordinate Judge, who ignored the District Judge's decree and ordered the case to be tried *de novo*:

*Held*, (1) that all proceedings taken on the valuation furnished by the plaintiff were taken with jurisdiction;

(2) that the Subordinate Judge, in any case, could not ignore the decree of the District Judge;

(3) that the Subordinate Judge must, therefore, take as his starting point the preliminary decree passed by the District Judge. **L** RAMJI LAL v. BUJAN LAL **352**

**Jurisdiction of Civil Court**—Partition of dwelling-house.

A Civil Court has jurisdiction to partition a dwelling-house situate in a village along with its *chabutra*, as the latter is only an appurtenance to the dwelling-house, and as no question of the division of a ground-site at all arises in the case. **O** TAJAMMUL HUSAIN v. BANDE RAZA, 7 C. L. J. 638; 23 C. C. 281 **433**

**Jurisdiction of Civil and Revenue Courts**—Additional sum agreed to be paid by tenant, suit for, quantum of.

A suit to recover any additional sum which a tenant agrees to pay for his use and occupation

## Jurisdiction of Civil and Revenue Courts—concl'd

of land is cognizable by a Civil and not a Rent Court. **U P B R MAHARAJ V. ABDULLA**, 2 U. P. J. R. (B. R.) 94 **255**

— *Ejectment—Tenants, dispute between—Procedure, proper.*

The Civil Court has jurisdiction to eject a trespasser, but the mere denial by a sub-tenant of his tenancy does not make him a trespasser.

Where in a suit for ejectment the defendant is described as a sub-tenant, and he denies the sub-tenancy and practically sets up that he is the tenant-in-chief, it is open to either of the parties to seek in the Civil Court a declaration that he is the tenant-in-chief, as that Court is the proper Court to try all disputes between rival claimants to a tenancy, and if, in such a suit the Court finds that the defendant is a sub-tenant, it ought not to decree possession and damages; the proper decree is for a declaration that the plaintiff is entitled to hold as tenant-in-chief. **A HARBARAN LAL V. NAURANGI KUNWAR**, 2 U. P. L. R. (A.) 302 **613**

— *Rent-free grantee, suit by, to recover rent wrongly realised by zemindar, whether cognisable by Civil Court—Question of status of plaintiff.*

A suit by a rent-free grantee to recover the amount of rent wrongfully realised by the zemindar is cognisable by a Civil Court, even though it is necessary in such a suit for the Court to decide the question of the status of the plaintiff in relation to the land in question. **A SANT PRASAD V. BAHADUR SINGH**, 2 U. P. L. R. (A.) 416; 19 A. L. J. 72; 43 A. 403 **831**

## Jurisdiction of Revenue Court—

*Tenant, status of—Question raised in Revenue Court—Court, duty of.*

Where the question of the status of a tenant is raised before a Revenue Court, that Court must decide what the tenant's status is or decide that he has *prima facie* under-proprietary rights, in which case either party must go to the Civil Court for a decision on the question of under-proprietary title. **U P B R MUKHTAR-UL-HUDA V. BAKHTAWAR KHAN**, 7 O. L. J. (B. R.) 669 **713**

## Land Acquisition Act (I of 1894),

**ss. 11, 12—Acquisition of land for purposes of quarrying—Compensation, method of assessing.**

Where a piece of land is compulsorily acquired for quarrying purposes its special adaptability for quarrying is an element for consideration in fixing the amount of compensation, and the basis for calculating the amount to be awarded is the present value of what might be expected to be realized in the future. **M RAGHUNATHA RAO V. SECRETARY OF STATE FOR INDIA**, 39 M. L. J. 623; 19 O. M. W. N. 759; 26 M. L. T. 397; 13 L. W. 11; 44 M. 261 **187**

**ss. 16, 31, 47—City of Bombay Municipal Act (II of 1888), s. 91—Acquisition of land by Government on behalf of Municipal Commissioner of Bombay—Land when vests in Commissioner—Month's tenancy, whether determined—“Vest”, meaning of—Procedure—Bombay Rent (War Restriction) Act (II of 1918), s. 9, applicability of, to land acquired under the Land Acquisition Act.**

The interest of a monthly tenant in property which is being acquired under the Land Acquisition Act comes to an end when the property vests in the

## Land Acquisition Act - concl'd.

Collector under section 16 of the Act. The effect of the acquisition and the resultant vesting is equally effective and complete in the case of acquisition undertaken by Government on the application of the Commissioner under section 91 of the City of Bombay Municipal Act.

The vesting contemplated by section 91 of the City of Bombay Municipal Act is such as would result under the Land Acquisition Act.

Section 91 of the City of Bombay Municipal Act *pro tanto* modifies the provisions in the Land Acquisition Act so as to vest the property in the Corporation on payment of compensation awarded, instead of in the Government and, therefore, no transfer from Government to the Corporation is needed.

The provisions of section 31 of the Land Acquisition Act do not apply in the case of acquisitions made by virtue of the provisions of section 91 of the City of Bombay Municipal Act and payment of the compensation amount by the Commissioner is enough.

The Crown is not bound by the provisions of any Act unless directly or by necessary implication referred to therein, and for this purpose the Crown means not only the King but also Officers of State acting on behalf of the Crown in discharge of their executive duties. The provisions of the Bombay Rent Act, therefore, cannot affect the rights and powers of Government and their Officers under the Land Acquisition Act.

The Bombay Rent Act was not intended to apply to premises acquired under the Land Acquisition Act for public purposes. The whole object of such an acquisition is to get the land immediately for useful public purposes and it would be defeating that object to lay down that the public body acquiring the land is not entitled to immediate possession. The general provisions of the Rent Act cannot be held by implication to repeal and override particular and special enactments like the Land Acquisition Act and the Municipal Act. **B BOMBAY MUNICIPALITY V. M. DAMODAR BROS**, 23 Bom L. R. 85; 45 B. 725 **571**

**Landlord and tenant—Acceptance by landlord of reduced rent for long time, whether conclusive to show that stipulation for payment of full rent was not intended to be acted upon.**

The fact that the landlord has received rent for a long time at a rate lower than that stipulated for in a *kabuliyat*, is not conclusive to show that the stipulation in the *kabuliyat* as to the payment of the full rent by the tenant was never intended to be acted upon, or that there was a waiver of that stipulation. **C GOLAK BEHARI BHOWMIK V. MANINDRA CHANDRA NANDI** **86**

— *Ejectment—Joint holding. Partition proceedings pending—One proprietor, whether can sue for ejectment.*

It is not open to one of two recorded proprietors of a holding in respect of which proceedings in partition are pending to maintain a suit against a tenant for ejectment. **U P B R DATTU SINGH V. RAM DAS**, 3 U. P. L. R. (B. R.) 97 **264**

— *Ejectment—Notice, cancellation of—Prima facie proof of under proprietary rights*

In a suit to contest a notice of ejectment, the Court ought to cancel the notice on the tenant pro-



**Landlord and tenant—contd.**

ducing *prima facie* evidence that he holds on an under-proprietary tenure. **UPBR KALLU MISIR v. BHAGWATI SINGH**, 2 U. P. L. R. (B. R.) 81 **142**

——— *Ejectment—Tenant permitted by landlord to continue after termination of lease—Landlord, right of, to eject.*

A landlord who permits his tenant to hold on after expiration of the term of the lease is not thereby precluded from ejecting the tenant. **UPBR COURT OF WARDS, AJODHYA ESTATE v. RAGHUBAR SINGH**, 7 O. L. J. (B. R.) 667 **625**

——— *Grove—Portion of land denuded of trees—Land, character of, whether affected—Re-entry, right of, whether comes into existence.*

The mere fact that a portion of a grove has become denuded of trees is not sufficient to deprive the land of its character of a grove, so as to give the Zemindar the right of re-entry in respect of the land as a whole, or in respect of any portion of it or to a declaration that the land is no longer grove land. **A CHOKHEY LAL v. BEHARI LAL**, 18 A. L. J. 20, 2 U. P. L. R. (A) 292 **115**

——— *Kabuliyat, provision in, for payment of increased rent on land being measured—Increased rent, date from which recoverable*

Where a *kabuliyat* provides for the payment of increased rent on the measurement of the land leased, such increased rent can only be claimed from the time the land is measured, and not from any anterior date. **C JATINDRANATH CHOWDHURY v. AJODHYA NATH NANDI** **743**

——— *Lease—Breach of covenant—Right of re-entry—Waiver.*

A right to re enter for breach of a covenant in a lease is waived by the lessor's bringing an action for rent accruing subsequently to the breach with knowledge of its existence. **PAT LEWHELLIN v. ALI ASGAR** **476**

——— *Occupancy holding—Rent, payment of, by tenant for himself and deceased brother—Lump receipt granted by landlord—Receipt, whether admission of tenant's succession to brother's holding.*

The fact that a Zemindar gives a lump receipt for rent paid by a tenant for his occupancy holding as well as for rent on account of his brother's holding subsequent to the latter's death, is not tantamount to an admission by the landlord that the tenant has succeeded to his deceased brother's holding as occupancy tenant. **UPBR BHOODA v. MURARI LAL**, 2 U. P. L. R. (B. R.) 83 **219**

——— *Rent—Tenant holding cultivated and uncultivated land—Ejectment from cultivated portion—Rent payable for remainder.*

A tenant who holds both cultivated and uncultivated land—the latter under a grove-tenure—at a certain rental, and who is ejected from the cultivated portion, is liable to pay proportionate rent for the remainder. **O THAKURAIN GIRRAJ KUNWAR v. CHANDRA SEKHAR**, 7 O. L. J. 657; 2 U. P. L. (J. C.) 198 **462**

——— *Tenancy, transferable, proof of.*

In a suit for possession by the landlord against the transferee of a tenancy which was created before the passing of the Transfer of Property Act and was not for the purpose of sale, the defendant must establish that the tenancy was

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transferable under the law as it stood at the time of its inception. The fact that it is heritable does not make it transferable in the absence of a custom to the contrary or an express contract to that effect. **C SULIN MOHAN BANERJEE v. RAJ KRISHNA GHOSH**, 33 C. L. J. 192; 25 O. W. N 420 **826**

——— *Tenant, whether can acquire miras rights by adverse possession—Mortgage—Tenant, possession of, whether can be adverse against landlord during continuance of mortgage.*

A tenant can set up against his landlord a claim to hold under more favourable terms of tenancy than those which the landlord is prepared to concede, and he can acquire such rights by prescription.

Where, however, the landlord has mortgaged his interest in the land, the possession of the tenant cannot be adverse to the landlord till the mortgage is redeemed. **B GITABAI BHAI RAJMANE v. KRISHNA MALHARI SHINDE**, 23 Bom. L. R. 119; 45 B 661 **913**

——— *Trees, property in—"Timber," meaning of—Bamboo trees, whether timber.*

In the absence of a custom to the contrary, the property in trees or in that which is likely to become timber, is in the landlord, and the property in bushes in the tenant.

By the term "timber" is meant properly such trees only as are fit to be used in building and repairing houses. Bamboo trees fall, therefore, under the category of timber. **PAT RAMESHWAR SINGH v. BASUDEVA SINGH**, 6 P. L. J. 127 **521**

**Lease—Assignment of lease—Assignee, liability of, covenants, extent of.**

No action of covenant will lie against an assignee of a lessee except for breaches of covenant occurring while he is assignee. **PAT BHUPENDRA NATH BOSE v. AMI PRASAD SINGH**, 2 P. L. T. 175; 3 U. P. L. R. (Pat) 3; (1921) PAT 74 **297**

——— *Covenant for renewal at option of lessee—Rule against perpetuities, whether applies—Covenant, whether enforceable—Transfer of Property Act (IV of 1882), s 14.*

A covenant in a lease to renew from time to time at the option of the lessee is a covenant running with the land and is not subject to any rule against perpetuities, and is enforceable if the intention in that behalf is clearly shown. **M TELlicherry PIERCE NATHU JATTEISON**, 12 L. W. 670; (1921) M. W. N 31; 41 M. 230; 41 M. L. J. 94 **591**

——— *Lessee continuing in possession for more than 12 years, status of—Adverse possession—Limitation.*

Where a person holds a village under a lease continuously for more than 12 years paying the rent stipulated and not sharing the profits of the village with the lessor or his co-sharers he acquires the limited interest of perpetual lessee under the lease by force of adverse possession. His taking possession under the lease operates as a complete ouster of not only the grantor but of every other claimant of his, the possession of the lessee being adverse against them all, and limitation for a suit to derive title of possession runs from the date of taking possession. **O PYAL HANU v. ROQIYA KHANAM**, 7 O. L. J. 63 **717**

# **Legal Practitioners Act (XVIII of 1879), s. 36—Order declaring person to be a tout—Authority by whom such order to be made.**

An order under section 36 of the Legal Practitioners Act, declaring a person to be a tout, made by a District Magistrate upon evidence recorded by a Subordinate Magistrate is not a valid order. Such an order can only be made by the authority mentioned in the section upon evidence recorded by itself. **C** NAFAR CHANDRA DOME, *In the matter of*, 24 C. W. N. 1074; 22 CR L. J. 20) **321**

# **Letters Patent (Bom.), ss. 15, 36, 44**

—Civil Procedure Code (Act V of 1908), ss. 4, 98  
—Procedure—Letters Patent Appeal—Special form of procedure, whether affected by s. 98—Costs

Section 86 of the Letters Patent of Bombay prescribes a special form of procedure, by which, if the Judges hearing an appeal are equally divided, the opinion of the Senior Judge prevails.

The provisions of this section are not controlled by section 98 of the Code of Civil Procedure, which provides for a reference of the point in dispute to one or more other Judges

In this case the Board, having all the materials before them, were willing to decide the question at issue, but the appellant would not consent to this being done. The Board in consequence reserved the costs of the appeal and all other costs since the error of procedure occurred, and intimated that the appellant might be made to pay these even if ultimately successful. **P C** BHAIKAS SHIVDAS v. RAI GULAB, 40 M. J. L. 519; 25 C. W. N. 635; 33 C. L. J. 488; 9 A. L. J. 405; 23 Bom. L. R. 623; 3 U P. L. R. (P. C.) 22; 14 L. W. 7; (1921) M. W. N. 408; 29 M. L. T. 350; 45 B. 718 **822**

—(Cal.), cls. 13, 15—Appeal—Order of Single Judge of High Court transferring suit, nature of—Order, whether appealable.

An order made by a Single Judge of the High Court under clause 13 of the Letters Patent, transferring a suit from the Calcutta Small Cause Court to the High Court for trial, is not a judgment within the meaning of clause 15 of the Letters Patent, and is consequently not appealable. **C** KHATIZAN v. SONAIRAM DAULATRAM, 47 C. 1104 **963**

—cl. 15. See CIVIL PROCEDURE CODE, s. 104 **274**

—(Lhr.), cl. 10—Appeal—Limitation, extension of—Court closed on last day of limitation—Appeal, whether can be presented on re-opening of Court.

The period of limitation for an appeal under the Letters Patent is governed exclusively by the rules made by the High Court. The provisions of the Limitation Act do not apply to such an appeal.

When the period of limitation for presenting a Letters Patent Appeal expired the High Court was in vacation and the appeal was presented on the day the Court re-opened:

Held, that the appeal was barred by time. **L** FATEH MUHAMMAD v. CHOITHU RAM **737**

**Life Assurance Company—Agent, right of, to receive commission on premia paid subsequent to his dismissal.**

In the absence of a definite agreement to that effect, an Agent of a Life Assurance Company is not entitled, on the termination of his services, to com-

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mission on subsequent premia paid by policy-holders in respect of policies secured by him, as his right to receive commission on such policies lapses on his dismissal. **M** EMPIRE OF INDIA LIFE ASSURANCE CO. LTD., BOMBAY v. NANU AIYAR, 39 M. L. J. 577; 12 L. W. 616; (1920) M. W. N. 770; 29 M. L. T. 49; 44 M. 170 **69**

**Limitation—Decree directing payment within certain time—Court closed on last day—Payment made on day of re-opening—Decree, whether complied with.**

Where a party is required by a decree to pay a certain sum of money within a certain period, and on the last day of that period the Court is closed, the payment of the money on the first day on which the Court re-opens is a payment in compliance with the decree. **A** REOTI RAM v. SITA RAM, 19 A. L. J. 49 **894**

# **Limitation Act (IX of 1908), ss. 4, 12—Time requisite for obtaining copy of judgment—**

**Limitation, expiry of, during vacation—Application made immediately on re-opening of Court—Time spent in obtaining copy, whether can be deducted.**

Where the limitation for filing an appeal expires during the vacation of the Court, the appellant is entitled to make an application for copies on the day on which the Court re-opens after the vacation, and is entitled to add to the period of limitation the time spent in obtaining the copies. **Pat** FARZAND ALI v. ABDUL HAMID **493**

—s. 5—Appeal, delay in filing—Sufficient cause for extension of time—Appeal led in wrong Court—Good faith, what is.

Where the delay in filing an appeal is due to the fact that the appeal was at first filed in a wrong Court, this is a sufficient cause for extending the period of limitation within the meaning of section 5 of the Limitation Act provided it is shown that the appellant acted in good faith.

An appellant acts in good faith who files an appeal in a wrong Court acting honestly under the advice of a Pleader

"In good faith" in this connection does not mean "without due care or attention", but means "honestly" though it may be negligently. **B** DATTATRAYA SITARAM GADKARI v. SECRETARY OF STATE FOR INDIA, 23 Bom. L. R. 89; 45 B. 607 **744**

—s. 5—Pauper, application by, for excuse of delay in filing appeal—Order granting application, whether can be re-considered.

An *ex parte* order granting an application for excuse of delay in applying for leave to appeal as a pauper, is open to re-consideration at the instance of the party prejudicially affected thereby. **M** KRISHNASWAMY NAYAKAR v. VEERAPPA NAYAKAR, 12 L. W. 400 **212**

—s. 6. See CIVIL PROCEDURE CODE, s. 151 **919**

—s. 14, Sch. I, Art. 62—Section 14, benefit of, when can be claimed—Suit to recover money paid as patni rent, when no patni in existence—Limitation.

In order to obtain the benefit of section 14 of the Limitation Act, it is essential that the proceeding, the time spent in prosecuting which is sought to be excluded, should be between the contesting parties.

**Limitation Act—contd.**

The period of limitation contained in Article 62 of Schedule I to the Limitation Act applies to a suit for the recovery of money paid as *patni* rent at a time where there was no consideration for the payment. **C JANAKINATH SINGHA ROY v. BEJOY CHAND MAHATAP** 698

— **s. 19.** See CONTRACT ACT, s. 25 514  
 — **s. 19—Acknowledgment—Debt referred to in subsequent document—Presumption—Acknowledgment of liability; what amounts to.**

Where the acknowledgment of a debt is contained in a document which does not include any definite and certain reference to a debt, the subject-matter of a suit, the presumption, in the absence of any other debt proved to exist, is that the debt acknowledged is the debt under consideration, and the burden of proving the contrary rests on the person disputing the debt.

"An acknowledgment of liability" under section 19 of the Limitation Act need not necessarily be in respect of the particular relief prayed for in a suit or application. It is a sufficient acknowledgment if it is of liability, whether pecuniary or in relation to other obligations, and is in respect of the property or right which is the subject-matter of the suit or application. The identity of the liability acknowledged need not correspond with the nature of the relief which a plaintiff seeks on the cause of action which embraces his right, and upon which he comes into Court, nor need the specification of the nature of the property or right be exact. **O JAGESHAR SINGH v. BIR RAM**, 7 O. L. J. 451; 23 O. C. 176; 2 U. P. L. (J. C.) 152 129

— **s. 20—Interest, payment of, as such—Civil Procedure Code (Act V of 1908), O. XXI, r. 2 (1)—Decree payable by instalments—Application for execution—Decree-holder, whether can certify payment of interest as such.**

Where the holder of a decree payable by instalments applies for execution thereof, it is open to him to extend the period of limitation, under section 20 of the Limitation Act, by entering in his execution application a payment on account of interest as such towards all overdue instalments. **S PAHLUMAL SEWANMAL v. SIDIK**, 14 S. L. R. 195 935

— **s. 23—Nuisance, whether continuing wrong.**

The causing of a nuisance is a continuous wrong independent of contract and a fresh period of limitation begins to run at every moment during which the wrong continues. **L RUKN-UD-DIN v. ALIAF AHMAD**, 529

— **s. 23, Sch. I, Arts. 120, 144**

— **Suit for injunction directing removal of chhappars—Limitation applicable—Erection of chhappars, whether continuing wrong.**

Plaintiffs, the owners of a courtyard, alleged that the defendants had erected *chhappars*, or thatched sheds, in front of their house and asked for a perpetual injunction directing them to remove the *chhappars* and restore the courtyard to its former condition;

*Held*, (1) that although the injunction would have the effect of restoring the courtyard to a state in which the plaintiffs would be able to have a more extensive use of it, the suit was essentially one for the issue of an injunction and was governed by

**Limitation Act—contd.**

Article 120 of Schedule I to the Limitation Act and not by Article 144;

(2) that the moment the *chhappars* were erected the injury sought to be removed by the issue of an injunction was complete, and that there was no continuing injury within the meaning of section 23 of the Limitation Act. **L LAL SINGH v. HIRA SINGH**, 3 U. P. L. R. (L.) 9 20

— **Sch. I, Art. 11A—Sale in execution—Auction-purchaser resisted in taking possession—Investigation by Court—Court refusing to put him in possession—Suit to establish title—Limitation.**

Where in execution of a decree property is sold, but the auction-purchaser is resisted in taking possession by a third party who claims the property as his, and the Court, after investigation, refuses to put the auction-purchaser in possession, the auction-purchaser's remedy is to institute a suit to establish his right to possession of the property, within the period prescribed by Article 11A of Schedule I to the Limitation Act. **A GANPAT RAI v. HUSAINI BEGAM**, 19 A. L. J. 53 905

— **Art. 13, applicability of—Execution of decree—Attachment of property—Objection, dismissal of—Attachment set aside—Suit by objector against judgment-debtor—Limitation.**

Where property purchased from a judgment-debtor was attached in execution of another decree against the judgment-debtor and the purchaser's objection was dismissed, but the attachment was subsequently set aside on the purchaser satisfying the decree:

*Held*, that a suit by the purchaser for a declaration against his vendee, the judgment-debtor, was not barred by the fact that the order dismissing his objection was not questioned or set aside by a suit within the period of limitation prescribed by Article 13 of Schedule I to the Limitation Act, inasmuch as that Article had no application to the facts of the present case. **PAT LAL SHAHA v. KADO MAHTO**, 6 P. L. J. 85; (1921) Pat. 66; 2 P. L. T. 345 849

— **Arts. 47, 142—Order awarding possession under s. 145, Criminal Procedure Code, made without jurisdiction—Suit to recover possession—Limitation applicable.**

Where in a proceeding under section 145 of the Criminal Procedure Code an order is made awarding possession of immovable property, but that order is made without jurisdiction, a suit to recover possession is, as regards limitation, governed by Article 142, and not by Article 47, of Schedule I to the Limitation Act. **C BHARAT CHANDRA DEB v. RAM SUNDAR CHOWDHURY** 860

— **Art. 61—Suit to recover defendant's share of money expended in clearing canal—Limitation applicable**

A private arbitration award provided, among other things, for the clearance of a canal by P., who was to recover from D. a certain share of the cost at the time of beginning the work. P. cleared the canal and brought the present suit to recover from D. his share of the sums spent in such clearance in six years. The question was as to what period of limitation was applicable to the suit:



**Limitation Act—contd.**

*Held*, that the period of Limitation contained in Article 61, Schedule I, to the Limitation Act applied to the suit, as the money that represented D.'s share of the clearance expenses was clearly money paid by P. for D. **S TULSIDAS DULOMAL v. WADERO ALLAHBUX KHAN**, 14 S. L. R. 219 **971**

**Sch. I, Arts. 81, 181, 182,**

**Expl. 1**—Suit by surety against principal—Payment made by surety into Court to satisfy decree—Limitation, commencement of—Execution of decree.

Article 81 of Schedule I to the Limitation Act makes limitation begin to run from the time when the surety pays the creditor, and the principal debtor remains liable to be sued for three years only after this payment has been made.

Where the payment made by the surety is made in satisfaction of a decree obtained by the creditor, limitation as against the principal begins to run from the date on which the surety pays the money into Court, and not from the date on which the creditor draws it out. **U B YINKE SUPAYA v. MAUNG KIN**, 3 U. B. R. (1920) 261 **23**

**Art. 116**—Mortgage—Mortgagee agreeing to pay prior mortgagee—Default in payment—Payment made by mortgagor—Suit for damages—Cause of action, date of, accrual of—Limitation applicable.

Where the parties to a mortgage agree that the mortgagee is to pay off a prior mortgage when he pleases, he being solely responsible for any interest which might accrue under the prior mortgage, and where owing to the default of the said mortgagee the amount due on the prior mortgage with interest is paid by the mortgagor, the cause of action for a suit by the mortgagor against the mortgagee for damages accrues when he is damned and not on the date of the mortgage. To such a suit the period of Limitation contained in Article 116 of Schedule I to the Limitation Act applies. **A ISHRI KERSHAD v. MUHAMMAD SAMI**, 19 A. L. J. 81 **829**

**Art. 118**—Adoption, suit for declaration of invalidity of—Computation of time—Fraud or inaction of nearest reversioner, whether gives fresh starting point to next reversioner.

A suit for a declaration that an adoption is invalid is a representative suit, which the nearest reversioner is entitled to bring on behalf of the whole body of reversioners, born or unborn, within the period prescribed in Article 118 of Schedule I to the Limitation Act.

Time begins to run against the whole body of reversioners from the time that the adoption comes to the knowledge of the next reversioner and fraud or inaction on his part would not give a fresh starting point to the other reversioners or stop time running which had begun to run against them all. **POLEPEDDI VENKATASIVAYYA v. POLEPEDDI ADENNA**, 12 L. W. 499; 39 M. L. J. 621; (1920) M. W. N. 753; 29 M. L. T. 43; 41 M. 218 **98**

**Art. 120.** See **BENGAL TENANCY ACT**, s. 158 (b) **529**

**Arts. 120, 124**—Trusteeship with power to appoint successor, whether recognised by law.

When title to an office has been acquired by statutory operation, whether under Article 120, 124 or 144 of Schedule I to the Limitation Act, the title

**Limitation Act—contd.**

of the true owner is not revived by re-entry, in other words, even if the lawful owner should re-acquire possession, he is not thereby remitted to his original title. **C KASSIM HASSAN v. HAZRA BEGUM**, 32 C. L. J. 151 **165**

**Sch. I, Arts. 120, 132**—Mortgage, payment of prior—Subsequent mortgage, invalid—Charge, whether created—Declaration of charge, suit for—Limitation.

Plaintiff lent defendant a sum of money to enable the latter to pay off a mortgage on his property. Defendant executed a mortgage in favour of the plaintiff for the amount of the sum lent, which was, however, invalid for want of due attestation:

*Held*, (1) that the plaintiff was entitled to a declaration that he had a charge upon the property to the extent of the money advanced by him;

(2) that the limitation for a suit to declare the charge was provided in Article 120 of Schedule I to the Limitation Act and began to run from the date on which the money was advanced.

Article 132 of Schedule I to the Limitation Act applies only to a suit brought to enforce a charge in existence and recognised at the date of the suit. **B CHHOTALAL KARSANDAS v. VISHNU GANESH GORHALE**, 23 BOM. L. R. 84; 45 B. 597 **903**

**Arts. 131, 144**—Inamdar—Suit to recover assessment—Adverse possession—Limitation.

A suit to recover assessment by an Inamdar against a person who claims to have purchased the Inamdar's rights is governed by Article 144 and not by Article 131 of Schedule I to the Limitation Act, and limitation begins to run from the date of the first non-payment of assessment.

Article 161 of Schedule I to the Limitation Act applies only where the relationship of landlord and tenant or superior holder and occupant is established. Where no such relationship has ever existed, that Article is not applicable. **B BHIMABAI PADAPPA DESAI v. SWAMIRAO SHRINIWAS PARWATI**, 23 BOM. L. R. 100; 45 B. 638 **892**

**Art. 132**—Mortgage—Loan of paddy secured by mortgage—Suit to recover money due—Nature of suit—Limitation applicable.

D. obtained a loan of a quantity of paddy upon a mortgage of his property, covenanting to re-pay the loan with interest within a certain time, and stipulating that, in case of default, the mortgagee could realise by sale of the property mortgaged. D. made default and the present suit was brought within 12 years of the due date of payment for recovery of the money with interest, and the question was whether the suit was within time:

*Held*, that the suit was one for enforcement of money charged upon mortgaged property within the meaning of Article 132, Schedule I, to the Limitation Act, and having been brought within the period prescribed by that Article, it was not barred by limitation. **DINABANDHU MAITI v. BISHNU BEWA**, 32 C. L. J. 221 **715**

**Art. 134**—Suit to recover, on behalf of trust, properties alienated—Limitation, terminus a quo.

The period of limitation applicable to a suit to recover, on behalf of a trust, properties alienated by a mutalli is prescribed by Article 134, Schedule I to

**Limitation Act—contd.**

the Limitation Act, and such period commences to run from the date of the alienation. **C** MOHAMMAD KAZIMUDDIN v. SOBHA KHATUN 689

— **Sch. I, Arts. 139, 144**—*Suit for joint possession by co-owner—Limitation applicable.*

Where a purchaser from a co-owner accepts a lease from his vendor and sues for joint possession of his share after the expiry of the lease, the suit is governed by Article 144, and not by Article 139, of Schedule I to the Limitation Act. **B** ICHALAL JAGMOHANDAS v. NAGO SINA PATIL, 23 Bom. L. R. 60 589

— **Art. 141**, applicability of, to case where there are more female heirs than one—*Limitation, commencement of.*

Article 141 of Schedule I to the Limitation Act applies to a case where a reversioner is entitled to property on the deaths of more female heirs than one inheriting jointly, and limitation in such a case begins to run from the date of the death of the last surviving female heir. **M** MUTHIALU CHENGAPPA v. BURADA GUNTA, 39 M. L. J. 567; 12 L. W. 656; 28 M. L. T. 272; 44 M. 655; (1921) M. W. N. 29 135

— **Art. 143**—*Lease forbidding alienation—Forfeiture on breach of condition—Suit by lessor for possession—Limitation terminus a quo.*

Where in contravention of the terms of a lease, the lessee alienates the property held by him, a suit by the lessor to recover possession of the property must, under Article 143 of Schedule I to the Limitation Act, be brought within 12 years from the date of the alienation, and not from the date on which the lessee surrenders possession to his transferee. **C** MOTI LAL PAL CHOUDHURY v. CHANDRA COOMAR SEN, 24 C. W. N. 1064 312

— **Art. 154.** See CRIMINAL PROCEDURE CODE, s. 195 (6) 33

— **Art. 168.** See CIVIL PROCEDURE CODE, s. 151 919

— **Art. 181**, applicability of. See PROVINCIAL INSOLVENCY ACT, s. 36 123

— **Art. 181**—*Mortgage suit—Preliminary decree—Final decree, appeal against, period for making—Decree against several defendants—Appeal by some defendants—Decree, when conclusive—Decree directing payment of prior mortgage but not specifying date of payment, effect of—Reasonable time, what is.*

The limitation applicable to an application for a final decree in a mortgage-suit is that provided by Article 181 of Schedule I to the Limitation Act, and commences to run from the date when the preliminary decree becomes conclusive between the parties.

Where a decree in a mortgage-suit is against separate sets of defendants for separate amounts, and some only of the defendants appeal and confine their appeal to the amounts decreed against them, the decree as regards the non-appealing defendants becomes conclusive upon the expiry of the period of limitation for an appeal from that decree, or on the expiry of the date fixed for payment of the amount decreed if that should be a later date, and not the date of the decree in the appeal of the appealing defendants, because that appeal is limited to that part of the decree which directs the property of

**Limitation Act—contd.**

the appellants to bear a proportionate part of the decretal amount, is not an appeal against the whole decree. Consequently, an application for a final decree in such a case against the non-appealing defendants, made more than three years after the preliminary decree has become conclusive, would be barred by limitation.

Where a decree for sale in a mortgage-suit provides for payment of the amount of a prior mortgage as a condition precedent to sale of the mortgaged property, but omits to specify the date on which such payment is to be made, the payment ought to be made or tendered within a reasonable time, and, as such a decree is a decree for redemption of that mortgage, payment should be made within six months of the decree. **A** GAYAN SINGH v. ATA HUSAIN, 19 A. L. J. 83; 43 A. 320 817

— **Sch. I, Arts. 181, 182**—*Execution of decree—Application against judgment-debtor, whether saves limitation as against surety—Limitation applicable.*

During the pendency of an appeal by a judgment-debtor, W. stood surety for the payment of the decretal amount. The appeal was dismissed and the decree-holder applied for execution of the decree. In this application he specified the names of the judgment-debtor and the surety, but sought execution only as against the property of the judgment-debtor. More than three years after the date of this application, the decree-holder applied to execute the decree as against the surety:

*Held*, (1) that the limitation applicable to the application was that laid down in Article 182 of Schedule I to the Limitation Act;

(2) that the previous application did not operate to save limitation as against the surety, inasmuch as no step was sought to be taken under that application as against the surety;

(3) that, therefore, the present application was barred by time. **L** WAZIR BAKHSH v. HARI RAM 265

— **Art. 182**—*Execution of decree—Suit against two defendants—Decree against one—Appeal against decree dismissing suit—Dismissal affirmed—Application to execute decree against defendant not joined in appeal—Limitation, commencement of.*

P. sued A. and B. upon a hand-note. The suit against A. was decreed, but against B. it was dismissed. P. appealed against the decree dismissing his suit and did not implead A as a party. His appeal was dismissed, and within three years of the date of the appellate decree he applied for execution against A. and the question was, whether the application was barred by limitation:

*Held*, that the application was not barred, as time ran from the date of the appellate decree finally dismissing the suit against B. **C** SATISH CHANDRA v. GIRISH CHANDRA, 47 C. 813 915

— **Art. 182 (2)**—*Execution of decree—Order returning memorandum of appeal for presentation to proper Court, nature of—"Appellate Court"—Starting point of limitation.*

An order directing the return of a memorandum of appeal for presentation to the proper Court is not a "final order," nor is the Court making the order

**Limitation Act—concl'd.**

"the Appellate Court," within the meaning of Article 182 (2) of Schedule I to the Limitation Act, and the decree-holder is not in such a case entitled to reckon the period of limitation for executing his decree from the date of that order. **M MAHOMED ABDUL KADIR v. SAMI PANDIA TEVAR**, 12 L. W. 304; (1920) M. W. N. 587; 39 M. L. J. 431; 43 M. 835

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**Sch. I, Art. 182 (5)—Application for time to ascertain judgment-debtor's share in attached property, whether step-in-aid of execution.**

An application by a decree-holder for time to enable him to ascertain the share of the judgment-debtor in certain property attached in execution of the decree, is an application to take a step-in-aid of execution within the meaning of clause (5) of Article 182 of Schedule I to the Limitation Act, and operates to save limitation. **B VISHVANATH PARSHARAM BRAVE v. NARSU TULSIDAS GUJAR**, 23 Bom. L. R. 107

916

**Art. 182 (5)—Execution of decree—Application for copy of decree, whether step-in-aid of execution.**

An application by a decree-holder for a copy of the decree is not an application to the Court "to take some step-in-aid of execution" within the meaning of Article 182 (5) of Schedule I to the Limitation Act. **M PUTHIA VEETIL MOHIDIN v. IRAKKAT KARNAVAN RAMAN NAYAR**, (1920) M. W. N. 700; 12 L. W. 534; 39 M. L. J. 572

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**Art. 183—Mortgage—Order absolute for sale—Application to enforce order—Limitation.**

An application to enforce an order absolute for sale made by the High Court in a suit for the enforcement of a mortgage-security must be made within 12 years from the date when the present right to enforce the order accrues, that is to say, the date when the order absolute for sale was made. **C APURBA KRISHNA SETT v. RASH BEHARY DUTT**, 47 C. 746

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**Madras District Municipalities Act (IV of 1884), ss. 32, 41, 280—Chairman, delegation of powers of, to third person—Complaint by delegate, legality of**

Where the Chairman of a Municipal Council lawfully authorises a person under section 32 of the Madras District Municipalities Act to exercise his powers, including the power to lodge a complaint, that person is entitled to exercise that power so long as the authorisation lasts, and he does not need express authorisation under section 280 to institute a complaint in respect of an offence under the Act. **M T. G. KRISHNASAMI NAIDU, In re**, 12 L. W. 47; (1920) M. W. N. 648; 22 Cr. L. J. 815

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**Madras Enfranchised Inams Act (IV of 1862). See INAM**

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**Madras Estates Land Act (I of 1908), s. 6—Tenant continuing in possession after sale of holding, status of—"Having held land as a ryot", meaning of.**

Prior to the Madras Estates Land Act coming into force, the holding of an occupancy tenant was sold in execution of a decree for rent and purchased by the landlord who did not obtain actual possession

**Madras Estates Land Act—cont'd.**

the tenant continuing in possession. In a suit to recover possession brought after the enforcement of that Act, it was pleaded that, by virtue of section 6 thereof, the tenant had acquired a permanent right of occupancy when the Act came into force, and was, therefore, entitled to resist the suit:

*Held*, that after the sale of the holding the possession of the tenant was that of a trespasser, and as he had no interest left in the holding he acquired no right by virtue of section 6 of the Madras Estates Land Act.

The phrase "having held land as a ryot" in the explanation to section 6 of the Act means that the interest in the land of a person has continued till the commencement of the Act at least as a tenant-at-will, and he is actually in possession at that date. **M VEMANNA VENKATACHELLA NAIDU v. ETHIRAJANMAL**, 39 M. L. J. 597; 13 L. W. 61; (1921) M. W. N. 189; 41 M. 220

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**s. 12—Occupancy tenant, right of, to trees on holding—"Cut down," "use," meanings of.**

An occupancy tenant, under section 12 of the Madras Estates Land Act, has the right to use, enjoy and cut down trees in his holding, and the fact that the rent payable for the land on which the trees stand varies with the number of trees standing thereon makes no difference.

The terms "cut down" and "use" in section 12 of the Act include the right to appropriate the trees cut down. **M RAJAH OF RAMNAD v. KAMITH RAVUTHAN**, (1920) M. W. N. 603; 12 L. W. 465

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**s. 25—Home-farm land, conversion of, into ryoti land—Tenant, whether liable for rent.**

D was in possession of home-farm land as usufructuary mortgagee. P. instituted a suit for redemption which was compromised, and D remained in possession for a term of years. On the expiry of this term P., treating the land as ryoti land, gave D. a lease of it on certain terms. P. now brought the present suit, under sections 77 and 192 of the Madras Estates Land Act, to recover rent on the basis of the lease. The suit was contested on the ground that D. having been admitted to possession of ryoti land, within the meaning of section 25 of the Act, he was not liable for rent:

*Held*, that as D. was previously in possession as usufructuary mortgagee up to the date of the lease, he could not be said to have been admitted to possession of ryoti land at the date of the lease; that section 25 of the Madras Estates Land Act had no application to the case, and that D. was liable for rent according to the terms of the lease. **M RAJANDBAMANIA DEVI GARU v. YELLAPPA RAMU NAIDU**, 39 M. L. J. 565; 12 L. W. 600

15

**ss. 45, 163—Eviction of trespasser—Mesne profits, recovery of, as damages—Civil Court, jurisdiction of, nature of.**

Under section 163 of the Madras Estates Land Act a Civil Court has no power to award anything else than the sum payable under section 45.

If a land-holder wishes to treat a trespasser as such and to recover mesne profits as damages from him, he must first apply to the Collector under section 45 of the Madras Estates Land Act to get the amount of the latter determined and then bring his suit in the Civil Court under section 163 of the Act. **M KOTIKALAPUDI KATTAYYA v. RANGIAH**



**Madras Estates Land Act—conold.**

VENKATU RAMAYA APPA ROW BAHADUR, (1920) M. W. N. 702; 39 M. L. J. 571; 12 L. W. 673; 28 M. L. T. 279  
32

— **s. 46 (5)**—Occupancy rights, application for acquisition of—Receiver holding estate, application to, validity of

Inasmuch as the term 'landholder' in sub-section (5) of section 46 of the Madras Estates Land Act is confined to a landholder who is the owner of the estate, an application for the acquisition of occupancy rights in an estate in the hands of a Receiver must be made to the landholder, and not to the Receiver. A Receiver has no jurisdiction to entertain such an application. **M** SWAMINATHA ODAYAR v. SUNDARAM AIYAR, 12 L. W. 565 (1920) M. W. N. 703; 28 M. L. T. 276; 39 M. L. J. 711; 44 M. 274  
18

— **ss. 55, 146**—Suit by transferee from ryot to obtain patta—Rival claimant, non-joinder of, effect of—Revenue Court, jurisdiction of, to inquire into merits of claim—Civil Procedure Code (Act V of 1908), O. I, r. 10 (2).

A suit under section 55 of the Madras Estates Land Act should not be dismissed by reason merely of the non-joinder of a rival claimant. Where an objection on the ground of non-joinder is taken, the Court should act under Order I, rule 10 (2) of the Civil Procedure Code, and add such claimant as a party defendant.

Section 55 of the Madras Estates Land Act is not affected in any way by section 146 of the Act and the Revenue Court's power to deal with the rights of parties before it under the former section is not controlled by anything in the latter. In a suit, therefore, under section 55, the Court is bound to decide whether the plaintiff is entitled to a patta or not, if his title to it is denied. **M** RAMANATHAM CHETTY v. ARUNACHALLAM CHETTIAR, 39 M. L. J. 474; 44 M. 43  
316

**Madras Hereditary Village Offices Act (III of 1895), ss. 13, 21**—Newly created village office, appointment to, suit respecting—Jurisdiction of Civil Court—Limitation for suit—Terminus a quo.

A Civil Court has jurisdiction to entertain a suit respecting an appointment to a newly created village office. It is only where jurisdiction is conferred on a Revenue Court by section 13 of the Madras Hereditary Village Offices Act, that section 21 bars the jurisdiction of a Civil Court.

The starting point of limitation for such a suit is the date of the publication of the Collector's notice. **M** TANGUTOORI KODANDARAMAYYA v. TANGUTOORI RAMALINGAYYA, (1920) M. W. N. 664; 12 L. W. 63  
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**Madras Inams Act (VIII of 1869).**  
See INAM  
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**Madras Regulation II of 1816,**  
**s. 10**—Village Magistrate, powers of—Confinement in front of temple, legality of.

Under section 10 of Madras Regulation II of 1816 a Village Magistrate has power to enforce a sentence of confinement only in the village choultry and nowhere else. Confinement in front of a temple is illegal. **M** POONCEAMI ILLAI, In re, 12 L. W. 638; (1920) M. W. N. 786; 39 M. L. J. 709; 22 C. L. J. 208; 44 M. 14  
64

**Malabar custom—Tiyas of South Malabar—**  
*Females, right of, to reside in family house after marriage—Law applicable.*

There is no custom among the Tiyas of South Malabar, whereby a female after marriage is entitled as of right to live in her parent's family house.

A person who admittedly belongs to the Hindu community and is domiciled in Southern India is ordinarily governed by the Hindu Law of the Shastras as expounded by the Southern Commentators. **M** THAIKKANDHI POKKENCHERI v. ILLIVATHUKKAL ACHUTTAN, 39 M. L. J. 427; 13 L. W. 101  
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**Malabar Law—Alienation by karnavan unquestioned by tawazhi members—Attaladakam heir, right of, to sue for recovery of alienated properties**

An attaladakam heir, who succeeds to the properties of a tawazhi only when there are no members left and to properties which have not been disposed of by the last members, cannot question an alienation made by the karnavan which was not impeached by the tawazhi members. **M** KATAPRATH KATAKKE v. VALUVAKKAT KISHAKKE, 12 L. W. 634; (1920) M. W. N. 763; 39 M. L. J. 702; 29 M. L. T. 45; 44 M. 140  
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— **Karnavan, powers of alienation of—Decree-debts, transfer of—Recital, false, in transfer deed, effect of—Decree in name of anandravan, whether belongs to tarwad—Presumption—Transfer of Property Act (IV of 1882), ss. 8, 7, 8, 3<sup>a</sup>, scope of.**

A decree-debt is moveable property and a karnavan of a Malabar tarwad has full power to alienate all moveable property belonging to the tarwad at his discretion and to realize debts due to the family in any manner he likes and to sell moveables and convert them into money.

A third person who makes purchases of moveables, including decrees and other debts, for consideration from the karnavan of a Malabar tarwad is not bound to see to the application of the purchase-money or to make enquiries whether there was necessity for the alienation.

A purchaser of property for consideration from a person having power to convey full title to the property is entitled to rely on all the powers vested in his vendor, which could enable that vendor to convey the complete title professed to be conveyed notwithstanding that the vendor mentions in the sale-deed that he derives his right to convey title by reason of facts whose truth or strength can be successfully attacked. False recitals as to under what particular state of facts he obtained his power to convey will not affect the title of the transferee, provided that the transferor has got the power to give an absolute title and professes to convey such absolute title.

Per *Sadasan Aiyar, J.*—There is no presumption that a bond or a decree standing in the name of a junior member of a tarwad belongs to the tarwad. **M** SUBRAMANIA PATTAR v. KRISHNA EMBRANDI, 12 L. W. 361; 39 M. L. J. 540  
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**Marriage—Muhammadian woman living as wife with her Presumption**

The law presumes against vice and immorality, and where it is proved that a Muhammadan woman lived with a Sikh for a number of years as his wife, there is a strong presumption in favour of a marriage having taken place between them. **L** SULAKHAN SINGH v. SANTA SINGH  
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**Master and servant**—*Servant, suspension and removal of, without reason—Master, liability of, for wages for period of suspension.*

Where an employee of a Municipality is suspended without any reason being assigned therefor, and is subsequently removed from service, his removal not being due to any misconduct, alleged or proved, he is entitled to his wages for the whole of the period for which he was under suspension. **C KAMINI KUMAR CHANDRA v. REBATI RAMAN DAS**, 33 C. L. J. 336 **756**

**Minor**—*Suit against minor on pro-note—Burden of proof of minority—Estoppel—Evidence Act (1 of 1872), s. 115.*

Where a defendant, in answer to a claim on a pro-note, sets up the plea of minority, the burden lies on him of establishing it.

A minor who obtains a loan on the representation that he is of age, is estopped from pleading his infancy as a defence to a suit on the loan. **L HARJI MAL v. ABDUL HALIM** **267**

**Misjoinder of parties**—*Suit against several defendants—Suit withdrawn as against some, whether involves dismissal of suit.*

Plaintiffs, proprietors of a village, sued to eject three persons, who were brothers, from a piece of land which was alleged to be *shamilat* land. Subsequently, finding that one of the defendants was on field service, the plaintiffs withdrew their claim as against that defendant and reduced it to two-thirds of the land in suit. A decree was passed in their favour. On appeal the District Judge dismissed the suit on the ground of non-joinder of a necessary party :

*Held*, that the claim having been reduced so as to relate only to the interests of the defendants on the record, the suit could not be dismissed on the ground of non-joinder of the third defendant. **L BHURA v. MATU** **6**

**Mortgage**—*Accretion to mortgaged property—Intention to keep accretion as separate acquisition—Merger—Redemption*

The general principle is that any acquisitions by the mortgagee are treated as accretions to the mortgaged properties and are, therefore, subject to redemption. But though the mortgagee may treat the acquisitions as accretions to the mortgaged property, he may, if he chooses, keep them for his own benefit and distinct from the mortgaged property. **PAT MAHESHWAR PRASAD SINGH v. BABU RAM RAI**, 2 P. L. T. 225; (1921) PAT. 93; 3 U. P. L. R. (PAT) 22 **308**

—*Assignment—Payment to mortgagee without notice of assignment, effect of—Mortgagee not in possession of mortgage-deed at time of payment, effect of—Notice, constructive.*

A payment made by a mortgagor to the mortgagee without notice of a prior assignment of the mortgage is, in the absence of collusion, binding on the assignee, even where by an arrangement between the mortgagor and mortgagee under which the latter agreed to receive a certain sum in full settlement of the mortgage-debt, the payment amounts to a discharge of the mortgage-debt.

No inference of constructive notice of the assignment by a mortgagee of the mortgage can be drawn against the mortgagor by the mere absence of the mortgage-deed from the possession of the mortgagee

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at the time of receiving payment of the mortgage-debt. **M NEELAMANI PATNAIK v. SUKADAYA BEHARA**, 12 L. W. 269; 43 M. 803 **255**

—*decree against mortgagor and surety—Application for execution against mortgagor—Limitation as against surety, whether extended.*

Where a mortgage-deed provides for the sale of the mortgaged property and in the case of a deficiency makes the mortgagor and his surety respectively liable for the balance, the liability of the surety is co-extensive with that of the mortgagor but is only deferred for a time. An application for execution of the decree as against the surety would be governed by Article 181 of Schedule I to the Limitation Act, but even if Article 182 were applicable, any application for execution made against the mortgagor would save limitation as regards the surety also under Explanation I to the Article. **U B YINKE SUPAYA v. MAUNG KIN**, 8 U. B. R. (1921) 261 **23**

—*Mortgagor's lessee, whether can question validity of mortgage.*

It is not open to the lessee of a mortgagor, in a suit brought for his ejectment, to question the validity of the mortgage. **C SHASHI BHUSAN v. DEB NATH** **705**

—*Redemption—Interest, whether charge on land.*

A mortgage-deed provided that interest on the principal sum would be paid every year, and in default of such payment compound interest would be paid, and that the mortgage would be redeemed on payment of the mortgage-money :

*Held*, that the expression "mortgage-money" did not include interest on the principal sum lent. **L NATHA SINGH v. GANGA RAM** **490**

—*renewal of, effect of, on original mortgage.*

The execution of a fresh mortgage, in renewal of an original mortgage, has not the effect of extinguishing that mortgage, but the money due under it is a part of the consideration for the second mortgage, and the presumption is that the rights of the parties under the first mortgage continue under the second mortgage. **N JAGANNATH v. RAGHUNATH** **525**

**Muhammadian Law—Legitimacy—**

*Acknowledgment of legitimacy, effect of—Marriage, disproof of—Legitimacy and legitimation, difference between.*

There is a difference between legitimacy and legitimation. Legitimacy is a status which results from certain facts. Legitimation is a proceeding which creates a status which did not exist before. In the proper sense, there is no legitimation under the Muhammadan Law.

An acknowledgment of legitimacy raises a presumption of marriage, but such presumption is capable of being displaced by contrary proof. Such an acknowledgment is a declaration of legitimacy and not a legitimation, and is, therefore, liable to be contradicted.

Once the fact of no marriage is established, no acknowledgment of legitimacy has any effect. **P C HABIBUR RAHMAN v. ALTAH ALI**, 47 M. L. J. 510; 33 C. L. J. 479; 19 A. L. J. 414; 23 Bom. L. R. 636; (1921) M. W. N. 366; 29 M. L. T. 354 **837**

**Muhammadan Law—conold.****Marriage—Acknowledgment of marriage, effect of.**

Although no presumption of marriage can be made from prolonged cohabitation, yet when a man acknowledges that a woman is his married wife, such acknowledgment, though made from ulterior motives, is sufficient in the eyes of Muhammadan Law to invest the woman with the status of a married wife, and her subsequent born children with the status of legitimacy, unless a marriage is shown to have been legally impossible. **O MUHAMMAD ALI KHAN v. GHAZANFAR ALI KHAN**, 7 O. L. J. 474 **147**

**Agreement by husband to reside with wife in her parents' house, legality of—Waiver of right.**

An agreement by a Muhammadan husband to live with his wife in her parents' house is invalid and cannot be utilised by the wife to defeat the husband's claim for restitution of conjugal rights.

Where in such a case it is shown that the wife did leave her parents' house and went to live with her husband in his house, she must be taken to have waived her right, if any, under the agreement. **L FATIMA BIBI v. NUR MUHAMMAD**, 1 L. 597 **83**

**Option of puberty—Marriage contracted by other than father with consent of father, effect of.**

If the father of a minor girl is present and consents to the contract of her marriage entered into by another person, it is all the same as if he himself had contracted the minor in marriage. There is no option of puberty in such a case. **L CHIRAGH BIBI v. GHULAM SARWAR** **453**

**Mutwalli, succession to office of—Till to office, whether can be acquired by prescription—Claim to office and to property appurtenant thereto, whether can be barred by limitation.**

A claim to an office and to property appurtenant thereto may be barred by limitation. If the office is not hereditary, Article 120 of Schedule 1 to the Limitation Act is applicable. If, on the other hand, the office is hereditary, Article 124 governs the matter.

A trusteeship with power to appoint a successor is well known to, and recognised by, law and may be prescribed for. **C KASSIM HASSAN v. HAZARA BEGUM**, 32 C. L. J. 151 **165**

**Wakf property—Mutwalli, a minor female—Mutwalli, temporary, proceedings for appointment of, pending—District Judge, power of, to appoint Receiver and grant lease—Husband of minor female mutwalli, whether can act as mutwalli.**

Where the mutwalli of wakf property is a minor female, and proceedings are instituted before the District Judge for the appointment of a temporary mutwalli, the District Judge is bound to make suitable arrangements for the upkeep and administration of the estate, and is competent to appoint a Receiver during the pendency of the proceedings and to grant a lease of the property.

The husband of a minor female mutwalli has, under the Muhammadan Law, no authority to act as mutwalli of the wakf estate, and any lease of that estate granted by him is void and unenforceable. **C BIPIN BEHARI SAHA v. CHAND CHANDRA GHOSH**, **753**

**Negotiable Instruments Act (XXVI of 1881), s. 5—Hundi—Signature of drawer, whether must appear at a specific place.**

It is not necessary that the name of the drawer of a hundi should be separately entered upon the document, either at the foot or any other part of it.

It is sufficient if the name of the drawer is introduced in the document to prove authentication, that is to say, to show the person to whom it is addressed that it has been made by a third person who purports to be bound by the document. **PAT SURAJ MULL-HAR PRASAD v. BANK OF BIHAR**, 3 U. P. L. R. (PAT) 46 **746**

**Nidhi, deposit in—Depositor nominating person to receive deposit—Nomination, whether can be enforced as Will.**

T. made a deposit in a Nidhi, and in accordance with its Articles of Association nominated N as the person entitled to receive the money after his death. T. died and N. brought the present suit to recover the amount of the deposit:

**Held**, that the nomination could not be enforced as a Will as it was not attested by two witnesses, and that N. had acquired no interest in the deposit. **M NANA TAWKER v. BHAVANI BOYEE**, 39 M. L. J. 39; 43 M. 728; (1911) M. W. N. 70 **239**

**Northern India Canal and Drainage Act (VIII of 1873), s. 70 (4)—“Authorised distribution,” meaning of—Distribution made by proprietary body of village, whether authorised.**

The words “authorised distribution” in clause (4) of section 70 of the Northern India Canal and Drainage Act mean a distribution made by some authority. A distribution made simply by the proprietary body of a village cannot be regarded as an “authorised distribution,” within the meaning of the clause. **L EMPEROR v. PAKHAR SINGH**, 1 L. 604; 22 CR. L. J. 203 **59**

**Occupancy rights, application for acquisition of. See MADRAS ESTATES LAND ACT, s. 46 (5).****Order, cancellation of—Procedure—Duty of Judge.**

The practice of scratching out or attempting to obliterate a previous order already passed by him in his judicial capacity, is conduct which no Judge ought, under any circumstance whatever, to permit himself to adopt. If he makes up his mind to cancel an order, the proper way to do so is by writing or dictating a fresh order, stating that the previous order is cancelled and giving the reasons for such cancellation. **A PARSHOTTAM SARAN v. HARGOOLAL**, 18 A. L. J. 1121; 2 U. P. L. R. (A.) 424; 43 A. 198 **131**

**Oudh Estates Act (I of 1869), ss. 8, 14, 15, 22—“Person who would have succeeded according to the provisions of the Act,” meaning of—Bequest to anyone but the immediate next heir, effect of—Limitations in cl. 11 of s. 22, effect of.**

Under the Oudh Estates Act of 1869, a bequest to anyone other than the immediate next heir breaks the line of succession, ousts the special limitations provided by the Statute, and makes the property subject to the ordinary law of succession.

When section 22 of the Act applies, clause 11 provides special limitations, and does not simply remit the succession to the unqualified ordinary law of the religion and tribe of the last taluqdar: and in cases coming under List No. 3 (specified in section 8)



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the rule of primogeniture will still operate **P C**  
**SITLA BAKHSI SINGH v. SITLA SINGH**, 19 A. L. J. 337;  
 40 M. L. J. 449; 8 O. L. J. 214; 25 O. W. N. 721; 24 O.  
 C. 107; 33 C. L. J. 520; 43 A. 245; 29 M. L. T. 390 **548**

**Oudh Rent Act (XXII of 1886), s. 3**

(8)—*Lease—Heritable and transferable rights conferred on lessee—Status of lessee—Rent, whether liable to enhancement*

The status of a lessee who, by the terms of the lease, has conferred upon him both heritable and transferable rights, is that of an under-proprietor within the meaning of section 3 (8) of the Oudh Rent Act, and the rent payable by him is not liable to enhancement. **U P B R MUHAMMAD ZAMAN BEG v. ILAHI BUX**, 2 U. P. L. R. (B. R.) 111 **618**

—**s. 48**—*Suit for possession based on right of inheritance—Right found not to exist, effect of—Defendant in possession without any right.*

Where in a suit for the possession of a cultivatory holding the plaintiff alleges a right based upon inheritance, and it is found that he has no right of inheritance whatever to possession of the holding, his suit is liable to be dismissed, even though it is found that the defendant is in possession without any right. **O KALI DIN v. SHEO SARAN**, 7 O. L. J. 690 **711**

—**s. 107-H**—*Section, interpretation of—"Successors," meaning of.*

The wording of section 107-H of the Oudh Rent Act should be interpreted as it stands. The word "successors" in the section includes not only an heir, but a transferee also, and a Court is not competent to limit the meaning of the word to successors by right of inheritance only. **U P B R DEPUTY COMMISSIONER, HARDOI v. PURAI**, 7 O. L. J. (B. R.) 661 **641**

**Oudh Taluqdars—Primogeniture sanad, construction of—"Successors", whether includes alienees.**

The ordinary form of sanad granted to the Oudh Taluqdars provides that, in the event of the grantee or any of his "successors" dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture.

Held, that "successors" in this connection is equivalent to heirs, i. e., is confined to those who succeed to the estate by virtue of the grant and does not include those who take the whole or part thereof through alienation. **P C GHULAM ABBAS KHAN v. AMATUL FATIMA**, 19 A. L. J. 434; 40 M. L. J. 577; 8 O. L. J. 225; 24 O. C. 118; (1921) M. W. N. 349; 43 A. 297; 29 M. L. T. 409; 34 C. L. J. 113 **937**

**Palayams in Southern Districts of Madras, whether alienable—Military service tenures, abolition of, by Proclamation—Police service tenures—Madras Regulation XXV of 1892.**

Where lands in British India are held on military service tenure, there is good reason for holding that no one of the successive tenants could deal with the land so as to deprive the next holder of the source from which his duties might be discharged.

In the Southern Districts of Madras, sundry palayams were originally held on military service tenure and subject to the payment of a tribute to the paramount power. But these military service tenures were abolished and determined by a Proclamation of the Governor in Council, dated 1st

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December 1801, and thereafter any character of inalienability attaching to the palayams by virtue of such tenure ceased.

Police service tenures were abolished in 1816 by the Government of Madras: but it was held in the present case that it was not proved that the palayam had in fact been held on such a tenure.

Madras Regulation XXV of 1802 neither gives to, nor takes away from, the former owners of lands not permanently settled any rights which they then had. **P C MALAYANDI APPAYASAMI NAICKER v. MIDNAPORE ZAMINDARI CO. LTD.**, 40 M. L. J. 637; (1921) M. W. N. 352; 34 C. L. J. 6; 44 M. 575; 4 L. W. 49; 29 M. L. T. 383 **953**

**Paper Currency Act (II of 1910), s. 26. See HUNDI**

**Partition of fractional share of estate—Estate not capable of partition—Decree, proper.**

Where in a suit for possession, by partition, of a fractional share of an estate, the Courts are unable, owing to the impartible nature of the estate, to separate by metes and bounds the plaintiff's share from the rest, the proper course is not to dismiss the suit, but to give the plaintiff a decree for joint possession over such share as is found lawfully to belong to him. **A RAJJAB SHAH v. TAHIR SHAH**, 19 A. L. J. 61; 43 A. 318 **878**

—*Portion of estate treated as separate—Partition of separate portion, whether inequitable.*

Where a portion of the land comprising an estate is treated as a separate entity from the remainder of the estate, it is not inequitable to allow that portion to be partitioned. **C DURGA CHAMAN v. ENAMUL HUQ** **762**

—**suit—Preliminary decree, nature of—Application for final decree, whether application for execution—Limitation.**

Inasmuch as a preliminary decree in a partition suit is not a decree which can be executed, an application for the purpose of actually effecting a partition and that a final decree be prepared, is not an application for execution the limitation for making which is governed by Article 181 of Schedule I to the Limitation Act; such an application is an application in the suit to which the law of limitation does not apply. **O TAJAMMUL HUSAIN v. BANDH RAZA**, 7 O. L. J. 538; 23 O. C. 281 **433**

**Partnership, dissolution of—Receiver, appointment of—Suit against partners—Receiver, whether necessary party—Test.**

Where in a suit for dissolution of a partnership a Receiver is appointed for winding-up the business and recovering the outstandings, he is not a necessary party to a suit brought against the partnership by a third party. The test in such cases is, whether the object of the suit is to interfere with the possession of the Receiver or the jurisdiction of the Court appointing him; if it is not, he is not a necessary party to the suit. **S ASUDAMAL-DWARKADAS v. CHOITHRAM-GOPALDAS**, 14 S. L. R. 171 **273**

—*Fraud of one partner—Party defrauded, rights of—Loss, liability for.*

Where a person is induced by the false representations of others to become a partner with them, the Court will rescind the contract of partnership at his instance, and will compel them to re-pay him whatever he may have paid them, with interest, and to

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indemnify him against all the debts and liabilities of the partnership.

When a partnership is rescinded on the ground of fraud or misconduct, the partners at fault are not entitled to ask the other members of the partnership to contribute to the losses which may have occurred in the partnership business. **L. GOLA SINGH v. HAKAM RAI**, 23 P. W. R. 1921; 3 U. P. L. R. (L.) 26 **709**

—Sub-partner, right of, to sue partner for accounts.

A suit by a sub-partner for an account of the partnership is maintainable against his partner, and he must accept the accounts in the main partnership as settled between the partners of that partnership, unless he can show that the accounts have been taken wrongly or *mala fide*. **S. GIDASING CHIMANSING v. BIKHCHAND BHOJRAJ**, 14 S. L. R. 193 **967**

**Pauper**, application by, for excuse of delay in filing appeal—Order granting application, whether can be re-considered. See **LIMITATION ACT**, s. 5 **212**

**Penal Code (Act XLV of 1860)**, ss. 28, 260—Counterfeiting stamps, what amounts to.

Accused, a stamp vendor under the Forest Account Rules, altered some used stamps so as to resemble genuine unused stamps, and affixed them to licenses issued to licenses for grazing cattle:

Held, that the alteration of the stamps amounted to counterfeiting within the meaning of section 28 of the Penal Code, and that the accused was guilty of an offence under section 260 of that Code. **N. RAMLAL v. EMPEROR**, 22 CR. L. J. 289 **785**

—ss. 99, 103, 104, 105, 147, 441

—Criminal trespass—Right of private defence of property, extent of—Resistance by trespassers, effect of—Rioting in village—Spectator, whether member of unlawful assembly.

Against criminal trespass the person in possession of the property has the right of private defence of property so long as the trespass continues, and this right extends to causing to the trespassers any harm other than death subject to the restrictions mentioned in section 99 of the Penal Code, namely, that no more harm should be inflicted than is necessary for the purposes of defence and that there is no time to have recourse to the protection of the authorities.

If, in the exercise of this right, such resistance is offered by the trespassers that a reasonable apprehension is caused to the owners that death or grievous hurt would be the result, the right of private defence of person then arises and extends to the causing of death. **PAT DEKHAR SHA v. EMPEROR**, 22 CR. L. J. 177 **33**

—ss. 109, 379—Person charged with theft, whether can be convicted of abetment of offence.

A person charged with an offence under section 379 of the Penal Code cannot be convicted of abetting that offence, where he is not charged with such abetment. **PAT DARBARI CHOPDHURY v. EMPEROR**, 22 CR. L. J. 311 **939**

—ss. 147, 149, 304, 325—Unlawful assembly—Common intention to cause death or grievous hurt—Death caused—Member of assembly—Death not ascertainable—Liability of members.

Where the members of an unlawful assembly, animated with the common intention of causing

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grievous hurt, cause death and it is impossible to ascertain by which of the members of the assembly death was caused, but it is found that one of them was immediately responsible for one of the deaths caused, that member is guilty of the offences of rioting under section 147, and of culpable homicide under section 304, of the Penal Code, and the remainder are guilty of rioting and causing grievous hurt under section 325, read with section 149, of that Code. **O. BARKAU SINGH v. EMPEROR**, 7 O. L. J. 671; 22 CR. L. J. 279 **679**

—ss. 149, 436, charges under, facts necessary to substantiate.

In order to substantiate a charge of arson under section 436, read with section 149, of the Penal Code, it is necessary to find that either from the inception or at any stage of the occurrence the accused were actuated by the common motive to set fire to a house, or that they knew that such an offence would be committed in prosecution of the common object. Their mere presence, unless they did something to aid and assist the principal culprit, would not make them guilty. **PAT HARDEO SINGH v. EMPEROR**, 22 CR. L. J. 267 **667**

—ss. 183, 186. See **CRIMINAL PROCEDURE CODE**, s. 476 **796**

—s. 193. See **CRIMINAL PROCEDURE CODE**, s. 161 **593**

—ss. 225, 353—Criminal Procedure Code (Act V of 1898), s. 56—Arrest under written order—Rescue from lawful custody—Assault on Police Officer—Offence—Criminal Court, duty of—Civil and criminal case, difference between trial of.

A constable arrested a person in pursuance of a written order made by a Sub-Inspector under section 56 of the Criminal Procedure Code. The accused hustled the constable, pushed him aside and thus rescued the person who had been arrested:

Held, that the accused were guilty of offences under section 353 read with section 225 of the Penal Code.

The duty of a Criminal Court is to get to the bottom of a case before it and to see that every scrap of relevant evidence is brought before it.

The difference between the trial of a civil and a criminal case is that, in the former, it is the duty of the parties to place their case before the Court as they think best, whereas in the latter it is the duty of the Court to bring all relevant evidence on the record and to see that justice is done. **A. EMPEROR v. JANKI PRASAD**, 19 A. L. J. 196; 22 CR. L. J. 210; 43 A. 283 **322**

—ss. 301, 307—Attempt to poison one person—Poison administered to several—Small quantity of poison—Offence

Accused sent some sweetmeats containing arsenic to A. with the intention of causing her death. B. and C. also shared the sweetmeats with A. and although all three of them became ill, none of them died:

Held, (1) that the accused was guilty of an attempt to murder not only A. but also B. and C.;

(2) that the mere fact that the amount of arsenic was not sufficient to cause the death of A. made no difference. **L. LALHA SINGH v. EMPEROR**, 22 CR. L. J. 194; 3 U. P. L. R. (L.) 12 **50**

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**S. 304**—*Intention to cause death—Three persons attacking fourth with lathis.*

Where three persons attack a fourth with lathis, the blows being directed at the head of that fourth, they must be fixed with the knowledge that they were likely to cause death. **L HARNAMA v. EMPEROR**, 22 Cr. L. J. 276; 3 U. P. L. R. (L.) 34 **676**

**ss. 323, 325**—*Evidence that fight occurred, whether sufficient for conviction.*

Unless the evidence is good enough to warrant a clear finding as to the facts and as to the guilt of the accused, no conviction under sections 323 and 325 of the Penal Code can be arrived at simply on the ground that enmity and a fight have been proved and that serious injuries have been caused in the fight. **L DANI v. EMPEROR**, 22 Cr. L. J. 199; 3 U. P. L. R. (L.) 11 **55**

**S. 406**—*Criminal breach of trust—Administrator, whether can be proceeded against without sanction of Court—Accounts passed by Court—Administrator, liability of.*

Where an estate is entrusted to an Administrator by the Court in the exercise of its intestate jurisdiction, a complaint charging him with criminal breach of trust under section 406 of the Penal Code in respect of the goods entrusted to him cannot be entertained without the sanction of the Court appointing him.

The mere fact that accounts have been filed in the Probate Court, or even the fact that the accounts have been passed by the Court, does not absolve the Administrator from his liability for any particular sums of money which may have been misappropriated by him, and he may be sued in the ordinary way for such sums. **C KRISHNA LAL v. PROFULLA KUMAR**, 33 C. L. J. 252; 23 Cr. L. J. 295 **791**

**S. 408.** See CRIMINAL PROCEDURE CODE, s. 234 **422**

**S. 420**—*Cheating—Hundi negotiated with knowledge that it will be dishonoured—Offence.*

Accused negotiated a hundi payable at sight and drawn on a firm which he knew would not pay the hundi. The hundi, when presented, was dishonoured. The accused spent the money obtained by him on speculative transactions and took no step to have the hundi honoured or to re-pay the amount obtained by him.

Held, that the accused was guilty of cheating. **B EMPEROR v. UTTAMLAL NAROTTAMDAS**, 23 Bom. L. R. 240; 22 Cr. L. J. 305 **993**

**S. 430**—*Mischief—Damming water channel and diverting water—Wrongful loss—Offence.*

Accused, without any sort of right, dammed up the water of a supply channel, and opened a diverting channel, and were convicted of an offence under section 430 of the Penal Code:

Held, that the act of the accused showed an intention to cause wrongful loss, and that they had been rightly convicted. **M ATHIMJOLAM PILLAI v. PALANIANDI AMBALAM**, 13 L. W. 266; 22 Cr. L. J. 270 **670**

**S. 451**—*House trespass by night with intent to commit adultery—Consent or connivance of husband—Presumption.*

A man who enters the house of another at night with intent to commit adultery with his wife is guilty

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of an offence under section 451 of the Penal Code, and if, in such a case, it is shown that the husband was at the time of the occurrence absent from the house in the legitimate pursuit of his occupation, it may safely be presumed that he neither consented to nor connived at any adultery or immorality on the part of his wife. **L KHANON RAM v. EMPEROR**, 22 Cr. L. J. 266 **666**

**S. 471**—*Forged document tendered to Police during investigation, whether amounts to "use" of forged document.*

Where a person during the course of a Police Investigation tenders a forged document to the Investigating Officer, and thereby causes that officer to do something which he would otherwise not have done, he is guilty of having used a forged document within the meaning of section 471 of the Penal Code. **PAT SAJAN LALL v. EMPEROR**, 22 Cr. L. J. 274; 3 U. P. L. R. (PAT.) 43 **674**

**Pleadings**—*Adverse possession, title by, whether can be pleaded in appeal*

A plaintiff may be allowed to succeed on a title by adverse possession, pleaded even for the first time in the Court of Appeal, provided such a case arises on the facts stated in the plaint and the defendant is not taken by surprise. **C KASSIM HASSAN v. HAZRA BEGUM**, 32 C. L. J. 151 **165**

*Inconsistent pleas, whether can be taken.*

As a matter of law, a defendant can put forward inconsistent pleas, and it is for the Court to take this fact into consideration in coming to the conclusion whether the pleas are well-founded. **PAT RAMAN CHOUDEY v. BACHA MISIR**, 2 P. L. T. 285 **282**

*Undue influence, plea of, when can be investigated.*

Undue influence, being a species of fraud, must be pleaded with precision, and unless a case of undue influence is made in the pleadings, such a case cannot be investigated by the Courts. **PATINDER CHAND v. BIDYADHAR PANDEY**, 5 P. L. J. 744; 4 P. L. T. 111; (1921) PAT. 107 **282**

**Possessory title**—*Burden of proof.*

Where it is proved that on the death of a person there was a scramble for possession of his property among persons claiming to be entitled thereto, and that the plaintiff and defendant both put their looks on a house belonging to the deceased, neither of them can be said to have a possessory title as against the other. **L TIRATH RAM v. KAHAN DEVI**, 1 L. 588 **101**

**Pre-emption**, evasion of—*Exchange, validity of.*

The law of pre-emption may be evaded by any legal means, and there is nothing illegal in a man becoming a proprietor in a village under an exchange where he apprehends that a sale effected in his favour would be pre-empted. **L NARAIN SINGH v. WARYAM SINGH** **576**

*Pre-emptor denying vendor's title, whether estopped from claiming pre-emption*

The fact that a person who brings a suit for pre-emption, has, at some time prior to the bringing of the suit, denied the title of the vendor, would not estop him from maintaining a claim for pre-emption. **O ALI BANDI v. ALI HASAN**, 23 O. C. 393 **706**



**Pre-emption - conold.**

— Suit by several plaintiffs—Withdrawal of some plaintiffs, effect of.

A pre-emptor does not lose his right if he joins with him a person who is entitled equally with himself to pre-empt, but who during the litigation, whether in the first Court or in the Appellate Court, gives up, either gratuitously or for a consideration, his right to pre-empt. In such a case the remaining plaintiff is entitled to carry on his claim alone. **692**  
**L ALLAH DITTA v. QAIM DIN**

— suit for, on ground of vicinage—Property. **271**  
See **PUNJAB PRE-EMPTION ACT, s. 16**

**Presidency Towns Insolvency Act (III of 1909), s. 21—Adjudication, application to annul—Debt, payment of, what amounts to.**

Where an insolvent applies under section 21 of the Presidency Towns Insolvency Act, to have his adjudication annulled, he must satisfy the Court that he has paid his creditors such sum as would have been a complete discharge in respect of those debts had there been no bankruptcy at all; that is to say, he must show that he has not only paid up all his debts but that he has paid interest up to the date of payment on such of them as carried interest **C HAILES, In re, A. A., 47 C 9.4 943**

— **s. 55—Provincial Insolvency Act (III of 1917), s. 38—Insolvent, mortgage by, within two years of insolvency—Good faith—Consideration—Burden of proof—Official Assignee, application by, to expunge admission of proof, effect of—Consideration, portion of, proved—Procedure.**

Where a mortgagee seeks to enforce a mortgage executed by a person within two years of his insolvency, the onus, under section 55 of the Presidency Towns Insolvency Act and section 38 of the Provincial Insolvency Act, rests upon the mortgagee to show that the transaction was executed in good faith and for consideration. The fact that the Official Assignee has moved to expunge proof of the mortgage which he had admitted under section 38 of the Second Schedule to the Presidency Towns Insolvency Act, does not alter the onus of proof, as such admission is in no sense an adjudication.

Where a portion only of the mortgage consideration is found to have been advanced, the proper order is to set aside the mortgage *in toto* and treat the mortgagee as an unsecured creditor for the amount advanced by him. **M OFFICIAL ASSIGNEE OF MADRAS v. SAMBANDA MUDALIAR, 39 M. L. J. 345; 43 M. 73; 28 M. L. T. 258 205**

— **s. 101, Sch. II, s. 18—Registrar in Insolvency, reference to—Mortgage, validity of, power of Registrar to decide—Appeal from order of Registrar—Limitation**

Where a reference is made to the Registrar in Insolvency under section 18, Schedule II of the Presidency Towns Insolvency Act, upon the application of certain persons alleging themselves to be mortgagees of an insolvent's estate, directing them to prove their mortgage before him, the Registrar has no jurisdiction to deal with the question of the validity of the mortgage, or in the absence of the parties consent and agree to do so, and by his decision adversely affect parties interested who are not sui juris.

**Presidency Towns Insolvency Act—conold.**

The period of 20 days provided by section 101 of the Presidency Towns Insolvency Act runs not from the date of the findings being filed or signed, but from the date of the matter being completed, and the report being signed. **C LALBIHARI SHAH, In re, 47 C. 721 889**

**Presidency Towns Small Cause Courts Act (XV of 1882), s. 9—Rules of Practice of Calcutta Small Cause Court, r. 92, object of.**

Under the powers given by section 9 of the Presidency Towns Small Cause Courts Act, the High Court added the following to rule 92 of the Rules of Practice of the Court of Small Causes at Calcutta:—

“Provided that the Court may, if in its opinion no sufficient grounds are shown for the application, dismiss it without directing service on the party against whom the application is made.”

*Held*, that the object of the foregoing addition was to remove the difficulty whereby a preliminary hearing was precluded for the purpose of finding out whether there were grounds for the application such as are indicated in the rule itself; that the rule was not *ultra vires* but that, so far as applications under section 38 of the Act were concerned, the preliminary hearing must be before a Bench of the Small Cause Court **C RAM CHANDRA SAGORENOLL v. AMARCHAND MURLIDHAR, 24 C. W. N. 783; 47 C. 763 917**

**Probate and Administration Act (V of 1881), ss. 4, 35, 82—Executor, right of, to recover debt due to estate, after death of sole legatee.**

An executor or administrator by virtue of his office, or, in other words, in the character merely of executor or administrator, takes an estate in the property of the deceased and a legal character is vested in him.

The property of the deceased vests in the legatee for purposes of enjoyment, but it vests in the executor for the purpose of administration, and the enjoyment of the property must be postponed to the due administration of the property.

Therefore, an executor is competent to maintain a suit for the recovery of a debt due to the estate of the deceased even after the death of a sole legatee. **Pat KALOO v. BIBI RAMZO, 2 P. L. T. 305 350**

— **s. 16—Will, proceedings to establish, validity of—Executor, general citation to—Non-appearance of executor—Special citation—Letters of Administration—Procedure—Executor, when can renounce executorship.**

Where in proceedings to establish a Will, a general citation is issued to the executor named in the Will to attend and watch the proceedings, and he fails so to attend, and the validity of the Will is established, the Court ought to issue a special citation under section 16 of the Probate and Administration Act to the executor, and, in the event of his renouncing or failing to accept the executorship within the time limited for the acceptance or refusal thereof, to issue Letters of Administration with a copy of the Will annexed.

**Probate and Administration Act—**

concl'd.

An executor is not bound to renounce his executorship until the validity of the Will is established. **C SAROJINI DAS V. RAJLAKSHMI DAS**, 47 O. 838 **974**

**Procedure—Issues, trial of, piecemeal—Interlocutory order—Revision—High Court, power of, to interfere.**

As the trial of a case piecemeal is a serious evil to the parties and might involve heavy costs in second appeal or any other hearing, the High Court will interfere with an interlocutory order directing the trial of certain of the issues in a case before proceeding to the trial of the others. **PAT SATYA NIRANJAN V. DWARKA NATH**, 2 P. L. T. 154 **528**

**Promissory note payable on demand, when overdue.**

Where a note payable on demand is negotiated, it is not deemed to be overdue for the purpose of affecting the holder with defects of title, of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue. **C D. N. SHAHA & CO. V. BENGAL NATIONAL BANK, LTD.**, 47 C. 861; 33 O. L. J. 541 **940**

**Provincial Insolvency Act (III of 1907), ss. 5, 15—Petition for adjudication by debtor—Grounds for dismissing petition.**

A debtor applied to be adjudged an insolvent, but his petition was dismissed on the grounds (1) that he had allowed a register containing the names of pilgrims allotted to him on partition to remain with his brothers; (2) that he had removed his place of residence; (3) that he had inserted fictitious amounts as debts, and (4) that he had given a false account of his income:

*Held*, that none of these grounds was a valid ground for dismissing the petition. **PAT MUNI LAL V. SHASHI BHUSAN RAI**, 2 P. L. T. 166 **848**

**ss. 16, 24—Schedule of creditors, non-preparation of, whether bars regular suit against insolvent.**

A firm was adjudicated insolvent, but no schedule of creditors, as required by law, was prepared, nor was notice of the insolvency proceedings served on all the creditors. One of the creditors brought a suit against the insolvents to recover the amount of his debt, but the suit was dismissed on the ground that no permission had been obtained from the Court under section 16 of the Provincial Insolvency Act:

*Held*, that the insolvency proceedings were no bar to the suit. **L DES RAJ V. DUNI CHAND** **528**

**s. 18—Sale by Receiver—Procedure.**

A sale by a Receiver in whom the property of an insolvent vests under section 18 of the Provincial Insolvency Act is really a sale by the owner, and may be held either by auction or by private treaty and need not be held in the manner provided for sales in execution of decrees under the Civil Procedure Code. **C ENTAZUDDI SHEIKH V. RAM KRISHNA BANIK**, 24 C. W. N. 1072 **745**

**s. 36—Limitation Act (IX of 1908), Sch. I, Art. 181, applicability of—Official Receiver, application by, to avoid transfer—Limitation for making application.**

**Provincial Insolvency Act, 1907—**

concl'd.

The period of limitation prescribed by Article 181 of Schedule I to the Limitation Act is confined to applications under the Civil Procedure Code, and does not apply to an application under section 36 of the Provincial Insolvency Act made by the Official Receiver. No period of limitation is prescribed for such an application, which may be made at any time during the pendency of insolvency proceedings. **M DURAIYYA SOLAGAN V. VENKATARAMA NAIKER**, 12 L. W. 535 **123**

**Provincial Insolvency Act (V of 1920), s. 10 (1) (a)—Rent Court decree, whether "debt."**

A Rent Court decree is a 'debt' within the meaning of section 10 (1) (a) of the Provincial Insolvency Act of 1920. **A MUNNA SINGH V. KUAR DIGBIJAYA SINGH**, 19 A. L. J. 273; 3 U. P. L. R. (A.) 44 **758**

**Provincial Small Cause Courts Act (IX of 1887), s. 23—Suit instituted on Small Cause Court Side of Munsif's Court—Question of title—Suit re-instituted on Original Side—Suit tried as Small Cause Court suit by consent of parties—Revision—Jurisdiction, objection to, whether can be raised.**

A suit for rent was instituted on the Small Cause Court Side of a Munsif's Court. The defendant applied for and obtained an order under section 23 of the Provincial Small Cause Courts Act for presentation of the plaint to a Court having jurisdiction to try the question of title. The plaint was then re-presented to the Munsif's Court on the Original Side, when the parties agreed that there was no question of title and wished the suit disposed of as a Small Cause Court suit. On revision the defendant objected that the Court had no jurisdiction as a Small Cause Court to try the suit, as the order under section 23 had not been set aside:

*Held*, that the objection could not be taken for the first time in revision. **M AREALI VEEMAN V. SUBBAROYAN**, 12 L. W. 423 **145**

**ss. 23, 25—Order directing return of plaint—Revision, whether lies.**

The High Court has power to revise an order returning a plaint under section 23 of the Provincial Small Cause Courts Act. **L LABHU RAM V. MOOL CHAND** **319**

**Public nuisance—Damage, special—Pathway, obstruction of—Suit by one member of public to compel removal of obstruction, maintainability of.**

Where it is shown that one member of the public has suffered special damage by the obstruction of a public pathway which prevents him from using the pathway as a convenient access to his house, he is entitled to maintain a suit for a declaration of right of way, and for an injunction to compel the removal of the obstruction. **C KALI NATH V. NAINUDDI** **711**

**Punjab Alienation of Land Act (XIII of 1900), s. 6—Mortgage by agriculturist in favour of third person in order to pay off debt due to non-agriculturist, validity of.**

There is nothing illegal or opposed to public policy in a third party coming in and taking the land of an agriculturist on mortgage, undertaking in exchange to pay off the debts due by the mortgagor to a non-agriculturist. **L LADHA SINGH V. AHMAD YAR** **463**

**Punjab Excise Act (I of 1914), s. 61****(1)**—Possession of illicit liquor—Sentence, deterrent, necessary.

In convictions for manufacturing liquor contrary to law and being in possession of it, deterrent sentences are absolutely necessary. **L. EMPEROR v. BUDHA**, 22 Cr. L. J. 253 **658**

— **s. 61 (1) (a)**—Possession of illicit liquor by two brothers living jointly—Offence.

Where illicit liquor is found in a house which is occupied by two brothers, the presumption is that the elder brother was in possession of the liquor. **L. MEHR SINGH v. EMPEROR**, 22 Cr. L. J. 272 **672**

**Punjab Pre-emption Act (I of 1913), s. 13 (o)**—Agricultural land, what is.

The mere fact that a plot of land is assessed to land revenue would not make it agricultural land, unless it is proved that the plot is occupied or let for agricultural purposes or for purposes subservient to agriculture. **L. MUHAMMAD SAID v. SHAH NAWAZ** **580**

— **s. 16**—Pre-emption, suit for, on ground of vicinage—Property transferred by pre-emptor to wife—Sale held ineffectual as against creditors—Pre-emptor, whether owner.

Plaintiff sued to pre-empt the sale of a house on the ground that he was the owner of an adjoining house. It appeared that the latter house had been sold by the plaintiff to his wife by means of a registered conveyance and that the wife had effected a mortgage of the house. The sale in favour of the wife had, however, been held to be ineffectual as against the creditors of the plaintiff. The plaintiff now contended that he was still the owner of the house and was entitled to pre-empt the sale of the house in dispute:

*Held*, (1) that the judgment holding that as between the plaintiff's wife and his creditors the sale in favour of the wife was ineffectual proved no more than that the sale in favour of the wife had been questioned by the plaintiff's creditors;

(2) that as between the plaintiff and his wife the latter was still the owner of the house;

(3) that, therefore, the plaintiff was not entitled to pre-empt the sale of the adjoining house on the ground of vicinage. **L. ABDUL RAZAK v. FAZAL ILAHI** **271**

**Punjab Tenancy Act (XVI of 1887), s. 59**—Joint tenancy and tenancy-in-common, distinction between—Survivorship, principle of, applicability of.

There is a distinction between a joint tenancy and a tenancy-in-common, the test being whether definite shares have been specified.

It is only in the case of a joint occupancy tenancy that the principle of survivorship applies. **L. HAKO v. SULTAN MUHAMMAD KHAN** **513**

— **s. 59**—Joint tenancy and tenancy-in-common, distinction between—Survivorship, principle of, applicability of.

The principle of survivorship applies only in the case of a joint tenancy.

Where there are defined shares in a tenancy, it is not a case of a joint tenancy but merely one of tenancy-in-common. **L. UTTAMI v. Nihal Chand** **62**

— **s. 59**—Occupancy rights—Succession—Burden of proof—Mortgage, effect of—Presumption.

**Punjab Tenancy Act—conold.**

In a contest between the landlord and the collaterals of a deceased occupancy tenant with regard to the succession to the tenancy, the burden of proving that the requirements of the proviso to section 59 of the Punjab Tenancy Act have been fulfilled lies on the collaterals.

The mere fact that the collaterals are in possession of the land and that mutation has been effected in their favour, does not shift the burden of proof on to the collaterals.

The Civil Courts have to come to an independent finding in such cases and cannot base their decision merely on an opinion formed by the Revenue Authorities.

In the *parcha tasdiq* of 1891-1892 it was entered that the occupancy tenants, who were real brothers, had stated that they had occupied the land in 1869:

*Held*, that there was no presumption that the word "they" included their father. **L. BAHADUR v. RAM SINGH** **456**

**Record of Rights, entry in, rebuttal of, proof of.**

When a circumstance is relied upon as negating the presumption of the correctness of the Record of Rights, that circumstance must not only be inconsistent with the Record of Rights, but it must be incapable of explanation upon any other reasonable hypothesis than that the Record of Rights must be wrong. **PAT GOBIND PRASAD v. CHATTURBHUI** **482**

**Registration Act (III of 1877), ss. 17, 28, 49, 60, 63**—Registration of documents—Place of registration—Inclusion in mortgage of property not intended to form part of security, effect of—Registration, validity of.

A mortgage-deed, executed in 1902, purported to mortgage a property in the Darbhanga District and a property in the Mozufferpore District. It was registered in the Mozufferpore District. It was found that the statement in the bond that it comprised the Mozufferpore property was, to the knowledge of both parties, a mere fiction introduced for the purpose of getting registration in the Mozufferpore District; and that the parties never intended that the Mozufferpore property should form part of the security:

*Held*, that the inclusion of the Mozufferpore property was a fraud on the registration law, and that the registration obtained by its means was invalid. **P. C. MATHURA PRASAD v. CHANDRA NARAYAN**, 40 M. L. J. 483; 19 A. L. J. 395; 33 C. L. J. 410; 23 Bom. L. R. 623; (1931) M. W. N. 370; 14 L. W. 1; 29 M. L. T. 413 **833**

**Registration Act (XVI of 1903), s. 17**—Document reciting what has been done in respect of certain property, whether compulsorily registrable.

A document which does not of itself effect any partition of immoveable property, but is merely a recital of what has been done in regard to certain property, does not require registration. **L. NITHA MAL v. SHIV RAM** **484**

— **s. 17**—Monthly lease—Rent payable annually—Registration, whether necessary.



**Registration Act, 1908—concl'd.**

A lease fixed a monthly rent and provided for ejectment of the tenant on failure to pay rent. Rent was, however, made payable annually:

*Held*, that the lease was a monthly one and did not require registration. **L MANGAL SINGH v. ATTRA** 226

**s. 17 (b)**—Receipt, unregistered in discharge of mortgage debt, admissibility of.

A document which merely evidences the receipt of a sum of money in full discharge of a mortgage-debt, the payment of the balance of interest being excused, is not affected by section 17 (b) of the Registration Act, and, even if unregistered, is admissible in evidence. **M NEELANANI PATNAIK v. SUKDAVA BEHARA**, 12 L. W. 269; 43 M. & O. 255

**s. 17 (3)**—Authority to adopt contained in Will of minor—Registration, whether necessary.

An authority to adopt conferred by a Will does not require registration to render it valid, although the executant was a minor and the bequests may not be valid. **M KONDAPALLI VIZIYARATHNAM v. MANDAPAKA SUDARSANA RAO**, (1920) M. W. N. 684; 12 L. W. 598

**s. 77**—Suit for compulsory registration—Court, duty of.

In a suit brought for the compulsory registration of a sale-deed, all that a Civil Court has to consider is the genuineness of the deed and not its validity. **A RAM GHULAM v. MENDA**, 19 A. L. J. 224 859

**Regulation III of 1872, s. 25**—Record of Rights, entry in, whether can be challenged on ground of fraud.

An entry in the Record of Rights prepared under section 25 of Regulation III of 1872 can be challenged on the ground of fraud. **PAT SIB SARAN SHAH v. RAMESWAR DE**, (1920) PAT. 363; 2 P. L. T. 40 640

**Rent**, suit for—Question of title, whether arises.

In a suit for rent, if the plaintiff proves that the defendant has been his tenant during the period for which rent is asked for, he is entitled to a decree for the rent for that period, no matter who the owner of the property in dispute may be, and no question of title to the property can arise in the suit. If the defendant's tenancy is proved, he is estopped from denying the plaintiff's title. **L LABHU RAM v. MOOL CHAND** 319

**Res judicata**—Decision of Revenue Court, whether binding in a subsequent suit in Civil Court—*Madras Estates Land Act (I of 1908), s. 189 (8)*—*Civil Procedure Code (Act V of 1908), s. 11*.

A decision on issues arrived at in a Revenue Court in a suit cognisable exclusively by that Court is not binding on a Civil Court as *res judicata*, even though the subsequent suit brought in the Civil Court could not be brought in a Revenue Court, as section 189 (3) of the Madras Estates Land Act does not extend the doctrine of *res judicata* in favour of decisions of Revenue Courts beyond what is enacted in section 11 of the Civil Procedure Code. **M SOBHANADHRI APPARAO v. DATHADU VENKATARAJU**, (1920) M. W. N. 639; 39 M. L. J. 476; 12 L. W. 512; 28 M. L. T. 359; 43 M. 859 700

**Mortgage suit**—Defendant omitting to put forward counter-claim—Separate suit, whether maintainable.

Where a transaction of mortgage has become fully

**Res judicata—concl'd.**

ripened, so that the rights and liabilities of the parties can be dealt with by the Court before which the suit is brought in respect of that transaction, whether the suit is for foreclosure by the mortgagee or for sale by the mortgagee, or in the alternative for foreclosure or sale by the mortgagee, or for redemption by the mortgagor, all questions, including even claims for rent due on transactions inseparably connected with the mortgage, relating to the taking of accounts between the mortgagor and the mortgagee ought to be decided in one and the same and in the very first suit, and no second suit can be brought by either party for any claim arising out of that same transaction of mortgage.

Therefore, where in a suit upon a mortgage the defendant omits to put forward a counter-claim for any sum that may be due to him from the mortgagee arising out of the mortgage transaction, a separate suit for recovery of that sum is not maintainable. **M AMEENAMMAL v. MEENAKSHI**, 12 L. W. 173 226

**Previous decision in same suit, effect of—Civil Procedure Code (Act V of 1908), s. 11, whether exhaustive.**

When a question at issue between the parties to a suit is heard and finally decided, the judgment given on it is binding on the parties at all subsequent stages of the suit. Its binding force depends not upon the Code of Civil Procedure, section 11, but upon general principles of law: if it were not binding there would be no end to litigation. **P C GEORGE HENRY HOOK v. ADMINISTRATOR-GENERAL OF BENGAL**, 19 A. L. J. 366; 40 M. L. J. 423; 29 M. L. T. 336; (1921) M. W. N. 313; 33 C. L. J. 405; 3 U. P. L. R. (P. C.) 17; 23 Bom. L. R. 643 631

**Record of Rights, whether nullifies effect of previous decision as res judicata.**

Where a previous decision operates as *res judicata*, the subsequent publication of a Record of Rights cannot nullify the effect of that decision, nor has such publication the effect of sweeping aside all previous decisions between the parties. **C JALADHAR BHOWMIK v. BIRENDRA NATH ROY** 389

**Wrong decision, whether operates as res judicata.**

A wrong decision in a previous suit has the force of *res judicata* in a subsequent suit.

Where the Settlement Court, in deciding the question of title as between a mortgagor and his mortgagee, lost sight of the fact that the mortgagor's right of redemption under the deed in suit had not been taken away by proper foreclosure proceedings and declared the mortgagee to have acquired full proprietary rights in the mortgaged property:

*Held*, that the decision of the Settlement Court nevertheless operated as *res judicata*. **O TILAK CHAND v. SHAMBHU SINGH**, 7 O. L. J. 524; 23 O. C. 269; 2 U. P. L. R. (J. O.) 163 404

**Restitution of conjugal rights—**

*Muhammadian Law*—Nikah, denial of, whether includes repudiation—Nikah read in absence and without consent, validity of.

In a suit for restitution of conjugal rights the defendant denied that a marriage had ever taken place between her and the plaintiff. It was found that if a *nikah* was read at all, it must have been

**Restitution of conjugal rights—** **Shamilat land—**concl'd.

concl'd.

read in the defendant's absence and without her consent:

*Held*, (1) that the *nikah*, if any, was invalid;

(2) that the plea of denial of a *nikah* amounted not only to a denial of the factum of the *nikah* but should be regarded as a repudiation of any *nikah* ceremony that may have been performed.

**L BEGAN v FAIZ BAKHSH**, 3 U. P. L. R. (L) 81 **734**

**Revision (Criminal)—Finding of fact—High Court, power of, to interfere.**

The High Court will not in revision interfere with a finding of fact which is within the competence of the lower Court. **PAT GAJADHAR LAL v. EMPEROR**, 22 Cr. L. J. 280 **422**

—New point, whether can be taken.

A point not urged in the lower Court, and not taken in the grounds of an application for revision, cannot be raised at the hearing of the application.

**M ATHIMOOLAM PILLAI v PALANIANDI AMBALAM**, 13 L. W. 266; 22 Cr. L. J. 270 **670**

**Rioting in village—Spectator, whether member of unlawful assembly. See PENAL CODE**, s. 99 **33**

**Sajjadanashin, when can be appointed**

A *sajjadanashin* maintains unbroken the spiritual line from the original preceptor. Such an office can exist only by virtue of the direction of the spiritual founder or by a valid custom. **C KASSIM HASSAN v HAZRA BEGUM**, 32 C. L. J. 151 **165**

**Service inam lands—Enfranchisement in name of holder of office—Claim by divided member to share in enfranchised lands, how far maintainable—Burden of proof—Exclusive enjoyment of lands by office holder.**

The enfranchisement of service inam lands in the name of the office holder does not *per se* debar a divided member of the family of the office holder from claiming a share in the enfranchised lands.

Where a divided member sues for a share in the lands enfranchised, the onus lies on him to prove that he is a member of the original service holder's family and that at any partition which has taken place among the members of the family the inam lands were kept out of partition as undivided property in which all the members retained joint rights.

The sole possession of the inam lands by the office holder is not *per se* adverse to the other members of the family, divided or undivided, so as to deprive them of any interest they might possess. **M DEVULAPALLI VENKATA SUBBA ROW v KOLLURI SATTANARAYANAMURTHI**, 12 L. W. 62; (1920) M. W. N. 754; 28 M. L. T. 448, 40 M. L. J. 31; 44 M. 179 **27**

**Shamilat land—Sale of khewat land—Second sale by purchaser with rights of shamilat, if any, effect of—Second purchaser, rights of.**

K. sold certain *khewat* land to M, who sold it to B. The sale-deed in favour of B contained the following clause: "whatever rights I had in the shamilat in respect of the above-mentioned land all those rights now belong to the purchaser" K. subsequently obtained a declaration that no share in the shamilat had passed either to M. or to B. The latter then brought a suit against M. claiming to be compensated out of M's *khewat* land for the loss of shamilat consequent on K's act:

*Held*, that M. did not purport to sell any shamilat to B and the latter's suit must, therefore, fail. **L MALIK KHAN v. BHOLA RAM** **459**

**Sonthal Parganas Civil Rules, r. 36**

—Attachment of property—Sale by judgment-debtor to pay off decree, validity of—Suit by purchaser against judgment-debtor, maintainability of.

The intention of rule 36 of the Sonthal Parganas Civil Rules is specifically and solely to protect the decree-holder; so that where there has been a bona fide sale by a judgment-debtor of property under attachment for the purpose of paying off the decree-holder, the judgment-debtor cannot question the validity of that sale as between himself and the purchaser, and a suit for possession of the property by the purchaser against the judgment-debtor is not barred by the rule. **PAT BABU LAL SHAHA v. KADO MAHTO**, 6 P. L. J. 15, (1921) PAT. 66; 2 P. L. T. 845 **849**

**Specific Relief Act (I of 1877), s. 27, III. 3 to clause (b)—Agreement to sell—**

Purchaser put in possession—Subsequent sale to third person—Prior purchaser, whether can enforce agreement against subsequent purchaser.

Plaintiff was in possession of certain property as mortgagee. The mortgagor agreed to sell the property to the plaintiff, but he subsequently sold it to a third person who made no enquiry as to the plaintiff's interest in the property:

*Held*, that the plaintiff could enforce specific performance of the agreement to sell in his favour as against the subsequent purchaser of the property. **B FAKI IBRAHIM v FAKI GULAM MOHIDDIN**, 24 Bom. L. R. 135 **986**

—**s. 42.—Hindu Law—Widow, transfer by—Declaration, suit for, by transferee against reversioner, maintainability of.**

A transfer by a Hindu widow of her rights being a valid transfer, the transferee is entitled to a decree as against the reversioners declaring his right to obtain possession as owner of the property transferred so long as the widow remains alive. **A KANDHAI PANDE v. DACHCHINA MISRAIN**, 9 A. L. J. 275 **784**

—**s. 45. See EXCESS PROFITS DUTY ACT**, SCH II, CL. (1) **964**

**Stamp Act (II of 1899), ss. 2 (1) (a), (b), (3), 35—Adhesive stamp not cancelled—Document, admissibility of, in evidence—Document inadmissible—Plaintiff, whether can prove his case by other evidence.**

Where a document which ought to be stamped, bears an adhesive stamp the cancellation of which has not been effected as prescribed by section 2 (1) (a), (b) and (3) of the Stamp Act, it is inadmissible in evidence under section 35 of the Act.

In a suit upon a pro-note which is inadmissible in evidence, it is open to the plaintiff to prove his case by other evidence. **PAT BARHAM DEO RAI v. RAM KISHEN MAHTON**, 2 P. L. T. 184 **652**

—**s. 12 (3)—Cancellation of adhesive stamp—Drawing lines across stamp, whether sufficient.**

The drawing of lines across an adhesive stamp is as effectual a mode of cancellation as any other, provided that from what has been done the intention to cancel is clearly apparent. **L KISHORI LAL BANARSI DAS v. RAM LAL-TEK CHAND** **559**

**Subrogation, doctrine of**—One of several mortgagors redeeming mortgage, effect of—Charge, creation of.

The principle of the doctrine of subrogation is applicable to the case of the substitution of one creditor for another by operation of law, and where one of several mortgagors redeems the mortgaged property, though he is not a mortgagee, he has a charge on the share of each of the other co-mortgagors in the property. **O JAI KISHORI V. MOHAMMAD ALI MOHAMMAD KHAN**, 7 O. L. J. 820 **560**

**Succession Certificate Act (VII of 1889), s. 4**—Suit against person who is not a debtor—Succession Certificate, whether necessary.

A succession certificate is not necessary in a suit by a Hindu widow against a person for the recovery of debts due to the estate of her husband wrongly collected by him and withheld from her.

Such a certificate is necessary only where a debtor to the estate of a deceased person is sued as such. **A SAHIB RAM V. GOBINDI**, 19 A. L. J. 268; 3 U. P. L. R. (A.), 43 **774**

**Suit for possession**—Defence, failure of—Appeal, second—Defence, new, whether can be set up.

Where, in answer to a suit for possession, the defendant contends that he has acquired a good title by adverse possession, the burden is upon him to allege and establish such title, and, if he fails to do so, he cannot set up a new defence for the first time in second appeal. **C BIPIN BEHARI SAHA V. CHANDRA GHOSH** **753**

**Temple**—Public dedication—Presumption—Mahant, powers and position of.

Where a temple was built for public worship and has been open always to such worship, the facts that the first worship was performed by a member of the public; that the temple has received further grants and gifts from the public; that fairs and public worship are annually celebrated, and that admissions as to the temple being *wakf* have been made in previous litigation, are sufficient, in the absence of evidence that the temple was gifted to a particular Mahant, to raise the presumption of a public dedication, and the Mahant of the institution is not the absolute owner of the whole income derived from the trust property, the assets being vested in him as owner for the time being as trustee for the institution nor, except in cases of necessity, has he any power to alienate the property; nor can he apply the surplus income to his own personal uses but must add the same as an accretion to the trust property. **O GAURI NATH KAKAJI V. RAM NARAIN**, 7 O. L. J. 613 **467**

**Transfer of Property Act (IV of 1882), s. 6**—Assignment of arrears of profits claimed, whether within section.

An assignment of the right to recover a share of the profits of an estate, claimed by the assignor to be due to him, is not an assignment of a mere right to sue, but is an assignment of the arrears of profits claimed to be due, and as such is not covered by section 6 of the Transfer of Property Act. **O GIRDHARI LAL L. AHMAD MIRZA BEG**, 23 O. C. 384 **690**

—ss. 6, 7, 8, 38, scope of. See MALABAR LAW **77**

—s. 14. See LEASE **531**

—ss. 43, 119—Exchange—Defective title—Subsequent acquisition of good title—Estoppel.

## Transfer of Property Act—contd.

The substance of the provisions embodied in section 43 of the Transfer of Property Act is that, though an assignment is of a defective title, yet when the assignor afterwards acquires a good title, the Court will make that good title available to make the assignment effectual, or, in other words, the interest when it accrues feeds the estoppel.

The special provision relating to exchange contained in section 119 of the Transfer of Property Act does not exclude the operation of section 43 of the Act. For the purposes of section 43, an exchange stands on the same footing as a sale. **C BHAIKAB CHANDRA MONDAL V. JIBAN KRISHNA MONDAL**, 33 O. L. J. 184 **819**

—s. 52—*Lis pendens*—Plaint in suit returned to make up stamp-duty—Plaint re-presented—Suit, whether pending in interval.

A transfer of property effected between the date when an insufficiently stamped plaint is returned for the stamp-duty to be made good, and the date of its re-presentation, is not affected by the doctrine of *lis pendens*, as on the date of the transfer no suit was pending. **C MOHENDRA NATH MAITI V. PARAMESWAR SAMANTA** **439**

—s. 53—Fraudulent transfer—Decree against Lambardar for share of profits—Subsequent alienations by Lambardar—Suit to declare alienations invalid—Proof requisite.

Certain decrees were obtained from the Revenue Court for a share of the profits against a Lambardar. The Lambardar thereafter alienated some of his property in favour of his son and grandson, and the present suit was brought to declare the alienations invalid, on the ground that they were made with the object of defrauding the decrees of the Revenue Court. It was not alleged, nor was evidence led to show, that after the alienations the Lambardar had no other property left to satisfy the decrees:

Held, that the suit must fail, as there was no allegation or proof that the alienations had the effect of depriving the plaintiff of the amount of the Revenue Court's decrees. **A JWALA SINGH V. FATTA**, 19 A. L. J. 87 **825**

—s. 53—Hindu Law—Joint family—Transfer of family property by one member to another—Decree against transferor—Property transferred, whether liable to attachment and sale—Execution of decree—Attachment of property—Claim based on transfer deed, failure of—Declaration, suit for—Decree-holder, whether can plead that transfer fraudulent—Transfer, whether can be questioned by subsequent creditor.

Inasmuch as a transfer by one member of a joint undivided Hindu family of a portion of the joint family property to another member of the family is illegal, a suit by the transferee against the holder of a decree against the transferor for a declaration that the property so transferred is not liable to attachment and sale in execution of that decree, is not maintainable.

Per Stuart, J.—When a decree-holder attaches property which he states to be the property of the judgment-debtor, and a third party objects that the property is not the property of the judgment-debtor, because it has been transferred by a good and valid deed, and is met with the reply that the deed is a fraudulent deed, and the Court



**Transfer of Property Act—contd.**

in execution decides that the deed is a fraudulent deed and upholds the attachment, it is open to the decree-holder to plead, in a subsequent suit brought against him by that third party for a declaration that the deed is a valid deed, that the deed is fraudulent. It is not necessary, in such a case, for the decree-holder to bring a suit to declare the fraudulent nature of the transfer.

Where a man makes a fraudulent transfer in order to evade his existing obligations, that transfer can be impeached by creditors whose obligations are of a later date. **A RAM CHAND V. MATHURA CHAND**, 19 A. L. J. 299

**ss. 53, 118**—Transfer, mutual, of immoveable property, nature of—Exchange—Transfer to defeat anticipated attachment in execution, nature of.

A mutual transfer of immoveable property between two persons amounts to an exchange within the meaning of section 118 of the Transfer of Property Act, and each party acquires title in the property transferred to him on execution of the deed of transfer in his favour.

A transfer made merely with intent to defeat an anticipated execution is not a transfer of property made with intent to defraud, defeat or delay creditors within the meaning of section 18 of the Transfer of Property Act. **O RIAZAT HUSAIN V. ALI BANDI**, 7 O. L. J. 199

**s. 54**—Sale of immoveable property of value less than Rs. 100 by unregistered instrument—Delivery, constructive, whether sufficient.

For the purpose of section 54 of the Transfer of Property Act, where immoveable property of value less than Rs. 100 is sold by means of an unregistered instrument, there must be a real delivery of the property. Mere constructive delivery resulting from the delivery of the unregistered instrument of transfer is not sufficient. **P. C. MATHURA PRASAD V. CHANDRA NARAYAN**, 40 M. L. J. 489; 19 A. L. J. 385; 33 C. L. J. 440; 23 Bom. L. R. 629; (1921) M. W. N. 370; 14 L. W. 1; 29 M. L. T. 413

**s. 55**—Sale—Portion of sale-consideration left with vendee to pay vendor's mortgagee—Mortgagee not paid—Charge, creation of—Vendor's lien, enforceability of.

A. sold certain property to B., leaving with him a portion of the sale-consideration for payment to C., who held a mortgage of the property from A. Subsequently, D. brought a suit for pre-emption and acquired the property from B., but neither he nor B. made any payment to C., who brought a suit to enforce his mortgage by sale of the property and obtained a decree. A., satisfied this decree and brought the present suit to recover the money paid by him by sale of the property:

Held, that B. and D. having acquired the property with notice of the mortgage to C., the amount due on that mortgage formed a charge on the property under section 55 of the Transfer of Property Act, and as the amount due was paid by A., he was entitled to enforce his lien against the property in the hands of D. **A RAMA NAND BHANU V. SHEO DASS**, 19 A. L. J. 58; 43 A. 314

**s. 55 (2)**—Covenant for title—Defect in title—Defect known to vendee, effect of—Covenant in previous transaction not binding on effect of title.

**Transfer of Property Act—contd.**

dispossession of—Damages, suit for—Limitation terminus a quo—Limitation Act (IX of 1908), Sch. I, Arts. 97, 116.

The effect of a covenant for title implied by section 55 (2) of the Transfer of Property Act can only be got rid of by the vendor indicating by clear and unambiguous expressions that he does not mean to guarantee that he has good title to the property and is entitled to convey the same. Mere knowledge on the part of the vendee of a defect in the title of the vendor would not by itself defeat the vendee's right on the basis of such a covenant.

The recital in a deed of conveyance of previous transactions which form the links in the chain of the vendor's title, has not the effect in law of warning the vendee that the vendor has a title liable to be defeated because of some hidden defect, so as to exempt the vendor from all liability.

Where owing to a defect in the title of a vendor to convey, the vendee is dispossessed in execution of a decree obtained against him setting aside the conveyance, the starting point of limitation for a suit by the vendee for damages for breach of covenant is the date of the original decree in execution of which he is dispossessed. The fact that there is an appeal and second appeal in the suit would not postpone the *terminus a quo* to the date of the appellate decree, because an original decree is not suspended by the presentation of an appeal, nor is its operation interrupted where the decree on appeal is one of dismissal. **M MAHAMED ALI SHERIFF V. BUDHARAJU VENKATAPATHI RAJU**, 11 L. W. 537; 89 M. L. J. 449; 27 M. L. T. 304

**s. 59**—Mortgage-deed—Attestation, what amounts to.

A mortgage-deed consisted of three sheets of paper. The mortgagor signed the second sheet in the presence of two witnesses, who also signed at the foot of the sheet as having witnessed the signature of the mortgagor. Then some addition was made and a third sheet was added including other properties in the mortgage. The third sheet was signed by the mortgagor in the presence of the same witnesses who had signed the second sheet:

Held, that there was a sufficient compliance with section 59 of the Transfer of Property Act and to validate the third page of the mortgage-deed, it was not necessary for the two witnesses to sign the third page of the deed. **C JANAKI NATH ROY V. ASWINI KUMARI DEVI**

**s. 59**—Mortgage—Pardanashin lady—Attestation, proof of.

Where it is proved that the witnesses to a mortgage-deed did not see the executant, who was a pardanashin lady, but saw her signing the deed and impressing it with her seal through a *pardah* which was hanging between them and the executant, and that one of the witnesses knew her by her voice, this is sufficient proof of proper attestation. **PAT RADHA KISHUN V. JAG SAHU**, 3 U. P. L. R. (PAT.) 14

**s. 83**—Mortgage, usufructuary—Redemption, date of—Money payable in a certain month—Deposit on last day of that month, effect of—Suit for redemption—Decree, form of.

A deed of usufructuary mortgage provided for redemption by the mortgagor of the

**Transfer of Property Act—contd.**

mortgage-debt in the month of Jeth in any year. The mortgagors deposited the amount due in Court on the 22nd June 1910, the last day of Jeth, but as notice could not be served on the mortgagee within the month of Jeth, the mortgagee did not appear and the proceedings fell through, but the money deposited remained in Court. In 1916 the mortgagor brought the present suit for redemption and for damages for the last three years preceding the institution of the suit. The suit was dismissed on the ground that, as notice of the deposit could not be given to the mortgagee in the month of Jeth, the tender was not a valid tender. On second appeal:

*Held*, that the suit had been wrongly dismissed; that as the amount deposited was sufficient to discharge the mortgage, there should have been a decree for redemption from the last day of Jeth next succeeding the deposit, and that the mortgagors were entitled to a decree for possession and damages for three years preceding the suit. **A AHMAD BEG V DHARMUN RAI**, 19 A. L. J. 259; 3 U. P. L. R. (A.) 45 **760**

— **S. 83**—*Notice of deposit, service of—Duty of Court.*

Where a mortgagor makes a deposit of the money due upon a mortgage under section 83 of the Transfer of Property Act, it is the duty of the Court, under the second paragraph of that section, to see that notice of the deposit is served upon the mortgagee, it is not the business of the mortgagor to see that this is done. **C NIBARAN CHANDRA V. PARBATI NASKAR** **454**

— **S. 95**—*Mortgage-decree—Sale of mortgaged property—Sale set aside on payment by one of several co-mortgagors, effect of—Charge, whether created.*

Where a sale of mortgaged property in execution of a mortgage-decree is set aside on the decretal amount being paid by one of the co-mortgagors, the payment does not give rise to a charge on the mortgaged property in favour of the co-mortgagor to the extent of the amount which he has paid in excess of his own share of the mortgage-debt, inasmuch as by doing so he cannot be said to have "redeemed the mortgage," the mortgage having been extinguished by the decree. **O RABNATH BAKSHI V. GANESH PRASAD**, 23 O. C. 334; 2 U. P. L. R. (J. O.) 196 **213**

— **S. 106**—*Landlord and tenant—Notice to quit—Notice containing clause for enhancement of rent if premises not vacated, whether valid.*

A notice by a landlord to his tenant to vacate premises occupied by him by a certain date which contains a clause that, if the premises are not vacated by the date mentioned, the tenant would be liable to rent at a certain enhanced rate, is a perfectly valid notice, and, in the absence of anything to show that the tenant accepted the offer to continue at the enhanced rate, is sufficient in law to determine the tenancy. **A SHANKAR LAL V BABU RAM**, 2 U. P. L. R. (A.) 414; 19 A. L. J. 92; 43 A. 230 **842**

— **S. 108 (c)**—*Lessor and lessee—Interruption caused by paramount owner—Lessee, remedy of.*

Where a lessee is interrupted in his enjoyment of the demised premises and the interruption is caused by the paramount owner of the property, and not by a stranger, the lessor is bound to remove the interruption, and, if he fails to do so, he must indemnify the lessee.

**Transfer of Property Act—concl'd.**

Defendant leased one of the *bungas* round the Golden Temple, of which he was the owner, to the plaintiff for use as a *halwai's* shop on *amawas* days. The manager of the Golden Temple prevented the plaintiff from using the *bungas* for the purpose for which it had been leased to him:

*Held*, that the defendant was liable to indemnify the plaintiff. **L DHARM NARAIN V. LABH SINGH** **477**

— **S. 111 (g)**—*Lease, determination of—Suit for ejectment, effect of.*

A lease which is subject to the provisions of section 111 (g) of the Transfer of Property Act, is not determined by forfeiture immediately on the breach of a covenant contained therein: the breach must be followed by some overt act on the part of the lessor; the mere institution of a suit for ejectment is not a requisite act, because the forfeiture must be completed and the lease determined before the commencement of the action. **C MOTI LAL PAL CHOUDHURY V. CHANDRA COOMAR SEN**, 24 O. W. N. 1064 **312**

**Trust, charitable—Hereditary trustees, right of, to appoint managing trustee.**

Where there are several hereditary trustees of a public charitable trust, there is nothing improper in one of them being appointed as managing trustee for certain purposes by the other trustees, though so far as acts like the institution of suits, etc., are concerned, they must all be parties and must act after mutual consultation. **M ANGAMUTHU V. RAMALINGA PILLAI**, 39 M. L. J. 685 **766**

**Upper Burma Criminal Justice Regulation, Sch., s. XII—Revision—District Magistrate, power of.**

Under the provisions of section XII of the Schedule to the Upper Burma Criminal Justice Regulation, a District Magistrate has extensive powers of revision allowing him to deal with the cases of Second and Third Class Magistrates as he thinks fit, instead of reporting them to the High Court. **U B NGA THET SHE V. EMPEROR**, 8 U. B. R. (1920) 267; 22 Cr. L. J. 313 **1001**

— **S. XV**—*District Magistrate, order of—Revision—Interference, when permissible.*

Under the provisions of section XV of the Schedule to the Upper Burma Criminal Justice Regulation, the Judicial Commissioner will not interfere with an order of a District Magistrate, even where the procedure is irregular, unless that procedure has occasioned a failure of justice. **U B NGA SAN DUN V. EMPEROR**, 3 U. B. R. (1920) 270; 22 Cr. L. J. 309 **997**

**Upper Burma Registration Regulation (II of 1897), ss. 4, 6—Document not signed, whether executed—Registration, whether necessary—Admissibility in evidence.**

Documents which, according to Burmese custom, are complete without signature are "executed" within the meaning of section 4 of the Upper Burma Registration Regulation, and, when they fall within the purview of the section, require registration, and in the absence of registration are inadmissible in evidence by virtue of the provisions of section 6 of the Regulation. **U B MA SAT PU V. MA SIN**, 3 U. B. R. (1920) 258 **16**

**Vendor and purchaser**—Agreement to sell—Death of vendor—Possession delivered to vendee by minor widow of vendor, effect of—Adopted son, whether can eject vendee.

A vendor having died after an agreement of sale was executed but before the completion of the sale, his minor widow received the purchase-money from the vendee and delivered possession of the property to the vendee. Subsequently, the widow adopted the plaintiff, who brought a suit to eject the vendee:

*Held*, that the suit must fail. **B LAXMAN MADHAV-RAO JAHAGIRDAR v. BHAGVANSINGH NARSINGHIAU NAVALURKAR**, 23 Bom. L. R. 55; 45 B. 434 **581**

—Covenant to indemnify purchaser—Costs of litigation affecting title—Liability of covenantor, extent of.

On a contract of indemnity in a deed of sale whereby the vendor covenants to indemnify the vendee against the costs of litigation affecting the title to the property conveyed, the vendee is entitled to recover not merely the taxed costs, but the actual costs which he had to pay to his legal adviser, provided they are not unreasonable. **M VENKATA RANGAYYA APPA RAO v. BOMMADEVARA SATYANARAYANA VARAPRASADA RAO**, 39 M. L. J. 316; 28 M. L. T. 188; 43 M. 898; 13 L. W. 297 **164**

**Wajib-ul-arz**, construction of.

The *wajib-ul-arz* of a village referred to a certain grove as standing on a different footing from other groves, and laid down that the grove-holder was to enjoy the full benefit of the grove, but that when the grove became denuded of trees the Zemindar should have the right to occupy and bring the land under his own cultivation, and this was followed by the words "and no tenant has any right without the consent of the Zemindar to plant a grove or scattered trees":

*Held*, that the meaning of the foregoing provision was not to prevent the grove-holder from keeping up the character of the grove by the planting of new trees. **A CHOKHEY LAL v. BEHARI LAL**, 18 A. L. J. 820; 2 U. P. L. R. (A.) 292 **115**

**Widow**—Powers of alienation, restrictions on, extent of.

A Hindu widow's powers of alienation are inseparable from her estate and their existence does not depend on that of heirs capable of taking on her death. The mere fact that there are no such heirs, does not confer upon the widow unlimited powers of alienation. **L TIRATH RAM v. KAHAN DEVI**, 1 L. 588 **101**

**Will**—Annuity, perpetual, payment of, out of specific property—Annuity, whether charge on property—Success Act (X of 1865), ss. 101, 160, 161.

The active words of a Will provided for the payment of an annuity to the first annuitant and to his sons and sons and so on in due order of succession, on the rents and profits of certain specific property.

*Held*, that the intention was that there should be a perpetual annuity which constituted a charge upon the property specified in the Will. **C SOBHA KANTA MISRA v. KARIMAN HALVAI** **750**

**Will**—concl.

—, construction of—Gift for life to widow with direction "duly, and as I have directed her orally," to make a Will—Direction, whether void for uncertainty.

A testator by his Will appointed his wife executrix with full powers of management, gave her his estate for life and empowered her "duly, as I have directed her orally, and according to the times, to make her Will." He also made a gift over in case his wife should die without making her Will:

*Held*, that the words cited gave the wife a general power of testamentary disposition and not merely a power exercisable in the manner specified in the oral directions: and that, therefore, the power was not void for uncertainty. **P C BAI SHIRINBAI v. RATANBAI**, 40 M. L. J. 277; (1921) M. W. N. 165; 19 A. L. J. 15; 83 C. L. J. 271; 29 M. L. T. 236; 23 Bom. L. R. 618; 25 C. W. N. 840; 45 B. 711 **222**

**Withdrawal** of unnecessary plaintiffs, effect of.

Where unnecessary plaintiffs withdraw from a suit, such withdrawal does not necessitate a dismissal of the suit. **U P B R PHAGOO KURMI v. DHARAMRAJI**, 2 U. P. L. R. (B. R.) 115 **592**

**Woman**, whether competent to hold office of mutwalli.

A religious office can be held by a woman under the Muhammadan Law, unless there are duties of a religious nature attached to the office, which she cannot perform in person, or by deputy, and the burden of establishing that a woman is precluded from holding a particular office is on those who plead the exclusion. A woman is, therefore, not incompetent to hold the office of *mutwalli*. **C KASSIM HASSAN v. HAZRA BEGUM**, 32 C. L. J. 151 **165**

**Workman's Breach of Contract Act (XIII of 1859), s. 1**—"Compositor,"

whether 'artificer, workman or labourer'—Agreement to re-pay advance by periodical deductions from wages, whether within Act.

A compositor in a Printing Press is an 'artificer' for the purposes of section 1 of the Workman's Breach of Contract Act.

An agreement between an employer and a workman, whereby the latter agrees to re-pay the advance received by him by periodical deductions from the amount of his wages and by working out the amount, is an agreement which falls under section 1 of the Act. **M BHOGIRAYATHU SOMANNA v. KANDIVADA CHELAPATHI**, 12 L. W. 61; 39 M. L. J. 710; 29 M. L. T. 48; 22 Cr. L. J. 196; 44 M. 53 **52**

—ss. 2, 3—Advance for marriage expenses, whether advance for work to be done.

An advance for a workman's marriage expenses is a loan and not an advance within the meaning of the Workman's Breach of Contract Act. A payment, if it is to be regarded as an advance within the meaning of the Act, must be made in some way on account of work which the workman has contracted to perform. **L BHOLA NATH v. MUNSHI**, 22 Cr. L. J. 288; 3 U. P. L. R. (L.) 28 **688**

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